SPORTS LITIGATION ALERT

April 8, 2022 Vol. 19, Iss. 7

Case Summaries

California Appellate Court Rejects 'The Baseball Rule' in Foul Ball Injury Case

By John E. Tyrrell and Matthew S. Cioeta, of Ricci Tyrrell Johnson & Grey

In April of 2018, plaintiff/appellant Monica Mayes was attending her son's collegiate baseball game between visiting Marymount University (for whom her son was pitching) and La Sierra University, when she was struck in the face by a foul ball. *Mayes v. La Sierra University*, No. E076374 (Cal.App.4th. Jan. 7, 2022). Mayes was sitting in a grassy area behind the third base dugout when she was hit. *Id.* at 2. The roof of the dugout was eight feet off the ground, and there was no protective net or fencing above the dugout. *Id.*

Mayes made four allegations in her complaint alleging that La Sierra was negligent in maintaining the

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premises of the baseball field: (1) La Sierra failed to provide protection of any sort over its dugouts; (2) The university failed to warn spectators of the lack of protection; (3) La Sierra failed to provide a sufficient number of protected seats for spectators; and (4) the school failed to exercise proper crowd control. *Id.*

On appeal, the California Appellate Court considered whether the trial court erroneously granted La Sierra's Motion for Summary Judgment when it held that Mayes's negligence claim was barred by the primary assumption of risk doctrine. *Id.* In support of its Motion, La Sierra offered the following facts: the university did not sell tickets nor charge admission to the game, and they did not dictate where spectators where they could or could not sit at games. *Id.* at 5. Mayes had previously attended over 300 of her sons' baseball games and was familiar with the fact that baseballs frequently flew into spectator areas. *Id.* Since 2009, there had been no reported spectator injuries caused by baseballs hit out of the playing field at La Sierra. *Id.*

Additionally, La Sierra asserted that it offered portable bleachers for seating, which were behind home plate and a protective backstop and accessible for any spectator. *Id.* La Sierra did not ask any of the spectators in the grass along the baselines to take down their tents or umbrellas, nor did it request spectators to sit behind the backstop. *Id.* The university would only assist with crowd control if the game's umpire requested it. *Id.* Furthermore, there was no requirement for a California Pacific Conference member or a National Association of Intercollegiate Athletics (NAIA) institution to put protective netting over the dugouts. *Id.*

In response, Mayes offered, while there were bleachers behind the backstop at home plate, there was only one seat available and "the bleachers were on a hilly, rocky, and dirt-covered area. The dirt was blowing around and making it 'potentially dangerous' to sit in that area." *Id.* at 6. Mayes and her husband proceeded to set up their folding chairs in the grass along the third base line, where hundreds of other spectators had done the same, roughly 60 feet from the playing field. *Id.* at 6-7. There were no posted signs advising the crowd that they had the option to ask La Sierra's athletic director or the umpire to control the crowd. *Id.* at 6.

Mayes had been to hundreds of her sons' baseball games over the previous 15 years, and was not concerned for her safety because she assumed that La Sierra had protective netting over the dugouts like every other field she had been. *Id.* at 7. She had never seen a spectator struck in the face by a ball. *Id.*

Mayes offered expert opinion testimony from a ballpark safety and management expert. The expert opined that, while NCAA standards did not apply to this facility (NAIA standards did), the field would have violated NCAA standards for a college baseball field which require 60 feet of unobstructed space between the foul line and the fence around the field; La Sierra had 32 feet of space. *Id.* at 8. Mayes was able to sit too close to the field which unreasonably increased her chance of injury. *Id.* That distance, combined with raised dugouts which obstructed spectators' view and a lack of crowd control, created an unreasonable risk of harm for spectators. *Id.* To get La Sierra's field up to the safety standards maintained by the NCAA and Major League Baseball, La Sierra would have had to install protective netting over the dugouts for approximately $8,000-$12,000. *Id.* at 9.

