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Case Summaries

Aldrich v. NCAA—Further Procedural Hurdles Prevent Former Student-Athlete Sex Abuse Victims from Successfully Filing Suit against the NCAA

By Adrienne M Arlan and Geoffrey A. Leskie, of Segal McCambridge

In September 2020, citing the "interests of justice," the United States District Court for the Northern District of California ruled that a lawsuit filed in the Court by multiple current and former student athletes against, *inter alia*, the NCAA and the NCAA Board of Governors (collectively, the "NCAA") needed to be transferred to the Southern District of Indiana as the California Court did not have personal jurisdiction over the NCAA, but the Indiana Court would. Following the transfer of the *Aldrich* case to the Southern District of Indiana, the NCAA again moved for dismissal of the plaintiffs' Second Amended Complaint ("Complaint").

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NCAA's Motion to Dismiss

The NCAA contested the Complaint on the basis of: (1) standing; (2) timeliness; and (3) improper defendant entity.

Standing

The NCAA initially argued that plaintiffs, Erin Aldrich ("Aldrich"), Jessica Johnson ("Johnson"), and Londa Bevins ("Bevins"), former athletes, lacked standing to pursue injunctive relief, and that remaining plaintiff, Beata Corcoran ("Corcoran"), a current athlete, lacked standing for both damages and injunctive relief. The plaintiffs only challenged the NCAA's arguments regarding Corcoran's standing.

The *Aldrich* Court outlined a three-part test to analyze standing that requires: (1) a plaintiff to have suffered an injury in fact that is concrete, particularized, and actual or imminent, and not merely conjectural or hypothetical; (2) the existence of a causal link between the injury and the conduct alleged; and (3) it must be likely, as opposed to merely speculative that the injury will be remedied by a judicial decision.

Crucial to the analysis in this particular case is that Corcoran is not alleging she was actually abused but that her alleged injury is the increased risk of sexual assault she faces as a student athlete. Comparing the situation to that of *Plotkin v. Ryan*, 239 F. 3d. 882 (7th Cir. 2001) where the plaintiff brought suit alleging a harm of increased risks of accidents as a result of bribes exchanged for commercial drivers' licenses, the *Aldrich* Court held that Corcoran's alleged injury was too speculative.. Accordingly, all claims for injunctive relief and all claims by Corcoran were dismissed.

Timeliness

Generally speaking, Indiana law, which was applied in this case, acknowledges that claims may survive even if the statute of limitations has run if an equitable doctrine intervenes. In response to the NCAA's arguments, Aldrich argued that the discovery rule and the law of the case doctrine deem the accrual of her claim to be 2019 and thus timely. Bevins and Johnson argue that fraudulent concealment or equitable estoppel tolled their respective statutes of limitations periods.

As to Aldrich, the Court held that "the ascertainable damage rule" for determining when the period of limitations begins to run best applies to this case which holds that, pursuant to Indiana's statute of limitations rules, the period does not begin to run until the time that the damage is or could be ascertained, citing to *Hildebrand v. Hildebrand*, 736 F. Supp. 1512 (S.D. Ind. 1990). Notably, in applying the ascertainable damage rule the *Aldrich* Court rejected a narrowly applicable alternative rule sometimes applied in child sexual abuse cases which originated in *Doe v. Schults-Lewis Child & Family Services, Inc.*, 718 N.E.2d 738 (Ind. 1999).

Delving into a fact-specific inquiry, the *Aldrich* Court found that Aldrich had not plausibly established that she could not have ascertained her damages until 2010 as she claimed. While all of Aldrich's numerous and grotesque factual allegations against her coach/mentor, John Rembao ("Rembao"), are not repeated herein, the Court found most troubling an allegation that Rembao physically and sexually exploited Aldrich while on a flight to Australia in 1999. The Court opined that given the nature of the incident, the relationship between Aldrich and Rembao, Aldrich's isolation on an airplane in a foreign country, and the lack of any other parents or authority figures should have made damage ascertainable with some ordinary diligence. Acknowledging its sympathy for Aldrich's situation and finding the abuse deplorable, the *Aldrich* Court found that the "discovery rule" did not obviate the running of the applicable statute of limitations barring Aldrich's claims.

Turning to Aldrich's arguments regarding the law of the case doctrine, the Court noted Aldrich's prior contention that Arizona law applied to her claims because

the California Court previously applied it when ruling on the NCAA's initial Motion to Dismiss. The *Aldrich* Court held that the law of the case doctrine did not apply in this case because the California Court had only applied Arizona law to Aldrich's claims against Rembao, not the NCAA. Secondly, the California Court concluded that it did not have personal jurisdiction over the NCAA, so it could not have "decided the issue" as required by the law of the case doctrine. Accordingly, all of Aldrich's claims were dismissed on the basis of timeliness.

Johnson and Bevins advanced different arguments in an attempt to overcome the NCAA's challenges to timeliness—fraudulent concealment and equitable estoppel. Passive fraudulent concealment, the type argued by Johnson and Bevins, requires a special relationship between the parties that could be described as a confidential or fiduciary relationship. The *Aldrich* Court acknowledged there is certainly trust between the plaintiffs and the NCAA, but mere trust does not rise to the level of a fiduciary or special relationship. The *Aldrich* Court then held that the NCAA does not have a duty to inform student-athletes of other sexual abuse cases. Thus, without any duty to "speak" required by equitable estoppel, the non-disclosure of other sexual abuse cases by the NCAA did not warrant equitable estoppel. Accordingly, Johnson and Bevins' claims were also dismissed for lack of timeliness.

Improper Defendant Entity

The NCAA also advanced the argument that specifically the NCAA Board of Governors ("Board") was not an entity with the capacity to be sued. The plaintiffs cited to a New Jersey case, *Nahas v. Shore Med. Ctr.*, No. 13-6537, 2018 U.S. Dist. LEXIS 70785 (D.N.J. Apr. 27, 2018), that permitted suit against a hospital's Medical Executive Committee, but the Aldrich court distinguished *Nahas* because New Jersey has a specific statute which sets forth a standard for evaluating capacity—unlike Indiana. To the contrary, a prior federal decision applying Indiana law, *Manassa v. NCAA*, No. 1:20-cv-03172-RLY-MJD (S.D. Ind. Sept. 13, 2021), held that the Board was not a suable entity under Indiana law. While unnecessary given the dismissal of all of the plaintiff's claims, the Court reiterated the position that the Board is not a suable entity.

Other Considerations and Future Implications

If the September 2020 *Aldrich* opinion was illustrative of anything, it was that that suing the NCAA is a procedurally complex process that can only be done with any regularity or certainty in the United States District Court for the Southern District of Indiana. This most recent *Aldrich* opinion further illustrates that even if plaintiffs navigate the initial personal jurisdiction issues, they face an uphill battle regarding standing and the applicability of statutes of limitations, not to mention that the Court has twice decided that the NCAA Board of Governors is not a suable entity pursuant to Indiana law. There are certainly circumstances where plaintiffs can clear these procedural hurdles such as recent, actual abuse that has been timely litigated, but this latest ruling makes it extremely difficult for those former athletes who have been abused in the past to seek justice against the NCAA.

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Two High School Hockey Players' First Amendment Defense to Cyberbullying Iced by the First Circuit Court of Appeals

By Professor Robert J Romano, JD, LLM, St John's University, Senior Writer

In June 2021, the U.S. Supreme Court, in the matter of *Mahanoy Area School District vs. B.L.1,* issued a ruling regarding a high school student's First Amendment right to free speech in this, the digital age. In its decision, the U.S. Supreme Court held that a public high school infringed the First Amendment rights of one of its students when it disciplined her for profane, off-campus language. Apparently, the student, a cheerleader, was removed from the cheerleading squad after posting a Snapchat[2] that school officials regarded as "negative, disrespectful, and demeaning", even though the posting occurred during weekend hours and not on school premises.[3] That Snapchat post, to put the matter into context, was a photo of said cheerleader and her friend giving the middle finger, accompanied by text which read *'fuck school fuck softball fuck cheer fuck everything'* superimposed over the photo.[4]

The U. S. Supreme Court, in applying the 1969 case of *Tinker vs. Des Moines Indep. Community Sch. District*,[5] held that when a student's speech occurs *'off campus'* and is done by using modern electronic technology or social media, schools have *'less leeway'* to regulate such speech than they do when that speech takes place during school hours or at an afterschool sponsored program.[6] Specifically, the U.S. Supreme Court determined since the 'speech' happened on social media, from an off-campus location, did not target any specific students or school staff, and was limited to a single, vulgarity-laced rant about the school's cheerleading program, that the Mahanoy Area School District violated the student's First Amendment rights.[7] Interestingly, however, the Court left 'for future cases' the determination as to "where, when, and how … the speaker's off-campus location will make the critical difference"[8] and suggested several areas in which discipline for off-campus speech by students may still be appropriate under the First Amendment. The Court even advised that these areas could include, but were not limited to, speech that involves "serious or severe bullying or harassment targeting particular individuals."[9]

This now brings us to the matter of *Doe v. Hopkinton Public Schools*,[10] wherein, on November 19, 2021, the U.S. Court of Appeals for the First Circuit issued a federal appellate decision which extended the holding in *Mahanoy* to *'off campus'* speech. Per the facts as laid out by the Court in the *Doe* matter, eight members of the school's hockey team, again using the social media platform Snapchat, humiliated and demeaned one of their teammates. That humiliated and demeaned teammate filed a complaint with his school alleging that those team members violated the School's anti-bullying policy by taking photos and video recordings of him in the locker room without his consent and that those video recordings were circulated amongst other students.

Upon receiving the student's complaint, the School's administration initiated an investigation wherein it concluded that "there was a preponderance of the evidence which showed that the eight students bullied and harassed the other player" and that such conduct "caused emotional harm to, created a hostile environment for him during school-sponsored events and activities and infringed on his rights at school."[11] As a result of these findings and in accordance with Massachusetts Anti-Bullying law,[12] all eight team members who engaged in the bullying acts were suspended from the hockey team for the remainder of the season.[13] In addition, two of the players, Ben Bloggs and *John Doe*, the plaintiffs/appellants in *Doe v. Hopkinton Public Schools*

1 *Mahanoy Area School District vs. B.L*, 141 S. Ct. 2038 (2021).

2 Snapchat is a social media smartphone app that allows users to post images that are accessible only for short periods of time—ranging from one second to 24 hours—and are self-deleting.

3 *Mahanoy,* S. Ct. 2038 (2021).