In granting La Sierra's Motion for Summary Judgment, the trial court held that the case was a "textbook assumption of the risk case." *Id.* at 10. The court opined that being struck by a foul ball is an inherent risk to being a spectator at a baseball game and that the primary assumption of the risk serves as a bar to injuries that are common in baseball. *Id.* Further, the trial court did not believe that La Sierra increased the risk of harm to Mayes and that she made a choice to sit in an area without protective netting. *Id.*

In its decision to overturn the trial court's grant of La Sierra's Motion for Summary Judgment, the Appellate Court cited case law to support the proposition that many sports and recreational activities are inherently dangerous, and that some efforts to reduce the risk of harm in those activities may significantly alter participation in them. *Id.* at 13 (*citing Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154-56). The primary assumption of risk doctrine is in place to avoid imposing a duty to eliminate risks of harm inherent in those activities, which would theoretically create a chilling effect on participation. *Mayes citing Nalwa* at p. 1156.

However, that does not absolve sport and event operators of owing any duties to participants. Owners and operators of sports venues have a duty not to increase risk of injury over the risk of injury inherent to the sport. *Nalwa*, 55 Cal.App.4th at p. 1154. Additionally, owners and operators of these facilities have a duty to take reasonable steps to protect participants' and spectators' safety, so long as those steps do not alter the nature of the sport or the activity. *See Knight v. Jewett* (1992) 3 Cal. 4th 296, 318. Put succinctly, the Court noted, "[a]s a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity,* the operator is required to do so." *Mayes* at p.15, *quoting Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th at pp.1299-1300 *see also Summer J v. United States Baseball Federation* (2020) 45 Cal.App.5th 261 (emphasis in original).

The Court considered *Summer J* as well as the century-old "Baseball Rule." In *Summer J,* the court acknowledged the two duties that owners and operators of sports facilities owe to participants and spectators. The Baseball Rule, which California first applied in 1935, provides that professional baseball teams and their owners are not liable for injuries to spectators by foul balls so long as the teams and owners took minimal steps to protect the spectators from harm. *Summer J* 45 Cal.App.5th at p.265. In practice, this means "that spectators assume the risk of injury from foul balls if they chose to sit in unscreened seats, even if no screened seats are available." *Mayes* No. E076374 at p. 24. An additional factor to consider, the *Summer J* court noted, is that recent developments to baseball stadiums and baseball games, such as spectators being closer to the field, velocity of pitched and hit balls, and more distractions at games such as free Wi-Fi, all increase the risk of harm to spectators at games. *Id.* at 274 *citing* Grow & Flagel, *The Faulty Law and Economics of the "Baseball Rule"* (2018) 60 Wm. & Mary L. Rev. 59, 85-98.

In in its decision to overturn the trial court, the *Mayes* Court reasoned that the baseball rule "is out of step with California's primary assumption of risk doctrine." *Mayes* No. E076374 at p. 24 *citing Grotheer* 14 Cal.App.5th at pp. 1300-01. The Court held that the trial court, similar to the baseball rule in general, failed to consider the second part of La Sierra's duty: take reasonable steps to increase safety and minimize the risk of harm to spectators if it could be done without materially altering the game for players or spectators. *Mayes* No. E076374 at 23-24. The Court held there were four triable issues of fact to determine whether La Sierra breached its duty of care by: (1) failing to install protective netting over the dugouts; (2) failing to

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Sandra Day O'Connor College of Law at Arizona State University

glenn.wong@asu.edu

warn spectators of the lack of netting over the dugouts; (3) failing to provide a sufficient number of screened seats; and (4) failing to exercise proper crowd control. *Id.* at 25.

This opinion highlights the need for sports and recreational facility owners to frequently evaluate their premises for potential safety hazards for participants and spectators alike. Likewise, these owners and operators should monitor trends within their industries for advances to safety materials that could be reasonably introduced without altering the nature of the activity.

John E. Tyrrell is the Managing Member at Ricci Tyrrell Johnson & Grey and has decades of experience in sports and events liability litigation and risk management. Matthew S. Cioeta is an associate at Ricci Tyrrell.

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Richard Dent et al v. NFL: The Litigation Continues

By Jeff Birren, Senior Writer

The *Richard Dent* class action lawsuit against the NFL was filed in 2014, based on allegations that the NFL dispensed painkillers to players to enable them to play despite their injuries. Since that time, it has gone up and down the legal system several times, as has been reported in these pages. A related case, *Etopia Evans v. Arizona Cardinals*, was filed against the clubs and it, too, has been reported on here.

More recently, several of the *Dent* plaintiffs, including Dent, Jeremy Newberry, JD Hill, and Marcellus Wiley, filed additional claims for "musculosketal injuries." Some had claims for "latent internal organ injuries" and there were now "latent internal organ injury claims." The NFL moved for summary judgment on these new claims. As to the first two claims, it did so based on the statute of limitations. It further argued that the third claim failed for "insufficient proof of medical causation." Judge William Alsup granted the motion and dismissed the claims. The plaintiffs responded with a motion "to amend the judgment or for relief from judgment under Rules 59(e) and 60(b)(1)" of the Federal Rules of Civil Procedure. Judge Alsup agreed but "only to the extent that the summary judgment record is retroactively augmented to include the correct version of the declaration of plaintiff's expert" (*Richard Dent et al v. NFL*, N.D. Cal., Case No. C 14-02324 WHA, ("Order"), at 2 (2-18-22)).

Litigation Update

After the plaintiffs filed their latest amended complaint in 2020, the NFL brought a motion to dismiss. That was denied by the Court on February 2, 2021. The NFL answered on March 19, 2021 and filed their summary judgment motion on October 6, 2021. The plaintiffs' opposition came on October 27, 2021, with an expert report that they had used in a related case (Order, at 3). The NFL replied on November 10, 2021.

The hearing was on December 2, 2021. Judge Alsop ruled on December 17, 2021, that "all claims of musculoskeletal injuries were barred by the statute of limitations; (2) the claims of some plaintiffs for latent internal organ injuries were also barred by the statute of limitations; (3) the latent internal organ injury claims of the remaining plaintiffs failed for insufficient proof of medical causation" (Order, at 2-3). The Court entered judgment for the NFL that same day.

The Plaintiffs' Motion

The plaintiffs filed a motion "For Relief From Judgment" on January 13, 2022 (Order at 3). This time counsel Included the expert declaration they had intended to rely upon in their summary judgment opposition. They asserted that they timely disclosed this declaration to the NFL and its counsel. They further stated that they did not discover the error until January 11, 2022. However, they did not file the "correct version" of the declaration until January 13, 2022, and they "offered no explanation whatever for the error, simply stating that counsel 'mistakenly relied on' the wrong declaration" in their summary judgment opposition.

Their motion sought reconsideration of the summary judgment ruling under FRCP 59(e) and 60(b)(1), specifically to "have the record augmented" to include the correct expert declaration and to amend or alter the summary judgment order "in light of the new declaration." The NFL filed an opposition and the plaintiffs replied.

The Ruling

The Court granted the motion in "the interests of deciding the case on the merits and providing a full

record for appeal" but only to allow the correct expert declaration into the record. However, the "new declaration would not and does not change the outcome." Although some plaintiffs had injuries, there were "plausible medical causes not proximately related to the NFL's alleged negligence. Therefore, under the laws of every interested jurisdiction, to prevail on their claims plaintiffs had to come forward with competent expert medical testimony that to a reasonable medical probability, accounting for the other plausible causes, and contributing factors, the drugs they took while playing in the NFL caused their latent internal organ injuries."

To begin with, the correct declaration "fails to create a genuine dispute as to specific medical causation." It stated that the "frequency and amount of medications" given to players "caused significant deleterious effects on the players… particularly with respect to musculosketal morbidity, but also with respect to kidney, liver and cardiac morbidities" (Order at 3-4). That was not enough to change the outcome. As to musculosketal injuries, the correct declaration "is irrelevant because those claims are time-barred" (Order at 4).

Furthermore, the declaration referred to "significant deleterious effects" and "kidney, liver and cardiac morbidities" but failed to "even identify the plaintiffs specifically or their conditions or diseases." In his deposition, this expert "acknowledged that he did not attempt to rule out the other plausible causes and contributors of plaintiffs' conditions and he acknowledged that he could not opine to a reasonable medical certainty as to the causes of any of plaintiffs' conditions."