4 *Id.* and **https://www.aclupa.org/en/cases/bl-v-mahanoy-area-school-district**.

5 *Tinker vs. Des Moines Indep. Community Sch. District,* 393 U.S. 503 (1969).

6 *Mahanoy Area School District vs. B.L*, 141 S. Ct. 2038 (2021).

7 *Id.*

8 *Id.*

9 *Id.*

10 *Doe v. Hopkinton Public Schools*, No. 20-1950 (1st Cir. 2021).

11 *Id.*

12 Mass. General Statute G.L. c. 71, §37O.

13 *Doe v. Hopkinton Public Schools*, No20-1950 (1st Cir. 2021).

matter, were given five and three day school suspensions. After being suspended from both the hockey team and school, Ben Bloggs and *John Doe* decided to use the courts as a way to continue bullying their teammate by filing a federal lawsuit claiming that the Hopkinton Public School District and its administrators violated their right to free speech as guaranteed under the First Amendment and Massachusetts Student Speech statute.[14]

In order to prevail on a right to speech claim, plaintiffs, in this case Bloggs and *Doe*, have to prove that (a) they were engaged in constitutionally protected conduct, (b) they were subjected to adverse actions by the school, and (c) the protected conduct was a substantial or motivating factor in the adverse actions.[15]

Here, Bloggs and *Doe* argue that any and all speech involving their teammate is protected by the First Amendment since they only engaged in minimal, 'non-offending' conduct and therefore, the School's administrators couldn't have reasonably concluded that their participation in the group was connected to the direct bullying of their teammate.[16]

The U.S. Supreme Court has long held that public schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[17] The Supreme Court has also been clear that schools have a significant interest in regulating "serious or severe bullying or harassment" that invades the rights of others.[18] This, coupled with the fact that Courts have traditionally deferred to "school administrators' decisions regarding student speech, led to the Appeals Court finding that free speech rights of Bloggs and *Doe* were not violated and that the School's administrators were justified in determining that the conduct involved "(a) caused emotional harm to their teammate, (b) created a hostile environment for him during school-sponsored events and activities and (c) infringed on his rights at school."[19]

The Appeals Court, in rejecting Bloggs' and *Doe's* minimal, non-offending role argument, found that the School's administrators, after a thorough investigation, "reasonably concluded" that they, Bloggs' and *Doe's,* acts "emboldened the bullies and encouraged others in the invasion of [the target's] rights".[20] The Court found that "speech that *actively encourages* … direct or face-to-face bullying conduct is not constitutionally protected" and that "the test is objective, focusing on the reasonableness of the school's response, not the intent of the student."[21] Therefore, the Appeals Court held that conduct or speech that actively and pervasively encourages bullying by others or fosters an environment in which bullying is acceptable and actually occurs – as in this case –is not protected under the First Amendment.[22]

The Appeals Court also concluded that Bloggs' and *Doe's* speech was not protected under the Massachusetts Student Speech statute because the State's Anti-Bullying law contains specific language proscribing conduct that "infringes on the rights of the victim at school."[23] The Court determined that to interpret the Student Speech Statute in any way would conflict directly with the Anti-Bullying Law, rendering it meaningless.[24]

The U.S. Court of Appeals for the First Circuit's *ruling* is significant since it confirms that there are some occasions where a student's *'off-campus'* speech can be the basis for disciplinary action which will not be considered a violation of that student's First Amendment rights. As suggested by the *Mahanoy Court*, whether that speech may be regulated depends on the specific facts of the case – such as whether it constitutes a "threat of harm, harassment, or if it infringes on the rights of another student."[25] Therefore, based upon this ruling, an individual may not be able to stop someone's *'off-campus'* bullying – but the Courts can.

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14 Mass. General Statute G.L. c. 71, § 82.

15 *D.B. ex rel. Elizabeth B. v. Esposito*, **675 F.3d 26, 43 (1st Cir. 2012)**.

16 *Doe v. Hopkinton Public Schools*, No. 20-1950 (1st Cir. 2021).

17 **Tinker, 393 U.S. at 513**.

18 *Mahanoy*, 141 U.S. at 2045.

19 *Doe v. Hopkinton Public Schools*, No20-1950 (1st Cir. 2021).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 **https://vdhboston.com/the-first-circuit-court-of-appeals-holds-that-off-campus-cyberbullying-by-students-can-be-a-basis-for-discipline-without-violating-the-first-amendment-or-the-massachusetts-student-sp/**

25 *Mahanoy*, 141 U.S. at 2045.

Exculpatory Clauses in New Jersey Recreational Settings: Assumption of Risk May Mean No Reward

By Kelly J. Woy

The enforceability of exculpatory clauses in New Jersey in the context of participation in a recreational activity is addressed in the Supreme Court's decision in *Stelluti v. Casapenn Enters.*, LLC, 203 N.J. 286, 1 A.3d 678 (2010). In *Stelluti*, the Court held that it is not contrary to the public interest, or to a legal duty owed, to enforce a recreational facility's agreement limiting its liability for injuries sustained as a matter of negligence that result from a patron's voluntary use of equipment and participation in an activity.

In *Stelluti*, the plaintiff entered into an agreement with the defendant gym for membership at its facility, and in accordance with the gym's requirement, signed and dated a Waiver and Release of liability form ("Waiver"). The Waiver provided that the signing member acknowledges the risks of participation in activities at the gym, is voluntarily participating in those activities, and assumes all such risks, including injuries which may occur as a result of the members use of amenities and equipment, participation in activities, sudden and unforeseen malfunctioning of equipment, and instruction or training. *Id.* at 682. The Waiver explicitly provided that the signor was releasing the defendant gym for its own negligence. *Id.* at 683. After signing the Waiver, the plaintiff participated in a spinning class; she set up her bike with the assistance of an instructor, and as she stood up on the pedals during the class as instructed, the handlebars fell off, and she was injured. *Id.*

The plaintiff sued the gym (among other defendants), setting forth negligence claims. The gym defendant filed a motion for summary judgment, which the Law Division granted, and the Appellate Division affirmed. The New Jersey Supreme Court granted the plaintiff's petition for certification. *Id.* at 687.

Initially, the Supreme Court acknowledged that the Waiver at issue was a contract of adhesion, in that it was a standardized printed form presented to the plaintiff on a "take-it-or-leave-it" basis, without the opportunity for the "adhering" party to negotiate. *Id.* at 687-88. However, the Court recognized that contracts of adhesion can be enforced where they are not unconscionable. The Court did not consider the plaintiff in this context to be in a classic "position of unequal bargaining power" such that the contract must be voided based on unconscionability, because the plaintiff "could have taken her business to another fitness club, could have found another means of exercise aside from joining a private gym, or could have thought about it and even sought advice before signing up and using the facility's equipment. No time limit was imposed on her ability to review and consider whether to sign the agreement." *Id.* at 688.

The Court explained that despite the general disfavor for exculpatory clauses and the need for careful scrutiny, such provisions are enforced unless they are adverse to the public interest. *Id.* at 689. Contracting-away of a statutorily imposed duty and agreements containing a pre-injury release from liability for intentional or reckless conduct are both against public interest. *Id.* at 688-89. Beyond those categories, there are four factors used to determine whether an exculpatory agreement is against public policy and therefore unenforceable:

1. Whether it adversely affects the public interest;
2. Whether the exculpated party is under a legal duty to perform;
3. Whether it involves a public utility or common carrier; and
4. Whether the contract grows out of unequal bargaining power or is otherwise unconscionable.

Id. at 689 (citing Gershon, Adm'x Ad Prosequndum for Estate of Pietroluongo v. Regency Diving Ctr., 368 N.J. Super. 237, 248, 845 A.2d 720 (App. Div. 2004)).

The Court explained that "[a]s a threshold matter, to be enforceable an exculpatory agreement must 'reflect the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full knowledge of its legal consequences.'" *Id.* at 689 (quoting *Gershon*, 368 N.J. Super.at 247). In this case, the exculpatory agreement explicitly set forth what was covered (including negligence on behalf of the gym), and the terms limiting the gym's liability were prominent. *Id.* at 690. Further, the plaintiff did not claim that she signed the Waiver as the result of fraud, deceit or misrepresentation. *Id.*

Therefore, the Court found that it could be presumed that the plaintiff understood the agreement.

Regarding the exculpatory clause's implications on public interest, the Court explained that while business owners must maintain safe premises for their business invites, the law recognizes that where certain activities posing inherent risks to participants are conducted by operation of some types of business, the business will not be held liable for injuries sustained as long as it acted in accordance with the "'ordinary duty owed to business invitees, including exercise of care commensurate with the nature of the risk, foreseeability of injury, and fairness in the circumstances.' When it comes to physical activities in the nature of sports—physical exertion associated with physical training, exercise, and the like—injuries are not an unexpected, unforeseeable result of such strenuous activity." *Id.* at 691 (internal citation omitted).

The *Stelluti* Court pointed out the New Jersey Legislature's recognition of the need for risk-sharing for certain inherently risky activities through certain activity-specific statutes:

> *Assumption of risk associated with physical-exertion-involving discretionary activities is sensible and has been applied in many other settings, including by the Legislature with reference to certain types of recreational activities. Recognizing that some activities involve a risk of injury and thus require risk sharing between participants and operators, the Legislature has enacted statutes that delineate the allocation of risks and responsibilities of the parties who control and those who participate in some of those activities. See N.J.S.A. 5:13-1 to -11 (Ski Act); N.J.S.A. 5:14-1 to -7 (Roller Skating Rink Safety and Fair Liability Act); N.J.S.A. 5:15-1 to -12 (Equine Act). Although no such action has been taken by the Legislature in respect of private fitness centers, that does not place the common sense of a risk-sharing approach beyond the reach of commercial entities involved in the business of providing fitness equipment for patrons' use. The sense behind that approach does not make it unreasonable to employ exculpatory agreements, within limits, in private contractual arrangements between fitness centers and their patrons.*
>
> *Id. at 692.*

The Court found that while there is public interest in holding a health club to its general common law duty to business invitees, "it need not ensure the safety of its patrons who voluntarily assume some risk by engaging in strenuous physical activities that have a potential to result in injuries", as that "could chill the establishment of health clubs". *Id.* at 693. It recognized that there is "positive social value" in allowing gyms to limit their liability, and "it is not unreasonable to encourage patrons of a fitness center to take proper steps to prepare, such as identifying their own physical limitations and learning about the activity, before engaging in a foreign activity for the first time." *Id.* Further, the Court found no evidence of grossly negligent and/or reckless conduct on behalf of the defendant gym. Accordingly, the Court affirmed.

Kelly Woy is a Ricci Tyrrell Associate.

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Plaintiff in NFL Concussion Case Losses Appeal

By Jeff Birren, Senior Writer

Amon Gordon was in the NFL over all or parts of eight seasons, though he only played in 33 regular season games. His last season was in 2011, and he later "submitted a claim for monetary damage" because his personal physicians "diagnosed with him with Early Dementia" in 2015 (*In Re NFL Players' Concussion Injury Litigation,* Case. No. 19-2753, 2021 U.S. App. LEXIS 34949; 2021 WL 5505402, (*"Gordon*") at 4, (11-24-21)). Eventually the Special Master denied the claim, and Gordon appealed that decision to Judge Brody in the U.S. District Court in Philadelphia who oversees the litigation. Judge Brody "sided with the Special Master's interpretation" (Id. at 5). Gordon then sought relief in the Third Circuit Court of Appeals, but in November 2021 that court affirmed Judge Brody in a short opinion. It is not a "presidential opinion under Third Circuit" rules and is not binding on the court (Id. at 1).

Background

Gordon played college football at Stanford beginning in 2000, primarily at defensive tackle. He had various injuries there. One article reviewed his "medical records that have become a part of the court record" (*advocacyforfairnessinsports,* Sheila Dingus, "Two Stanford Alumni, Two Very Different NFL's For Luck and Gordon" ("*Dingus*"), (8-26-19)). *Dingus* recounts that at Stanford Gordon had a right shoulder injury that required surgery as a freshman; broke his elbow as a sophomore; had a left-hand fracture as a junior, and that year "recalls having his 'bell rung'" (and that usually means a concussion.) He also had several smaller injuries, including a high ankle sprain and bone chips in his ankles (Id.).

Gordon was a fifth-round draft choice of the Cleveland Browns in 2004. He did not have an easy time in the NFL. On the very first play of the 2004 NFL regular season, he had a concussion on a kick-off return (Id.). That year Gordon played in six regular games (**www.nfl.com/players/amon-gordon/stats/career**). He was on the Browns' injured reserve list for the entire 2005 regular season due to a traumatic fracture of his left thumb, and a left knee injury that required "microfracture surgery" (*Dingus*). The Browns waived him after the season. He then joined the Denver Broncos. He was on the practice squad that year, but had arthroscopic surgery of his right knee (Id.) He played in no regular season games in 2006.

Denver waived him after the season, and it was on to Baltimore. He played in five regular season games in 2007. Baltimore cut him prior to the 2008 regular season. Carolina signed him, but during a practice he injured his left hip/abductor muscle. Carolina released him, and he went to Tennessee. He was on the practice squad for seven weeks and played in the last two regular season games. He was waived prior to the start of the playoffs (Id.). Philadelphia claimed him off waivers.

In 2009 he ruptured his left Achilles in May. He settled with the Eagles and had surgery (Id.). 2010 brought off-season time with New England and Tampa, and then preseason time in Seattle. He was released, spent time with Tennessee, and then returned to Seattle where he played in six regular season games and one playoff game. Seattle did not renew his contract.

Gordon joined Kansas City in 2011 and played in all sixteen regular season games for the Chiefs, despite several injuries, including a hip pointer, a left knee bone bruise, a hip bruise on his right side, and shoulder pain. An X-ray "showed some structural damage," that was "far more extensive than just a rotator cuff tear" (Id.). 2012 did not go well for him. Gordon had injections in both knees and pain in his left hip. He "did not pass the physical exam" and "discovered that he had extensive anatomical problems in multiple parts of his body." He was released (Id.), his NFL career over.

Post-NFL Litigation

Less than a year after his playing career ended, he was part of a class-action case in federal court in New York, *Baggs et al v. NFL, et al,* No. 1:13-cv-05691-RA, (S.D.N.Y. (8-14-13)). The case was transferred to Judge Brody in Philadelphia (*MDL Conditional Transfer Out Order* (9-11-13)). The NFL and the plaintiffs entered a class-wide settlement that allowed the class of former players to seek damages, and Gordon did so (*Gordon* at 3.)

Gordon also became the second-named plaintiff in another class action case against the NFL, this time in federal court in Chicago, *Lance Brown, Amon Gordon, and Charles Grant v. The Bert Bell/Pete Rozelle NFL Player Retirement Plan et al,* No. 1:20-cv-06949 (N.D. Ill, Eastern Div. (11-23-20)). It was a 20-page ERISA lawsuit. After some wrangling, plaintiff's counsel dismissed the complaint without prejudice on March 23, 2021.

Claim Procedures

The Third Circuit stated that the class action settlement established procedures for former players seeking a diagnosis. There were different procedures for players who received a diagnosis from their personal physicians prior to the settlement's effective date. However, "*all* diagnoses were still required to be 'based on evaluation and evidence generally consistent with' the diagnostic criteria used in the Baseline Assessment Program" (Id. at 3), (emphasis in the original).

After the reviewing panel makes its determination, both parties can appeal that decision to the District Court who may refer such appeals to a Special Master. Either side can subsequently appeal the Special Master's decision to Judge Brody, but "the settlement

agreement limit's the court's review. The factual determinations of the Special Master are 'final and binding'" and the Court's "review is limited to questions of law" (Id. at 3/4).

Retired players can receive monetary relief if they can show that they have a "Qualifying Diagnosis." That includes "(1) Early Dementia, (2) Moderate Dementia, (3) Alzheimer's disease, (4) Parkinson's Disease, and amyotrophic lateral sclerosis" (Id. at 4). "Early dementia, the subject of this appeal, can be particularly hard to quantify." Prior to the testing, the physicians "must first estimate the player's pre-injury intellectual functioning." That leads to classifying each such former players as "Below Average," "Average," or "Above Average," a category that includes all players with an estimated pre-injury IQ above 110.

The player is given "a battery of tests spread across the five domains to estimate the degree of functional and cognitive impairment." The "examining physician" "assesses the player's scores." If an individual score is "far below what is expected for a person with the same pre-injury baseline," the physician can infer that the former player "is suffering from some sort of cognitive decline." The raw scores are "converted into T-scores to determine if the scores are enough standard deviations below the expected range to indicate statistical significance." To be deemed "impaired" the subject "must have two scores in that domain that fall below the standard-deviation threshold. And, to receive an Early Dementia diagnosis, the former player must be impaired in two or more domains" (Id.).

Gordon's Claim

Gordon submitted a monetary claim in 2017, prior to the settlement, because his personal physicians "diagnosed him with Early Dementia." That diagnosis was reviewed by the advisory panel. The panel approved the claim and determined that the diagnosis "was generally consistent with the" Program's criteria (Id. at 5). A neuropsychology consultant then reviewed the application and recommended that the claim be denied "because Gordon's personal physicians did not properly scale Gordon's scores." The claim was "also flagged for an audit." After the audit was completed, the panel "again approved" the claim. The NFL appealed the decision to the Special Master.

The parties agreed that Gordon belonged in the Above Average pre-injury baseline, and that the personal physicians "used many of the same tests" that were part of the Baseline Assessment Program. The NFL asserted that Gordon's personal physicians used improper "scaled scores" rather than the T-scores. When the scores were "properly converted to T-scores," "Gordon failed to meet the Program's criteria for an Early Dementia diagnosis." The Special Master agreed, finding that Gordon's personal physicians' diagnosis was not "generally consistent" with the Program's diagnostic standards. The Special Master also "concluded that Gordon's test scores did not show the cognitive decline required for a diagnosis" and consequently denied the claim.

It was Gordon's turn to appeal. He argued that the Special Master misinterpreted the settlement agreement. However, the "court's jurisdiction is limited to "legal issues." The appeal was therefore "confined to a single question: whether the Special Master erroneously required Gordon's pre-effective date diagnosis to be 'generally consistent' with the diagnostic standards listed in the settlement's Baseline Assessment Program." The District Court accepted the Special Master's interpretation of the agreement. All such diagnoses "must be made" consistent with Exhibit 1 to the agreement, and that "unequivocally states" that retired players diagnosed outside of the program must be diagnosed "based on evaluation and evidence generally consistent" with the Program's diagnostic criteria. This "applies to all Qualifying Diagnosis of [Early and Moderate Dementia], including pre-Effective Date Diagnoses" (Id.). Judge Brody affirmed the Special Master, and Gordon appealed to the Third Circuit.

The Circuit's Analysis

The Circuit reviews the District Court's "interpretation of the settlement agreement for clear error and its administration of the settlement for abuse of discretion." Gordon "now completely abandons his argument presented to the District Court." He "concedes that all pre-effective date diagnoses must be 'generally consistent" with the diagnostic criteria the settlement's Baseline Assessment Program." He even repeated his concession in his reply brief. Gordon's new argument was that the District Court "abused its discretion by failing to explain its reasoning for upholding the Special

Master's determination. Gordon presents no other arguments" (Id. at 6).

Gordon insisted that he "cannot discern the factual basis of the District Court's denial of his award" (Id.). This is "meritless." The District Court only had a single question before it: whether the diagnosis supporting the claim had to be generally consistent with the program's standards. Gordon claimed that the District Court "should have given a more detailed account of the factual underpinnings of his claims" but those issues "were not before the court and were not germane to the disposition of Gordon's legal objection. The District Court gave a well-reasoned and detailed analysis of the issue Gordon raised. Thus, we find no abuse of discretion."

The Court stated in a footnote that Gordon "suggests" that the T-score in effect requires "'race norming" that leads to "the unequal treatment of black players." However, that "issue is not before" the Court and Gordon "specifically did NOT ask this Court to consider that issue because the evidence is not before it" (Id. FN.2, at 4), (emphasis in the original).

Conclusion

Gordon's wife and personal physicians insist that he has major cognitive impairment. If this is true it is a sad story. Such claims must be presented with vigor, clarity, and completeness, and the facts must support the desired conclusion.

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No High Score for Atari in IP Trial against E-Commerce Marketplace

By Robert E. Freeman, Jonathan Mollod, and Peter Cramer, of Proskauer

In the dramatic conclusion to a copyright and trademark infringement multiplayer contest that went into the final round between online print-on-demand marketplace Redbubble Ltd. ("Redbubble") and videogame studio Atari Interactive, Inc. ("Atari"), a California federal jury burst the game company's bubble when it gave Redbubble the win. (*Atari Interactive Inc. v. Redbubble Inc.*, No. 18-03451 (N.D. Cal. Nov. 4, 2021)). In 2018, Atari brought direct and vicarious counterfeiting and infringement claims against Redbubble stemming from the alleged presence and sale of unlicensed Atari-branded goods on Redbubble's site. It took over three years for the case to wind its way to trial but, for now at least, it appears that Redbubble has escaped the "Pitfall" of infringement liability and statutory damages.