Finally, and most importantly to the Court, "it is undisputed" and acknowledged by the plaintiffs and their expert that "the conditions and diseases plaintiffs claim defendant is liable for has plausible causes or contributors not proximately caused by the defendant's alleged negligence." The law, however, "required competent medical testimony that to a reasonable medical certainty, accounting for the other factors and contributors the drugs plaintiffs took while playing football caused their ailments. Plaintiffs have not raised a genuine dispute in that regard."

Conclusion

With that, the Court granted the motion to augment the record with the correct declaration, denied the motion in all other respects, vacated the proposed hearing date, and told the plaintiffs that they "should proceed to perfect their appeal, if that is their intent." The plaintiffs complied, filing a notice of appeal on February 23, 2022. So once more *Dent* will head back to the Ninth Circuit, with the plaintiffs again trying to revive a case they filed in 2014. Litigation is usually more suited to the tortoise than the hare.

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Daily Fantasy Sports Found Constitutional in New York

By Irwin Kishner, Dan Etna, and Justin Blass, of Herrick, Feinstein LLP

On March 22, 2022, the New York Court of Appeals penned the final chapter to the interactive fantasy sports (commonly known as daily fantasy sports ("DFS")) legal saga. In its 4-3 decision, New York's highest court ruled that DFS contests do not violate a state constitutional prohibition on the expansion of gambling, holding that these contests are predominantly games of skill and therefore legally permissible within the state.

DFS contests are available for all major professional sports, from football, baseball and basketball to golf and various racing organizations. DFS contests involve statistical-based competitions by virtual teams of athletes who play for different real-life teams. The roster of each virtual team is selected by a DFS contestant. The virtual teams earn fantasy points based on how the selected athletes actually perform in sporting events.

New York's constitution has long prohibited gambling and other games of chance. Over the years several amendments have been enacted to allow specific forms of gambling, including betting on horse races. In 2015, New York's Attorney General sued two providers of DFS alleging that the DFS contests offered on their platforms violated the state's constitutional prohibition on gambling. In response, the state legislature enacted a law declaring that DFS contests do not involve gambling as the outcomes of the contests depend upon "the skill and knowledge of the participants." The law was then challenged by a group alleging that the law violated the state constitution.

In its decision, New York's highest court stated that DFS contests "involve a significant exercise of the participants' skills," requiring participants to "draw from their knowledge of the relevant sport, player performance and histories, offensive and defensive strengths … schedules, coaching strategies … and the fantasy scoring system … in selecting virtual players for their rosters." The court further stated that the state legislature's determination when enacting the 2015 law that DFS contests are predominantly games of skill "because they pit the strategic rosters of participants against one another … is firmly grounded in evidence and logic." In doing so, the Court rejected arguments that DFS contests constitute "games of chance" because the outcomes ultimately depend on the performance of athletes that the DFS contestant does not control, and that the presence of a material degree of chance makes the contests gambling. The New York Court of Appeals also cited studies presented to the New York legislature that found rosters developed by skilled human participants "were more successful in [DFS] contests than randomly generated lineups over 80% of the time."

While the decision ends years of legal uncertainty regarding DFS contests, its immediate impact remains to be seen. Companies and platforms offering DFS contests have operated in New York for years. However, with the legality of DFS contests now firmly established, and given the recent development of mobile sports wagering within the state, other providers may now seek to enter the space and compete for market share. Current operators may explore opportunities to further expand, whether by further developing current offerings through expanded prizes or introducing new DFS contests. Operators that also offer mobile sports wagering in New York may seek ways to further integrate their sports wagering and DFS contest platforms. In any event, the New York Court of Appeals ruling establishes DFS contests as a legally-recognized feature of the sports landscape in New York.

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Dutch Football Coach Prevails Against Former Employer in Case Involving Force Majeure Defence During Covid-19

A Dutch football coach, René Hiddink, has prevailed in a FIFA Football Tribunal against his former employer, Football Association of Maldives [FAM], in a case involving the use of a force majeure defence during Covid-19.

The decision is important in its restatement and application of FIFA's Covid-19 policy and the interaction of that policy with 'force majeure' provisions in football contracts – a clause commonly found in employment agreements which entitles a party to be excused from their obligations if an event occurs which is beyond reasonable control.

Background of the Case

In January 2021, Hiddink and FAM agreed the terms of an employment contract whereby Hiddink was appointed as assistant coach of the Maldives' Men's National Football Team for a three-year term.

However, barely three months into his tenure, FAM informed Hiddink that football in the Maldives would be halted indefinitely due to the Covid-19 pandemic, and that there was not enough money to continue employing him in his role.

Days later, FAM sent Hiddink a termination notice, stating that his contract of employment was being terminated due to the Covid-19 pandemic, referencing the 'force majeure' clause in Hiddink's contract.

Hiddink filed his claim at the FIFA Tribunal in September 2021, seeking damages equivalent to the remaining value of his employment contract. FAM resisted the claim, contending that the parties had reached a 'mutual understanding' to terminate the contract, and that the termination served the 'common welfare' of football in the Maldives given the 'significant financial and economic losses' caused by the pandemic, which themselves constituted a force majeure event justifying termination of the contract.

In its decision, the FIFA Football Tribunal rejected FAM's force majeure defence in its entirety, noting – as argued by Mr Hiddink – that the contract was entered

into *during* the pandemic and, therefore, the effects of the pandemic could not have been unforeseen.

As a result, FAM has been ordered to pay Hiddink the full remaining value of the contract as damages, together with interest.

David Winnie, head of sport at Blaser Mills Law, said: "Understandably, Mr. Hiddink is absolutely delighted with this outcome and our client's stance and courage in bringing this matter before FIFA's Football Tribunal has been fully vindicated.

"A force majeure defence based on Covid-19 cannot be used as a blanket justification to excuse a party from its contractual obligations, and each situation must be considered on a case-by-case basis.

"This decision upholds FIFA's Regulations on 'termination without just cause' and sends a clear message to football worldwide on the parameters and limitations of using a force majeure defence during Covid-19."

Ashley Cukier of Littleton Chambers assisted the plaintiff on the case.

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Skater Can't Land Lanham Act Complaint Against Video Game

By Marcelo Barros, of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP

Zachary Miller, a well-known professional skateboarder, was paid by Easy Day Studios Pty. Ltd. and Reverb Communications, Inc. to help develop a video game, which was ultimately called Skater XL. Miller agreed to model various clothing outfits for the game, but only with the understanding that the outfits he wore would be applied to a generic, unidentifiable character. But when the game came out, Miller's reaction was that the character was neither generic nor unidentifiable, but an "exact copy" of him. As a result, Miller sued Easy Day and Reverb in the Southern District of California, alleging false endorsement and false advertising under the federal Lanham Act. The district court, however, dashed the skateboarder's hopes of recovery when it granted the defendants' motion to dismiss—though with leave to amend.

Skater XL allows players to perform numerous skateboarding tricks. Players can either play singly, mastering their skills alone, or online in what the game calls "multiplayer mode," where they share skateboarding sessions in simulated environments. Players choose from among five possible characters. Four of these characters are explicitly identified famous skateboarders—Tiago Lemos, Evan Smith, Tom Asta, and Brandon Westgate. However, the last character, which is the generic character that Miller modeled his clothing outfits for, is completely anonymous and not identified by name or backstory. Indeed, this character was intended (at least according to the defendants) "to be something of a blank slate upon which users can customize the character according to their own preferences, including choosing the character's gender, race, and hair color."

But Miller's central allegation in the case was that while he had been told that the game's generic character would not be identifiable as him, that is not how things turned out. Rather, Miller alleged that the defendants had made the generic character in a way that was readily identifiable as him—and had used his "image and likeness"—without his consent. Flowing from this central allegation, Miller's legal argument under the Lanham Act was straightforward. First, he contended that the Defendants' conduct violated the Act because it was likely to create confusion in the minds of the consumers playing Skater XL by making them think—falsely—that he had endorsed or sponsored the game. Second, he contended that the Defendants' conduct amounted to false advertising under the Act.