Redbubble, an Australian company founded in 2006, is an online marketplace that utilizes a print-on-demand model. This means that, unlike traditional retailers, the company does not order or manufacture a stock of ready-to-sell inventory. Instead, it creates individualized items, printing designs previously uploaded by independent artists/sellers onto generic goods like t-shirts and mugs when a customer places a custom order. Importantly for this suit, Redbubble also does not create the designs itself, but instead relies on files uploaded by third-party creators. Moreover, Redbubbble lets the creators set the ultimate retail price for each item and, upon each sale, forwards the purchase order to a third-party manufacturer (or fulfiller), which creates the final product based on the customer's specifications and ships it via pre-approved carriers.

Atari was born more than a generation earlier than Redbubble, in California in 1972. That year, it released Pong, the world's first massively successful videogame. Atari developed hundreds of games over the next decade, including iconic titles like Adventure, Missile Command and Centipede, before being split up and sold following the video game industry's 1983 crash.

After changing corporate hands multiple times in the 1980s and 1990s, the current iteration of Atari Interactive was formed in 2001 when French publisher Infogrames Entertainment, SA (later renamed Atari, SA) acquired the brand. Today, Atari continues to develop and market new games and gaming hardware, but it is also focused on nostalgia, reselling its classic titles and licensing its IP for merchandise.

The presence of unauthorized, user-uploaded designs on print-on-demand sites has been a concern both for platforms like Redbubble and IP owners like Atari and the subject of much litigation in recent years, as courts have wrestled with who is responsible for infringing products displayed on and sold through such digital marketplaces. As with other online marketplaces that host user-uploaded content, it is a risk

of Redbubble's business that some of its independent artists will upload copyrighted images or trademarked designs for merchandise without authorization, and that consumers might complete a transaction to receive such infringing products. However, the ultimate issue of copyright and trademark liability depends on the circumstances of each case and particularly on a platform's precise role in managing its marketplace.

Beginning in 2018, Atari launched a series of lawsuits targeting online merchandizers it claimed were menacing its licensing operation (like "**Space Invaders**" descending upon Earth) and improperly profiting off of its iconic IP, including the Atari logo and imagery from its classic games. Most of these suits were eventually resolved, but Redbubble apparently refused to play ball (or **Pong**) and opted for "**Combat**" in court.

In June 2018, Atari filed a **complaint** in the U.S. District Court for the Northern District of California, alleging that Redbubble is "powered by a substantial quantity of counterfeit goods." It accused Redbubble of direct, secondary and vicarious trademark infringement, trademark counterfeiting, and copyright infringement, and even included screen grabs from Redbubble's site showing t-shirts for sale featuring the USPTO-registered logos for Atari and Pong, among others. Upon receiving the complaint, Redbubble immediately removed the listings identified in Atari's complaint, and also began to proactively police for Atari-related designs. Redbubble also contended that, generally speaking, it did not create the designs and was merely a "transactional intermediary" and not a seller of the merchandise on the site.

Grappling with cross-motions for summary judgment this past January, the California court acknowledged the unique position of print-on-demand businesses, noting that "Redbubble does not fit neatly into the category of either an 'auction house' on the one hand, that will generally be free from liability for direct infringement, or a company that itself manufactures and ships products on the other, on which liability for direct infringement can be readily imposed." On January 28, 2021, the court **granted Redbubble's summary judgment motion on contributory and vicarious copyright infringement and willful copyright and trademark infringement**, noting that "Atari provides no evidence that Redbubble knew of 'specific infringing material' and failed to act." The court further noted: "Redbubble's Marketplace Integrity Team proactively screens for infringing content based on information it receives from content owners [and] searches Redbubble's site for potentially infringing listings." However, the marketplace was not able to "**Breakout**" from the suit entirely, as the court left the questions of direct copyright infringement, as well as all forms of (non-willful) trademark counterfeiting and infringement, for a jury. Notably, the court also rejected Redbubble's 17 U.S.C. § 512(c) (DMCA "safe harbor") defense, noting, "Redbubble actively participates in modifying the files uploaded by users to display the designs on Redbubble-selected physical products" and thus fails the DMCA requirement that infringing images be stored "at the direction of the [third-party] user."

At the trial in November 2021, allegations careened through the courtroom like "**Asteroids**" in deep space. The game studio called the website's infringement "out of control," but Redbubble countered by pointing out that despite offering a form through which content owners can report infringing products, Atari hadn't flagged any merchandise as infringing on the site since 2011, leaving the Redbubble's "Marketplace Integrity Team" in the dark.

Since Redbubble's business model involves independent third parties marketing and selling their designs on its platform and a third party fulfilling the orders, Atari's best chance for victory was perhaps its vicarious liability claim. Generally speaking, a defendant commits vicarious copyright infringement when it profits from direct infringement while declining to exercise its right to stop or limit it. On this point, however, the jury was apparently swayed by Redbubble's argument that, despite its automated anti-fraud system and Marketplace Integrity Team, it cannot police its platform effectively without assistance from IP owners in the form of takedown requests. As the court stated in its prior January 2021 opinion in dismissing the vicarious copyright claims, "[F]inding infringement would be like 'searching for a needle in a haystack' where Redbubble lacks knowledge of [the] needles' appearance." In other words, by going straight to litigation without first attempting to work with Redbubble's piracy team and inform them of specific instances of infringement, Atari attempted to use a cheat code to skip to the

final level. This argument pressed the right buttons for the jury, who needed less than a day to deliberate before **exonerating Redbubble from infringement claims**. A **judgment** from the court dismissing all claims soon followed.

After the verdict, it appeared to be game over. However, Atari inserted additional tokens for extended play and **filed an appeal** to the Ninth Circuit. Stay tuned.

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Articles

States Focus on Diversity in Sports Betting

By Michelle W. Cohen, Member, Ifrah PLLC

Companies seeking gaming licenses and registrations (whether as an operator or a service provider, such as an affiliate) should pay special attention to states' increasing diversity requirements. In considering license applications, gaming regulators are emphasizing organizations' commitments to diversity. The areas of focus include minority and women's participation in company ownership, hiring, and use of diverse outside vendors.

Several states, including Maryland and Virginia, include diversity ownership in the regulators' analyses of sports betting licensing applications. Other states, such as Pennsylvania, require that licensed companies (including affiliates) maintain and implement diversity plans. While the requirements vary state by state, we provide a few examples below to illustrate industry trends. The focus on "diversity, equity and inclusion" ("DEI") will no doubt continue as additional states implement sports betting.

Maryland

Maryland has enacted the most sweeping law concerning diversity considerations for sports betting licensees. The state's sports betting law (HB 940) emphasizes the participation of minorities and women. As background, when Maryland legalized medical cannabis, the state did not award minorities and women any of the initial licenses. In granting sports betting licenses, legislators sought to ensure that minorities and women are afforded significant opportunities to obtain sports betting licenses. In particular, the law "expresses the intent of the General Assembly that the sports wagering program is to be implemented in a manner that, to the extent permitted by law, maximizes the ability of minorities, women, and minority and women-owned businesses to participate in the sports wagering industry, including through the ownership of licensed sports wagering entities under the bill." The Sports Wagering Application Review Commission ("SWARC") is directed "to the extent permitted by federal and state law" to "actively seek to achieve racial, ethnic, and gender diversity when awarding licenses." (**https://legiscan.com/MD/text/HB940/id/2402214/Maryland-2021-HB940-Chaptered.pdf**).

In addition to 17 licenses available to specified entities (which include casinos, professional sports stadiums, horse racing tracks, off-track betting facilities and bingo halls with at least 200 electronic instant bingo machines), the state may award up to 60 mobile sports betting licenses. Most observers believe the "money is in the mobile." Consequently, the SWARC will likely scrutinize ownership of mobile applicants even more than land-based applicants.

Under Maryland's law, sports wagering applicants seeking investors must make "serious and good-faith efforts to solicit and interview a reasonable number of minority and women investors and must submit related documentation as part of the application." (**https://mgaleg.maryland.gov/2021RS/fnotes/bil_0000/hb0940.pdf**). Once awarded a license, applicants must sign a memorandum of understanding with the SWARC that requires the licensee to make serious, good-faith efforts to interview minority and women investors in any future capital rounds.

A sports wagering application must include an affidavit attesting to the number of minority and women owners, the ownership interest of any minority and women owners, the number of minority and women employees, and the number of current contracts the applicant has with minority and women owned

subcontractors. These are ongoing obligations., with sports wagering licensees reporting this information yearly.

Maryland extends its diversity goals to goods and services in the sports wagering industry. The law requires the Governor's Office of Small, Minority, and Women Business Affairs (in consultation with the Office of the Attorney General) and sports wagering licensees – to establish a clear plan for setting "reasonable and appropriate minority business enterprise participation goals and procedures for the procurement of goods and services relating to sports wagering, including procurement of construction, equipment, and ongoing services." It would appear this requirement would be more applicable in the context of land-based sports betting licensees, though mobile providers obtaining services (such as geolocation and integrity services) may have participation goals imposed upon them as well.

Maryland's law also establishes a Small, Minority-Owned, and Women-Owned Business Sports Wagering Assistance Fund. The support for the fund comes from 5 percent of the fees collected from the larger (Class A-1 and A-2) Sports Wagering facility licensees (the professional sports venues and casinos). The Fund is to provide grants or loans to small, minority-owned, and women-owned businesses entering the sports betting industry.

In the current applicant pool, two off-track betting facilities may be the initial benefactors of Maryland's diversity requirements. Both businesses seek to launch sports wagering in early 2022. Riverboat-on-the-Potomac is a minority-owned business (partnering with PointsBet) and Long Shot's is a woman-owned business.

Virginia and Pennsylvania

The Virginia Lottery (the Commonwealth's sports betting regulator) considers several factors in awarding the state's limited sports betting licenses. These factors include past experience, financial viability, success with sports betting in other jurisdictions, and "whether the applicant has demonstrated that the applicant has made serious, good faith efforts to solicit and interview a reasonable number of investors that are minority individuals." (11 VAC 5-70-50). Virginia's definition of "minority" includes African Americans, Asian Americans, Hispanic Americans, and Native Americans. Virginia does not include women in this consideration (unlike Maryland), and does not impose the extensive requirements for minority and women participation (and possible preferences) specified by Maryland law. However, with limited licenses, those otherwise qualified applicants that can demonstrate minority owners and efforts made to solicit those owners should receive due consideration.