Addressing Miller's false-endorsement claim, the court first explained that the Lanham Act protects against the "unauthorized imitation of [a celebrity's] distinctive attributes, where those attributes amount to an unregistered trademark." This occurs, the court recognized, when an infringer mimics a famous person's distinctive attributes in a manner that causes consumers to be confused as to whether the person is endorsing a particular product. The key inquiry, though, is not whether there is a possibility of confusion, but rather whether there is a likelihood of confusion.

The court recognized, however, that in assessing likelihood of confusion, there are First Amendment concerns when expressive content is involved. To account for these concerns, courts (including the Ninth Circuit) have employed a burden-shifting test known as the Rogers test, after the Second Circuit's decision in Rogers v. Grimaldi. Under this test, the defendant

bears the threshold burden of showing that the use of an allegedly infringing mark is part of an "expressive work." Here, as in most cases, this was an easy burden to overcome, something akin to performing an ollie, a basic skateboarding move. In fact, because the underlying work was a video game, and the law was clear that video games are expressive works protected by the First Amendment, Miller did not even dispute that the defendants met their threshold burden. As a result, the burden shifted under the Rogers test to Miller, who had to show that the defendants' use of his likeness either (1) was "not artistically relevant to the underlying [expressive] work" or (2) "explicitly misle[d] consumers" regarding the work's "source or content." However, this burden was, in the court's view, a difficult trick to land, more akin to attempting a 900, the 2-1/2 revolution aerial spin.

Addressing the first possibility—that Miller could show no artistic relevance—the court noted that all the defendants needed to establish was an amount of artistic relevance "above zero." Given that the game purported to create a realistic simulated environment, the court concluded that the likeliness to a real-life skateboarder met this nonzero threshold. Moving on to the second possibility—that Miller could show that the defendants misled consumers—the court underscored that neither mere use of Miller's likeliness nor the recognition of Miller by some consumers would be sufficient. Rather, the court said, there must be some "explicit representation to suggest [Miller's] endorsement or sponsorship." But even accepting the allegations in Miller's complaint as true and construing the complaint favorably to him, as the court was required to do in the context of a motion to dismiss, it did not find it plausible that the use of a single anonymous character, in stark contrast to four identifiable ones, would explicitly mislead consumers into thinking that Miller had endorsed the game.

Miller's false advertising claim similarly ended in a face plant. False advertising claimants, the court said, "must demonstrate standing beyond the typical Article III requirements." Specifically, Miller had to show both that he was in "the zone of interests" protected by the Lanham Act and that his alleged injuries were proximately caused by the defendants' infringing use. To be in the zone of interests, however, Miller had to show "an injury to a commercial interest in reputation or sales." But Miller was a skateboarder and did not compete "in the same market" as the defendants, nor had Miller alleged that he had lost endorsement opportunities or suffered some other competitive injury. Indeed, the court noted, while Miller had alleged that the defendants had "injured" him, he had alleged no facts to support that allegation, and he had simply ignored the issue in responding to the defendants' motion to dismiss. Accordingly, the court sided with the defendants and granted their motion.

Having dismissed all of Miller's claims under the Lanham Act, the court declined, in its discretion, to exercise supplemental jurisdiction over the remaining state law claims (which were described as common law and statutory right of publicity claims). Miller had argued that there was diversity jurisdiction over these claims, but as the court noted, that requires complete diversity, and one of the defendants (Reverb) and Miller were both California citizens.

But this might not be the end of the parties' dispute. Because all of Miller's claims were dismissed without prejudice, if he can overcome the deficiencies the court identified in his complaint, there may be more yet to come.

The case is Miller v. Easy Day Studios Pty. Ltd., No. 20cv02187-LAB-DEB, 2021 U.S. Dist. LEXIS 176582, at *1 (S.D. Cal. Sep. 16, 2021)

This article originally published in Finnegan's **INCONTESTABLE Blog** *on February 10, 2022.*

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Articles

After Career Ending Injuries, Former UCLA Bruins Football Player Settles with NCAA

By Gina McKlveen

Last month the attorney for a former UCLA offensive lineman, who was suing the University, ex-head coach Jim Mora, and the NCAA for injuries he suffered following multiple concussions, filed a "conditional" settlement with the Santa Monica Superior Court.

The former Bruins player, Poasi Moala, was recruited by Mora, UCLA's then-head coach, in 2013. Afterwards, Moala suffered multiple head injuries that resulted in concussions as well as serious hip injuries that eventually required numerous operations. Moala alleged that by the end of the 2013 season his injuries became so severe that the 265-lbs athlete could barely squat, let alone play through an entire football game. Despite making his injuries known to Mora and the Bruins team over the course of three years, Moala claimed that his coaches continued to dismiss the player's injuries and downplay his issues, often disregarding or ridiculing him altogether.

Once the team allowed Moala to become X-rayed and receive an MRI, the results showed several severely torn tissues along the player's right hip. The medical examination also revealed lesions, damaged tissue, around both of Moala's hips—a type of injury that Moala asserted could have been prevented, or at least minimized, had the team taken his medical concerns seriously much sooner.

Instead, Moala's complaint alleged that whenever the former Bruins player complained about the pain he was experiencing, his UCLA coaches and trainers told him that his hips were just tight and that if he stretched them out the cause of his pain would be resolved. Likewise, with respect to Moala's head injuries, the complaint stated his concerns were not taken seriously by the UCLA team.

Prior to joining the team Moala had no prior history of head injuries, but by August 2013 he was regularly subjected to repeated hitting during repetitive head-to-head contact drills during practices that resulted in two documented concussions throughout his UCLA football career.

Such conduct is a similar subject of another lawsuit filed by Moala's teammate, John Lopez, another former UCLA offensive lineman. Lopez, like Moala, was recruited by UCLA's former head coach, Mora, in 2013. He attested that he suffered his first-ever concussion shortly thereafter during the team's annual summer training camp.

Lopez later suffered two more concussions—a second one at the Bruins summer training camp in 2014, and a third and final one in 2015 that was so severe that he was forced to medically retire by his junior year. His symptoms and brain injuries from these concussions resulted in drastic changes in his demeanor, including short term memory loss, depression, and anxiety. By 2016, Lopez was unable to attend classes to complete his college degree and attempted to commit suicide by overdosing on a combination of over-the-counter and prescription medications. The player's complaint claimed that both the UCLA, its coaches, and the NCAA failed to protect him from these injuries.

Again, similar to Moala, while Lopez was still playing on the team, he reported his injuries to the coaches and trainers, but rather than being taken seriously, he was ridiculed by them for his injuries instead of being appropriately treated. Lopez's lawsuit alleged that the team's culture of "no excuses" cultivated by Mora subjected him to drills described as "unnecessarily brutal" which required players to practice at full speed with no safeguards against helmet-to-helmet contact. This culture of "no excuses" also contributed the lack of complete implementation of post-concussion symptom protocol, which Moala's complaint alleged was put in place "just for show" and was not actually followed in "any meaningful way."

Both Moala and Lopez, therefore, accused UCLA of failing to follow proper concussion protocol. A third former UCLA offensive lineman, Zach Bateman is also suing based on his UCLA football related injuries. Like his two former teammates, Bateman expressed symptoms of injuries in both his feet, but claimed he

was discouraged from seeking medical attention for his injuries. Instead, he was compelled to return to the field to play before receiving any medical treatment and before allowing his injuries to heal. Dissatisfied with UCLA's response, Bateman sought off-campus medical treatment, immediately receiving an MRI that revealed two fractures to his right foot.

Bateman was the only UCLA player of the three former offensive linemen, not to name the NCAA as a defendant in his lawsuit. When all three of these players' lawsuits were filed in 2019, each plaintiff sought over $15 million dollars. In the past three years, NCAA attorneys have stated that the organization has no legal duty to either Moala or Lopez for their injuries. The NCAA also previously claimed that it had no direct oversight or control over the student-athletes at UCLA.

Currently, Moala's recent settlement with the NCAA offers no further details as to the contents of the agreement between the parties. In the past, the attorney for all three players, Pamela Tahim Thakur, has stated that her clients' health and safety was clearly disregarded by the UCLA coaching staff. Whether the University and the NCAA maintains its position that student-athlete health and safety is a top-priority remains to be realized so long as protocols meant to protect players, like Moala, are continuously disregarded by those put in charge.