Pennsylvania's law requires applicants for gaming licenses and other authorizations (including gaming service providers such as marketing affiliates) to submit written diversity plans with their applications (including renewal applications). Organizations must also submit an annual diversity compliance report assessing their performance for the previous year. Diversity plans must include information regarding recruiting efforts, training, development and retention, how the plan is distributed, vendors and procurement, and complaint procedures. The Pennsylvania Gaming Control Board takes these requirements seriously and will require applicants and licensees to resubmit their plans if they do not meet the Board's requirements. Thus, companies should be prepared to address these topics and to implement their stated goals.

Future Diversity Initiatives

As additional states implement sports betting, they will no doubt look to how diversity initiatives have succeeded in Maryland and other jurisdictions. It remains to be seen whether other jurisdictions will follow Maryland's lead with a focus on minority and women ownership in the license selection process. Some states may instead model Virginia's minority ownership "factor" in licensing consideration. Other states could adopt Pennsylvania's diversity plan requirements as a guide to foster diversity in employment and procurement in sports gaming. Irrespective of how the states pursue diversity, sports betting operators and service providers should be ready to address issues such as minority and women ownership, recruiting and retention, and procurement. Whether in initial license awards, renewals, or ongoing compliance assessments, the focus on diversity in the sports betting industry is here to stay. Regulators in many states will monitor who "talks

the talk" and who "walks the walk" when it comes to diversity, equity and inclusion.

This article appeared in My Legal Bookie, a publication on legal sports betting produced by Hackney Publications.

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Morgan Lewis Partner Discusses NFTs, and How They Intersect with the Sports Industry

Non-Fungible Tokens, or NFTs, are all the rage in the technology community, especially at the intersection of entertainment and sports.

We wanted to learn more about this important topic, so we sought out **Doneld Shelkey**, a partner in the Technology Practice at Morgan Lewis, for his insight into the growth of this field over the past year.

Shelkey represents clients in global outsourcing, commercial contracts, and licensing matters, is well versed in copyright and trademark law issues as well as some of the other legal issues that are surrounding the rise of NFTs in the sports industry. What follows is his insightful interview.

Question: How did you get involved in NFTs?

Answer: Morgan Lewis has a robust technology transfer practice that lent itself easily to the issues involved with NFT related transactions. One of the first mainstream uses of NFTs was in the sports memorabilia and the collectible arena. Once businesses and investors saw the money that consumers were willing to pay for NFTs, it didn't take long for us to start receiving calls.

More substantively, we have been seeing NFT transactions that are all over the map. Commercially popular applications, like the sports collectibles example, were some of the most straight forward and have issues that are typical in other media contexts, such as rights clearance, IP related issue and rights of privacy and publicity. But we have also seen more business-to-business NFT questions relating to smart contract licensing and development and handling regulatory issues associated with SAFTS and other SEC issues.

Q: Why are they a good fit for the sports industry?

A: At its core, an NFT solves what is called the "double spend" problem with digital assets. Prior to NFTs, if you wanted to sell digital sports collectibles, you either had to create a proprietary ecosystem that maintained the "authenticity" of a digital object (and had popular support of the ecosystem to make them valuable). With NFTs, you simply can secure the rights to create a digital collectible and produce one using an already existing third-party infrastructure that can maintain the authenticity of the item. Essentially, the technology ensures you are buying authentic goods…which is extremely valuable for collectors of all types, including sports memorabilia collectors.

Q: What are some of the latest trends you are seeing as far as their use in the sports industry?

A: As you can tell from my previous answers, right now, the trend is all about digital collectibles, so rights clearance is all the rage. In many cases, you have to look back through previous agreements that were not drafted at all with NFTs in mind…they didn't even exist…and try to determine where the various parties have the rights to sell or buy a particular style of NFTs. Although there has been a lot of talk about a NFT "bubble" in the sports space, my personal view is that we aren't yet at capacity. With new technologies coming around the "metaverse," improvements to 3D printing, and other technologies that, though are unrelated, will almost certainly serve to stabilize the value and potentially increase the demand for collectible NFTs. Said differently, having a collectible NFT video of a sport event playing in your "metaverse house" will be thing in the near future (as odd as that may sound to some purists).

Q: Why should organizations, teams, athletes and others need lawyers to facilitate their creation or use of NFTs?

A: While access to NFT technology is relatively trivial given the various third-party services providers out there now, the ability to effectively and legally source and sell content is a complicated matter. Turning something into a NFT and commercializing it is not an intuitive process from a legal perspective. For example, content used to create NFTs are often covered by copyrights or are subject to agreements that, as mentioned above, were most likely drafted prior to the NFT age, so having your lawyer review your plan and

ensure you have the various permissions you need to make your NFT drop is a good idea. Otherwise, you could end up paying your profits out to various right's holders rather than your pocket.

Additionally, not all NFT service providers are the same. So, reviewing (and creating) the terms and conditions surrounding the NFTs and related services are imperative. Are you granting commercial rights to the NFTs? Are they allowed to publicly display the NFT? At its core, the NFT world is a licensing world, so having a licensing attorney review the agreements moving around rights is a really good idea.

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How Mediation Can Help Resolve Esports Disputes

By Katharine M. Nohr, JD

Movies and television legal shows give the impression that disputes are resolved in dramatic courtroom battles. The reality is that most litigants, insurance companies, and businesses prefer not to put the power of resolving lawsuits in the hands of judges or juries but would rather seek a settlement before trial. Most judges assigned to cases will hold settlement conferences in an effort to work with both parties to try to come to a settlement agreement. However, judges' time is often limited and not all judges have the skills to effectively mediate cases. This is where trained mediators come in.

Esports Litigation

As Esports grows, lawsuits are becoming more prevalent. A former employee filed a lawsuit against Riot Games and its CEO, a Court of Appeals considered the U.S. Government's WeChat ban appeal, and Epic Games filed lawsuits against Apple and Google in the UK and Australia over Fortnite. Law firms with Esports sections and specialties are emerging and insurance companies are offering policies insuring against Esports risks. Increased litigation adds to the cost of doing business in all business sectors. Even if the risk is covered by insurance and the policy requires the insurer to provide a defense (pay attorneys to represent you and/or your business) and indemnify you (pay any judgement or settlement), the cost will be passed on to you through higher premiums.

Litigating a case can cost tens of thousands to hundreds of thousands of dollars and can take years to conclude. Complying with discovery demands can take a significant amount of time and stakeholders will likely experience stress from the uncertainty of the outcome. Despite the downside, individuals and companies often seek resolution of conflict through litigation with the hope of remedying a wrong or seeking a favorable ruling on a dispute. They may be seeking an injunction (asking the court to order another party to cease an action) or damages, including monies to make them whole, compensation for emotional distress, and even punitive damages that are usually not covered by insurance.

Are there alternatives to Litigation?

Alternative Dispute Resolution ("ADR") refers to means of resolving disputes or litigation without the need to go to court. These methods can be used during the traditional litigation process in order to resolve the case early or can be used instead of litigation. ADR includes mediation, arbitration, negotiation and collaborative law. Mediation, the focus of this article, is where both parties choose a neutral person or panel to assist them in coming to an agreed upon resolution. A mediator can also be court appointed.

Why mediation in Esports?

1. Reputations can be preserved. Even though Esports is global, it is a relatively small community including high profile stakeholders and the need to preserve reputations. Because of this, the advantages of mediation are particularly important to the space. Mediation is confidential (unless the parties agree otherwise). Unlike court proceedings, the actual mediation process and the mediation agreement can be kept confidential.
2. Mediation is less costly than traditional litigation. The time commitment required by the attorneys and parties is significantly reduced. Other costs that are typically high, such as those for expert witnesses, court reporters, subpoenaed documents, and support staff will likely be reduced or eliminated. Mediation

costs are also much more predictable than the cost of trial, allowing parties and insurers to budget for such costs.

3. Increased control of the outcome. The downside of trial is that the parties are essentially putting the power of the outcome of their case into the hands of the judge and jury. Mediation gives the parties greater control over the resolution of the dispute. They negotiate an outcome that they are willing to accept and the chance of dissatisfaction of the result is minimized.
4. Mediation is generally voluntary, allowing either party to withdraw at any time.
5. Convenience. Another advantage of mediation is that it is more convenient than trial. Each party can weigh in on scheduling and the venue. Now, mediation can be done virtually with the parties and mediator appearing from distant locations by Zoom, or another platform. This further reduces the cost. During the proceeding, the mediator will meet with each party in turn privately in order to hear their positions and work with them to effectuate a settlement.
6. Speed. The outcome of mediation is significantly faster than litigation. It can be used early on in a dispute—-even before a party files a lawsuit. Oftentimes, mediation can resolve a case in a matter of hours or in a day. A dispute may not be resolved during the first session. However, it can open up channels of communications and allow the parties to exchange offers over time. Such offers and negotiations will provide parties with information that may ultimately lead to settlement.
7. Preserve business relationships. One of the most significant benefits of mediation in the Esports industry is its use in allowing the parties to preserve their business relationships. It allows the parties to effectively communicate with each other to attain a mutually agreed upon resolution. Such resolution may include a path for the parties to continue to work together successfully in the future. Sometimes, a resolution will not be monetary, but consist of an apology or a promise to cease a harmful action. While litigation can result in verbal attacks against each other, mediation seeks conciliation.

How do Parties enter into mediation?

If there's a contractual provision requiring mediation, then the parties must adhere to this requirement. If not, a party can propose mediation to the other party. If they both agree, then the process of agreeing to a mediator begins. Usually, the parties will agree to split the cost of mediation. The mediator will usually hold a pre-mediation conference in order to schedule the date and venue. If both parties are represented by counsel, the mediator will usually require the attorneys to submit pre-mediation statements with exhibits for review before the mediation. This allows the mediator to understand each party's position and the likely outcome at trial.

What are the disadvantages of mediation?

1. An unwilling party. Although there are many advantages to mediation, it is not always the best means to proceed. Sometimes, a party will not agree to participate. If so, the potential for a resolution is significantly reduced. A court may order the party to participate, but this may not ensure a successful mediation.
2. Need to establish precedent. There are cases where a party wishes to establish a legal precedent and can only do this by proceeding to court.
3. Decision-Maker is not available. In order to successfully mediate a case, the decision-makers or those with authority for each party need to be available and willing to negotiate. If they are not, the case is not likely to settle.
4. Mediation may not be cost effective in a particular case. This might occur when the amount at issue is minimal or when the likelihood of the parties actually achieving a settlement is low. In this case, the parties may pay for mediation, but end up in court anyway.

Can mediation be used even if there isn't a lawsuit?

Yes. If there is a dispute and the parties to the dispute feel that they might be able to resolve the dispute with

the help of a neutral third party, they can agree on mediation before filing a lawsuit.

How Can Esports businesses use mediation?

Disputes between any stakeholder in Esports may wish to go to mediation, rather than wait until a party files a lawsuit. Or, if a lawsuit has already been filed, mediation may be selected as a means of putting a quick end to litigation. Esports publishers, casinos, and companies may also consider mediation to address intercompany issues. A skilled mediator can assist with creating a company mediation policy as well as serve as a neutral to assist in resolving disputes.

Mediation provisions in contracts

If you want to avoid costly litigation, make sure your contracts contain a mediation provision. When negotiating contracts, it's a good idea to talk with your attorney about including such a provision. When reviewing contracts prepared by others, look for a mediation agreement. If there is none, consider asking that it be included.

Choose the Right Mediator for Your Esports Dispute

In order to successfully mediate your Esports dispute, you'll want to select an experienced mediator who understands the issues unique to Esports. There are many skilled mediators available, but if they have to Google "Esports" or have very little knowledge of the legal issues, roles, relationships, and history, you may be spending additional and unnecessary time educating the mediator.

In short, your Esports organization can save significant time and money by mediating disputes. Consider this option as an alternative to litigation.

Katharine M. Nohr, Esq. is an Esports mediator, arbitrator, attorney, and former Judge. She's the author of Managing Risk in Sport and Recreation: The Essential Guide for Loss Prevention (2009 Human Kinetics), and is the host of ThinkTech Hawaii talk show, "The Wide World of Esports" and was awarded ThinkTech Hawaii Host of the Year in December of 2021. Ms. Nohr is available to serve as a virtual mediator for your Esports dispute.

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NCAA Labels Oklahoma State University's Reaction to Committee's Decision 'Unacceptable'

The NCAA didn't mince words in a statement it made in November after Oklahoma State University officials, upset that a decision to sanction the basketball program after an NCAA investigation uncovered violations was upheld, effectively outed the members of the NCAA appeals committee that made the decision.

The NCAA suggested that "comments by Oklahoma State personnel … resulted in NCAA volunteer committee members and staff receiving threatening and offensive messages after being identified by name. This is unacceptable.

"Oklahoma State personnel encouraged individuals to circumvent the NCAA member-created process that every school agrees to participate in as part of their responsibility to each other. Further, there is a troubling trend of misstating facts about the infractions process by schools that disagree with the infractions outcomes. Each member has the ability to seek change to the Division I infractions process, and there is a review group underway looking at how to improve the process.

"This is also a clear example of the work that needs to be done to address issues and behaviors like this moving forward with the new NCAA Constitution and Division I Transformation process. We know that an adverse decision can be emotional, but personal attacks against individuals simply carrying out their responsibilities are inappropriate, unethical and potentially dangerous."

The Decision that Led to the 'Unacceptable' Behavior

OSU's reaction was fueled by the NCAA Division I Infractions Appeals Committee's decision confirming the level of the violation that occurred in the Oklahoma State men's basketball program when a former associate head coach violated NCAA ethical conduct rules.

Among other penalties upheld by the committee, the men's basketball program must serve a one-year postseason ban.

In the NCAA Division I Committee on Infractions decision regarding Oklahoma State, the infractions

panel found the former associate head coach accepted cash bribes in exchange for arranging meetings for financial advisors with a student-athlete and his family. The former associate head coach also knowingly made direct cash payments to a student-athlete.

The infractions panel found that the violation represented severe breaches of conduct under NCAA rules, resulting in a Level I-standard case for the school and Level I-aggravated case for the former associate head coach.

In its appeal, the school argued that the infractions panel erroneously classified Oklahoma State's case at the same level as the former associate head coach, stating that the coach's personal and unethical conduct did not provide competitive advantages or benefits to the school.

The infractions panel argued in its response that holding the school responsible at the same level was consistent with legislated NCAA violation structures. Specifically, the panel noted that a member school is responsible for its staff members, and when a staff member commits a violation while employed by the school, both the individual and the school are responsible for the violation.

In its decision, the appeals committee agreed with the infractions panel, noting that NCAA members have established that control and responsibility for conduct in college sports rests with a school. Additionally, the appeals committee stated that assessment of level is tied to the conduct that resulted in the violation, and not the specific circumstances of the parties. As a result, the appeals committee upheld the infractions panel's finding that Oklahoma State's case was Level I.

Additionally, Oklahoma State argued that the infractions panel assigned too much weight to aggravating factors and too little weight to mitigating factors when determining the classification of the case for the school. Therefore, Oklahoma State appealed several penalties in this case — including probation, a postseason ban, scholarship reductions and recruiting restrictions — and argued that the infractions panel abused its discretion.

In its response, the infractions panel argued that it appropriately exercised its discretion when it considered and weighed aggravating and mitigating factors. It specifically stated that the application of the aggravating factors — including a history of major violations at the school and that persons of authority condoned, participated in or negligently disregarded wrongful conduct — was "straightforward and unremarkable."

The appeals committee concluded that Oklahoma State's disagreement with the weighing of the aggravating and mitigating factors did not demonstrate an abuse of discretion. Though the appeals committee acknowledged that the infractions panel provided little or no analysis of how the mitigating and aggravating factors were weighed in its initial decision, the appeals committee stated that a disagreement with the weighing of the factors is "not a sufficient demonstration to warrant a determination that the panel abused its discretion, and this committee may not substitute its judgment for that of the panel."

Because the appeals committee determined the infractions panel had not abused its discretion in the determination of the level of this case or in the weighing of the aggravating and mitigating factors, the appealed penalties were upheld.

The members of the Infractions Appeals Committee who heard this case were Jonathan Alger, president at James Madison; Ellen M. Ferris, senior associate commissioner for governance and compliance at the American Athletic Conference; W. Anthony Jenkins, acting committee chair of the Division I Infractions Appeals Committee and attorney in private practice; Allison Rich, senior associate athletics director and senior woman administrator at Princeton; and David Shipley, a law professor and faculty athletics representative at Georgia.

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Tulane Sports Law Expert Gabe Feldman Examines Current Legal Issues in Collegiate Athletics

LEAD1 Association, the organization representing FBS athletic departments, recently released a summary of an interview that LEAD1 President and CEO Tom McMillen, former conducted with Gabe Feldman, Director of the Tulane University Sports Law Program.

Both McMillen, also a former Congressman, and Feldman recently presented before the Knight Commission on Intercollegiate Athletics, with McMillen

offering the political angle, and Feldman the legal viewpoint.

Here are some of the main takeaways from their conversation, according to LEAD1:

On NIL, according to Feldman:

- ***How the NCAA enforces NIL will impact their ability to defend the principle of "amateurism" in the courts.*** Given the NCAA's permissive Interim NIL policy, if the NCAA continues to allow for huge NIL deals, it will undermine their ability to defend amateurism or prohibitions on "pay for play" in the courts under antitrust law. In this vein, the Supreme Court Alston decision, Justice Kavanaugh's concurrence specifically, makes the point that college sports should be treated more like other enterprises, and not given differential treatment based upon amateurism. For college sports to protect the collegiate model, the enterprise must focus on the academic mission as the differentiating feature from other enterprises.
- ***NCAA investigations on NIL deals, like BYU and Miami, are fact determinative, but may be more of an exploratory exercise at this point.*** The NCAA's Interim NIL policy does not permit compensation for work not performed by college athletes (e.g., legitimate NIL deals must be quid pro quo). The NCAA enforcement issue, therefore, is whether these "collective" NIL deals, like Miami and BYU, are legitimate and not just an "end-around" for boosters to funnel cash to athletes. Because the NCAA's Interim NIL policy is very deregulated and generally defers to state laws where applicable, recent reports of the NCAA investigating various institutional NIL agreements may be more of an exploratory exercise to learn more about the nature of the deals, than a true investigation.
- ***A "crisis" may need to occur for the Congress to get involved in college sports.*** As McMillen has stated, a crisis, like a college athlete suffering significant harm because of an NIL agreement, due to lack of regulatory oversight, may create the type of impetus for the Congress to get involved in college sports. Unlike the current NIL landscape, according to Feldman, professional sports are heavily regulated, including with respect to agent involvement, so the NIL landscape may be unfortunately "ripe" for some significant negative event to occur to a college athlete.

On the employment status of college athletes, according to Feldman:

- ***It is plausible that the new NCAA Division I, being charged with implementing transformative change, could factor in collective bargaining for college athletes into their rules-making considerations.*** DeMaurice Smith, Executive Director of the NFLPA, recently made comments that there needs to be a new model in college sports with college athletes having bargaining power but not defined as employees. He believes a conference could lead the charge by creating a College Athlete Corporation where college athletes would share in revenue and have other bargaining rights. According to Feldman, new NCAA Division I could consider modifying pay for play rules considering this possibility, particularly if athletes were to bargain for a portion of television revenue.
- ***Albeit unlikely, College Basketball Players Association recent unfair labor practice charge filing under National Labor Relations Act (NLRA) could lead to full-scale collective bargaining rights for college athletes.*** It is possible that the filing could lead to all college athletes being classified as employees and the NCAA, conferences, and institutions being classified as employers under the NLRA, which would mean that all college athletes would have a right to form a union and collectively bargain. According to Feldman, such collective bargaining relationship may not be such a bad thing, given that professional sports are protected under antitrust law due to being unionized (e.g., non-statutory labor exemption).

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Arbitration and Regulations Governing Players/Agents – an Excerpt from Darren Heitner's Book

We live in a cynical world. A cynical world. And we work in a business of tough competitors. I love you. You . . . complete me..

—Tom Cruise, as character Jerry Maguire in 1996 film Jerry Maguire

The 1996 movie *Jerry Maguire* was all the justification needed for many to fall in love with the vocation of representing professional athletes. While the film touched on turbulent times encountered by sports agents in real life, it also promoted the fruits of what could be possible when an agent and an athlete are loyal to one another and benefit from the hard work accomplished on and off the field.

The stark reality of the sports agent industry is that there are plenty of disputes taking place between player and agent, as well as agent versus agent, through respective players' associations' mandatory grievance procedures. These systems have been crafted with a key purpose being to shield the public from inner-industry fights that can become extremely emotional and expensive as they approach a hearing, which is a modified version of a trial in the realm of civil litigation. Agents agree to be bound by respective players' associations' regulations, which include mandatory arbitration provisions, when they apply to become certified to represent those players in their team contract negotiations. Certification is granted based on the discretion of the union. It is not a right to be certified. In fact, a players' association can determine at any point in time that it chooses to no longer certify agents and instead represent the players with their team contract negotiations.[26]

Arbitrators, instead of sitting judges, actively preside over these pending disputes, oftentimes stepping in on multiple occasions with the overt intention of causing the parties to come to an early settlement. Many of the arbitrators chosen by the players' associations to sit in on disputes have long histories of dealing with issues concerning the players and agents in the league in which those individuals work and have an enhanced knowledge of the matters that have come before the tribunal in years past. This is important because they are to rely upon precedent, as a court of law would do, in drafting an opinion and an award should a case make its way through an arbitration hearing.

For instance, from 1994 through 2008, arbitrator Roger Kaplan presided over almost every arbitration conducted through the National Football League Players' Association (NFLPA) mandatory grievance procedure.[27] Arbitrator Kaplan has been used less frequently by the NFLPA starting in 2016 but remains one of two main arbitrators, along with Jim Conway, selected by the NFLPA to oversee disputes, and he continues to preside over the vast majority of NFLPA governed grievances.

Similarly, George Nicolau had been the arbitrator of choice for the National Basketball Players' Association (NBPA) for decades. However, the NBPA shifted to other qualified, experienced individuals, including Jim Quinn, to rule, largely based on Nicolau's plethora of precedent. The Major League Baseball Players' Association (MLBPA) also has a select few arbitrators that it tends to choose for its arbitrations, including arbitrator Joshua Javits.

The arbitration proceedings are intended to be active, expedient, and confidential, which are terms rarely used in the context of describing civil litigation. While a civil litigator by trade may be able to quickly adapt to the various players' associations' regulations and case law, a seasoned practitioner in this area should have a tactical advantage based on his or her knowledge and experience with using the applicable precedent, the general demeanor of the arbitrator, and the relaxed rules of evidence within a proceeding, at least at the early stages of a dispute. This is one area where I truly believe a sports lawyer can distinguish himself or herself from someone who merely dabbles in sports-related issues.

26 *See* NFLPA Regulations Governing Contract Advisors (as amended through August 2016), at https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/RegulationsAmendedAugust2016.pdf ("The NFLPA shall have sole and exclusive authority to determine the number of agents to be certified, and the grounds for withdrawing or denying certification of an agent").

27. *Weinberg v. Nat'l Football League Players Ass'n*, 06-cv-2332, 2008 WL 4808920, at *2 (N.D. Tex. Nov. 5, 2008).

NFLPA Regulations

> *I wanted to be represented by somebody who was going to look out for my best interest and nothing else. So I thought, Who better than me?*[28]
>
> —*Richard Sherman, NFL player*

The business relationships between NFL players and the agents who represent them are governed by the NFLPA Regulations Governing Contract Advisors (NFLPA Regulations), which is infrequently updated in its long-form version but is occasionally modified through the distribution of official NFLPA memoranda.[29] Agents representing NFL players, referred to in the NFLPA Regulations as *contract advisors*, are explicitly governed by the regulations and may be sanctioned by way of suspension, revocation of licensure, and/or monetary fine for violation(s) of same.

In many ways, the NFLPA Regulations, much like regulations distributed by other players' associations, act in a way that is like a state bar's rules of professional conduct. They warrant what are acceptable practices of the profession and carry steep penalties for those who fail to perform according to the strict standards of the enforcement bodies that oversee those who have been certified.

Disputes arising under the NFLPA Regulations are often governed by Section 5, which indicates that the arbitration procedure will be the exclusive method for resolving disputes that may arise from (1) denial by the NFLPA of an applicant's Application for Certification; (2) any dispute between an NFL player and a contract advisor with respect to the conduct of individual negotiations by a contract advisor; (3) the meaning, interpretation, or enforcement of a fee agreement; (4) any other activities of a contract advisor within the scope of the regulations; (5) a dispute between two or more contract advisors with respect to whether or not a contract advisor interfered with the contractual relationship of a contract advisor and player; and/or (6) a dispute between two or more contract advisors with respect to their individual entitlement to fees owed, whether paid or unpaid, by a player-client who was jointly represented by such contract advisors, or represented by a firm with which the contract advisors in question were associated.

In 2013, I had my first experience representing an agent in a dispute based on the NFLPA denying his Application for Certification. Seven years before that I had communicated with Cleodis Floyd for the first time. Floyd sent me an unsolicited email seeking information regarding the best websites to get football and basketball news, and he remained in touch as he went from an aspiring agent to law school student, to practicing lawyer, and eventually a NFLPA contract advisor applicant. Floyd's criminal past never came up in conversation, as it had no reason to be discussed, until the NFLPA denied Floyd's Application for Certification on June 25, 2013, based on Floyd's alleged conduct that purported to adversely affect his service in a fiduciary capacity on behalf of players. Floyd came to me for help, and even though I understood that we would be arbitrating against the NFLPA, the entity responsible for crafting the NFLPA Regulations, and in front of an arbitrator paid for by the NFLPA, we had cause for a fight.

We appealed the NFLPA's denial of Floyd's Application for Certification and on September 6, 2013, argued our position in front of NFLPA-appointed arbitrator Roger P. Kaplan. Part of our argument was that the NFLPA did not have a reasonable basis to deny Floyd's application because Floyd's background did not preclude him from being admitted to practice law in the State of Washington. Floyd testified and acknowledged that he had committed theft in his late teens, but that he had grown up and matured since that time, which included volunteering as a speaker at inner-city high schools where he shared his story and mentored student-athletes in not making the same mistakes that he made at an early age. After hearing Floyd's side of the story, arbitrator Kaplan was left to determine whether Floyd's prior criminal conduct served as sufficient grounds for the NFLPA to claim that Floyd "engaged in . . . conduct that significantly impacts adversely on [his] credibility, integrity or competence to serve in a fiduciary capacity on behalf of players." Arbitrator Kaplan found that the NFLPA failed to meet its burden to prove that it had a "reasonable basis in

28. Richard Sherman, *How It All Went Down*, The Players' Tribune, Mar. 21, 2018, at https://www.theplayerstribune.com/articles/richard-sherman-49ers-seahawks-free-agency.

29. The most recently published long-form version of the NFLPA Regulations is amended through August 2016.

the circumstances of the case under review" to deny Floyd's application.[30]

Throughout my career, I have been contacted by many NFLPA contract advisors and those who were denied certification for one reason or another, and I have represented a handful of them in cases concerning disciplinary action taken by the players' association. Two years after winning the Floyd case, I was contacted by Contract Advisor Vinnie Porter who asked whether I had any time to talk about possibly representing him in one such arbitration hearing that was set to occur in the beginning of 2016. On February 5, 2015, Porter received notice of a disciplinary complaint filed by the NFLPA's Committee on Agent Regulation and Discipline (CARD), which claimed that Porter knowingly participated in a conspiracy designed to defraud athlete client investors out of millions of dollars by fraudulently concealing the price of an investment, the amount of equity being purchased, and the identities of other investors. It cited multiple sections of the NFLPA Regulations as grounds to suspend Porter from acting as a contract advisor through the resolution of any and all criminal complaints against him.

Porter originally took matters into his own hands, drafting and delivering a self-written letter to serve as his formal notice of appeal. The NFLPA confirmed receipt of the letter but advised Porter that he failed to file a timely appeal. The NFLPA Regulations require an appeal be filed within twenty days following receipt of notification of the proposed disciplinary action, and Porter allegedly waited more than seven months to file. On December 31, 2015, I notified the NFLPA of my representation of Porter and began to engage in discussions concerning the availability of certain evidence and the potential for resolution. Ultimately, amicable resolution was not an available option. Unlike civil litigation, arbitrations under the various players' associations, especially when the arbitration is between contract advisor and association, often go to hearing and result in an opinion and award. Very few court cases go to trial; the same cannot be said about arbitrations in sports.

On March 7, 2016, we appeared once again in front of arbitrator Kaplan, who was selected by the NFLPA, to argue that Porter timely filed his appeal and that no further punishment of Porter was warranted based on the NFLPA's prior statements. I explained to arbitrator Kaplan that Porter had not violated the law. He had not been convicted of a crime. He had never provided financial services to an NFL player. He had never sought to involve any of his own clients in a proposed transaction, which he barely had any involvement in, and which led to Porter entering into a deferred prosecution agreement. Most important, I argued that the NFLPA could not justify keeping the suspension in place based on a document signed by a representative of the NFLPA stating that the suspension would only last until the resolution of criminal complaints against Porter and no more complaints existed.

Arbitrator Kaplan agreed. All criminal charges against Porter had been resolved, which effectively brought an end to the suspension, allowing Porter to once again be a certified contract advisor and represent NFL players. Additionally, arbitrator Kaplan found that the unique circumstances surrounding the case (i.e., ongoing discussions with the U.S. Attorney's Office) prolonged the period for which Porter was able to respond to the suspension notice and thus ruled that the appeal was timely made.

The book can be purchased here: **https://www.americanbar.org/products/inv/book/418874835/**

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New Allegations Surface Against Former University of South Alabama Volleyball Coach Accused of Sexually Harassing and Sexually, Physically, and Emotionally Abusing Players

University of South Alabama (USA) student-athletes alleging sexual harassment and physical and emotional abuse at the hands of a former head women's volleyball coach have filed an amended complaint, making new allegations.

30. Associated Press, *Cleodis Floyd Can Become NFL Agent*, ESPN.com, Oct. 23, 2013, at http://www.espn.com/nfl/story/_/id/9869419/arbitrator-rules-cleodis-floyd-become-nfl-agent-being-convicted-bank-fraud.

In addition to naming Coach Alexis Meeks-Rydell as a defendant, the plaintiffs also charged that the university was aware of the issues within its women's volleyball program and failed to take adequate steps to address the situation and protect its student-athletes. This was illustrated in a new allegation in Friday's filing – that associate athletic director, Chris Moore, perpetuated the abusive situation in the university's women's volleyball program.

The case was originally brought by former University of South Alabama volleyball players Rachael DeMarcus and Alexis Silver against Meeks-Rydell. Friday's amended complaint adds six additional former players as plaintiffs: Caitlin Tipping, Meaghan Jones, Hannah Kazee, Hannah Johnson, and two unnamed individuals, referred to as Jane Doe 1 and Jane Doe 2. The amended complaint also adds Moore and current senior associate athletic director, Jinni Frisbey, as defendants. The original defendants included: Meeks-Rydell, the university's Director of Athletics Joel Erdmann, and former assistant coaches Rob Chilcoat and Patricia Gandolfo.

According to the complaint, the plaintiffs were routinely subjected to blatant sexual harassment and sexual, physical, and emotional assault by Meeks-Rydell. The lawsuit alleges Meeks-Rydell created a climate of fear and intimidation among the volleyball team players. She regularly overtrained players and coerced them to practice or play while injured, in violation of NCAA bylaws. She often would verbally abuse injured players, ridiculing and accusing them of faking injuries and forcing them to play through serious medical conditions, including concussions and asthma attacks, as well as ankle and knee injuries, according to the complaint.

The complaint also alleges that Meeks-Rydell physically and sexually abused her players, forcing one to "cuddle" with her in hotel room beds during team road trips, pinching players' buttocks as they exited the team bus, and forcing them to engage in "floor hugs" in which team members laid on the ground while Meeks-Rydell laid on top of them. And on at least one occasion, Meeks-Rydell, apparently upset with DeMarcus, slapped her across the face. This abusive behavior continued, unchecked, throughout 2019 and 2020, with the direct knowledge of defendants Erdmann, Chilcoat, Gandolfo, as well as other university officials, all of whom either could have, or should have, reported or stopped the abuse but failed to do so.

"Alexis Meeks-Rydell, the University of South Alabama, and the other defendants had a duty to ensure the safety of its student-athletes. Not only did they fail to do that, but they also actively conspired to cover up a situation that they knew was detrimental to these young women," said Diandra "Fu" Debrosse Zimmermann, plaintiffs' counsel and a partner at DiCello Levitt Gutzler. "It's become all too common for collegiate athletes to endure this type of abuse, but what makes this case particularly shocking is how brazen and willful the University was in coercing one of its students to write a fraudulent letter to the NCAA to cover up its knowledge of the situation. These women—and all women, for that matter—deserve so much more, and we are committed to ensuring they get justice."

According to the lawsuit: "Meeks-Rydell's relentless and pervasive pattern of harassment and abuse occurred in violation of federal and state laws, as well as in violation of National Collegiate Athletic Association ("NCAA") regulations established to protect student-athletes' educational opportunities outside of their chosen sport. The University had a duty to protect its students from such abuse and the University failed to do so. The University knew of Meeks-Rydell's misconduct, through its officials and agents who were physically present during and directly aware of the physical and emotionally manipulative and abusive verbal harassment. These officials and agents were in positions to remedy the circumstances, and refused to act to protect Plaintiffs and other student-athletes. The University acted with deliberate indifference to Meeks-Rydell's actions and the abuse to which Plaintiffs were subject. Senior associate athletic director Frisbey assisted in encouraging the abuse Plaintiffs suffered. As a result of the University's actions and failures to act, Plaintiffs were deprived of their enjoyment of educational opportunities and programs to which they were entitled as student-athletes at the University of South Alabama."

"Meeks-Rydell's abuse was so severe that my clients not only suffered prolonged physical and psychological issues, but they were left with no choice but to abandon their athletic and academic careers at the University of South Alabama. Meeks-Rydell's inappropriate and abusive conduct frequently and consistently

occurred in the physical presence of the other coaches and staff," said Kenneth P. Abbarno, a DiCello Levitt Gutzler partner and plaintiffs' counsel.

Meeks-Rydell was hired as the university's women's volleyball team head coach on Dec. 31, 2018, and served in that role until she resigned in February 2021. She currently serves as an assistant coach at Purdue University Fort Wayne but was placed on administrative leave in September 2021 after the original complaint was filed. Former assistant coaches Chilcoat and Gandolfo have also moved on from the university to serve as assistant coaches at Brown University and the University of West Florida, respectively. Moore, Frisbey, and Erdmann remain at South Alabama.

The case is *Rachel DeMarcus, et al. v. University of South Alabama, Alexis Meeks-Rydell, Joel Erdmann, Rob Chilcoat, and Patricia Gandolfo*, Case No. 1:21-CV-0380-KD-B, pending in the U.S. District Court for the Southern District of Alabama, Mobile Division.

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Richard Giller Brings Expertise in Insurance Recovery on Behalf of Sports Clients to Greenspoon Marder

Greenspoon Marder has announced the launch of the firm's Insurance Recovery and Counseling practice group to be led by partner Richard Giller in Los Angeles.

Greenspoon Marder's national Insurance Recovery and Counseling Practice Group represents policyholders in all types of insurance matters. Its team of attorneys assist clients in assessing and addressing their insurance needs, and securing insurance recovery in connection with both first and third-party insurance policies.

"We are thrilled to welcome Richard to our Los Angeles office as we strategically expand our Insurance Recovery and Counseling practice group, and build our firm's national footprint," says Gerry Greenspoon, co-managing director at Greenspoon Marder. "In the last year throughout the COVID-19 pandemic, we have seen significant market changes across every industry, and the needs of our clients continue to shift. Richard's exceptional insurance recovery experience and its crossover with the sports and entertainment industry will be a great benefit to our clients," adds Michael Marder, co-managing director at Greenspoon Marder.

"I am honored to take the reins of Greenspoon Marder's Insurance Recovery and Counseling practice group and I am excited to quickly grow the group into one of recognized prominence. The firm's national presence, superior reputation, and complimentary practices, together with its cadre of exceptional attorneys, will make my new role that much easier," said Giller.

Giller, a well-known sports lawyer in the industry, concentrates his practice on recovering insurance benefits from insurance companies on behalf of his institutional and individual clients. With over 35 years of experience, Giller develops litigation strategies for complex insurance & commercial disputes. He has represented policyholders across the U.S. and has successfully secured hundreds of millions of dollars in defense costs, settlements, and indemnity payments on behalf of his clients. Besides advising Fortune 500 clients, Giller represents collegiate and professional athletes, professional sports teams and entertainers in securing payouts under various insurance products including permanent total disability (PTD), temporary total disability (TTD), and loss-of-value (LOV) insurance claims.

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Tulane Law School Launches Award Celebrating Black Sports Lawyer and Alum Robert L. Clayton

Tulane Law School is launching a major new award that celebrates the leadership and impact of Robert L. Clayton, a leading attorney in the sports law field and an allum of the school.

The Deans Kramer & Clayton Award for Leadership in Equity, Diversity and Inclusion will be presented to Tulane Law alumni in recognition of exemplary impact in advancing the cause of access and inclusion in the legal profession. The award is named for John Kramer, who served as the 19th Dean of Tulane Law School from 1986 to 1996, and Clayton, who served as an Associate Dean and leader of an innovative and remarkably successful program at Tulane to recruit and mentor minority law students.

During the years of Dean Kramer and Clayton's leadership, Tulane Law School boasted the highest representation of Black students of among U.S. law schools, excluding historically Black institutions. Many of those graduates have gone on to major leadership positions as judges, members of Congress, university presidents and scholars, civil rights and public interest advocates, and heads of law firms.

"Dean Clayton was one of the first teachers in Tulane's legendary Sports Law Program and played a crucial leadership role in helping to recruit and mentor a generation of Tulane Law students who have gone on to careers of extraordinary leadership and impact in the sports world, as lawyers, agents, front-office executives, compliance leaders, athletic directors and more," said the school's current dean – David D. Meyer. "It is a privilege to honor his legacy as we celebrate the exceptional success of our alumni."

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News Briefs

Herrick Elevates Sports Law Attorney to Partner

Herrick, Feinstein LLP has announced the promotion of sports law attorney Scott C. Ross, and three other attorneys, to partner. "We are thrilled to welcome such a talented group of attorneys into our partnership," said Irwin Kishner, Herrick's Executive Chairman. "They have proven to be critical advisors to our clients across a range of practice areas, and each of them exhibits the commitment and quality of service that sets Herrick apart from our competitors." Ross has more than "a decade of experience litigating complex commercial, real estate, and employment disputes in state and federal court, as well as in alternative dispute resolution forums (including JAMS and AAA)," according to the firm. "He has obtained countless successful outcomes for prominent real estate developers, investors, hotel owners, business executives, financial services, technology, and advertising companies, and international banking and lending institutions in the prosecution and defense of high-stakes contract and business tort claims, including breach of fiduciary duty and fraud."

Bailey Glasser Elevates Title IX Lawyer Arthur H. Bryant to Partner

Bailey Glasser has announced the elevation of seven new partners, including Arthur H. Bryant, one of the sports law industry's leading attorneys when it comes to representing plaintiffs in Title IX matters. Bryant joined Bailey Glasser after a long, successful tenure as Executive Director of Public Justice. He has won major victories and established precedents in constitutional law, consumer protection, toxic torts, civil rights, class actions, and mass torts. He was recently named by the National Law Journal as a 2021 Trailblazer in Sports Law. In the past year, Arthur has won settlements preserving women's (and men's) intercollegiate athletic opportunities and advancing gender equity at Brown University, the College of William & Mary, Clemson University, the University of North Carolina at Pembroke, East Carolina University, University of St. Thomas, La Salle University, Dartmouth College, and Dickinson College.

Attorney John Tyrrell Set to Speak Before Golf Course Superintendents

John Tyrrell, a founder and Managing Member of Ricci Tyrrell Johnson & Grey, will make a presentation before the Philadelphia Association of Golf Course Superintendents on liability issues on January 26.at the Concord Country Club in Concordville, Pa. Tyrrell has decades of experience in the representation of operators and managers of stadiums, arenas, entertainment and recreational facilities, including professional and collegiate sports teams; golf courses; ice rinks; gymnastics facilities; rowing associations; paintball facilities; and concert and entertainment venues. Tyrrell is trial counsel to such entities, and also provides risk

management and liability prevention consultation to these clients. He has developed a particular expertise in prosecuting and defending contractual indemnity and insurance claims, both at trial and through declaratory judgment proceedings. Tyrrell has lectured at training sessions for the event staff of his clients. He has also authored information guides, ticket and pass disclaimers, prospective releases, patron signage and other communication devices used at facilities.

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