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Termination of Athlete Endorsement Contract under Morals Clause: Event Study Analysis of Social Activism and Incidents of Moral Turpitude

By Sungho Cho, JD, Ph.D.

Sponsors expect that athlete spokespersons would increase their brand equity (Gwinner, 1997). Although merits of celebrity endorsement have been well documented, studies also highlighted negative outcomes from the practice when spokespersons are involved with controversial behavior (Mudrick et al, 2019; Sanderson et al, 2016; Schmidt et al, 2018; Smith, 2019; Watanabe et al, 2017). Since the value of athlete endorsement predicates on the wholesome public images of the spokespersons, sponsors would terminate the contracts in case of scandals. While such severance under the morals clauses has been upheld by court (*Nader v. ABC*, 2005), a critical question remains, i.e., whether controversies around athlete spokespersons would be detrimental to sponsors regardless of different characters of scandals (Abeza et al, 2020). This project examines how athlete spokespersons' controversial acts would affect the shareholder wealth of their sponsors by using the event study analysis method (Bartz et al, 2013; Hood, 2012). Two different categories of controversial spokesperson behavior, i.e., incidents of moral turpitude and social activism, are compared.

Incidents of Moral Turpitude v. Social Activism

Sponsors reserve rights to terminate endorsement contracts under morals clauses if their spokespersons are implicated with scandalous behavior. *Nader v. ABC* (2004, p. 346) provides a typical morality clause: "[i]f … [spokesperson] shall commit … anything which might tend to bring [spokesperson] into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on [sponsor] … [Sponsor] may … immediately terminate the [endorsement contract] hereunder." Although the language is notoriously ambiguous, such provision has been enforced by courts since it was drafted in response to the famous arrest of Fatty Arbuckle, a movie star, on rape and murder changes (Epstein, 2015). While sponsors may terminate agreements almost at-will, the unique nature of the relationship management in the endorsement practices and other strategic concerns would make such decisions complicated (Connor, 2010; Roberts & Burton, 2018). Specifically, research shows that different outcomes have been observed based on the types of scandals (Kwak et al, 2018; Sassenberg et al, 2018).

What constitutes moral turpitude might be a challenging question. At least, the concept of crime of moral turpitude suggests the nature of the action's reprehensibility. According to Dadhania (2011), the crime of moral turpitude can be defined criminal misconduct in which moral turpitude is inhered in the elements of such crime. Black's Law Dictionary (1990, p.1008-9) provides a definition: "[An] act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and

duty … [A] behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others." Thus, the social definition of immorality has been incorporated into the legal concept. Controversial spokesperson behavior might have different attributes (Kwak et al, 2018). While salacious incidents covered by news outlets such as heinous crime or immoral scandals would have negative impacts on the suspects' sponsors (Abeza, 2020), participation in social justice initiatives may appeal some consumer groups based on their social identities and political orientations (Sanderson et al, 2016). Since the reprehensibility might be different based on the nature of incidents, this study examined the impacts of spokespersons' behavior by comparing two dichotomized categories: (1) scandals related to moral turpitude; and (2) social activism.

Methodology & Result

An event study analysis measures the magnitude of the effect that an unanticipated event has on the expected profitability and risk of a stock portfolio of firms associated with that event. It is one of the most widely used methodologies in finance, accounting, law, and management (Agrawal & Kamakura, 1995). The methodology is consisted of five steps: (1) defining an event when the information became public; (2) measuring a target security's actual return on the dates of interest; (3) estimating the target security's expected return; (4) computing the abnormal return by subtracting the expected return from the actual return; and (5) assessing the statistical significance of the abnormal return. (Bhagat & Romano, 2007).

For the event study analysis, markets are presumed to correctly and quickly response all publicly revealed information. This presumption is predicated on the so-called efficient market hypothesis (Johnson et al, 1991). In this study, the authors define the "event" as athlete spokespersons' controversial acts. The event must be initiated by or connected to an endorsement company which is publicly traded in the stock markets.

In this study, a market model is estimated for each individual firm using stock trading days of returns against the market value, S&P 500 and this is employed to compute the cumulative abnormal return (CAR) within 1 day (+1), 2 day (1, +1), 3 day (-1, +1),5 day (-2, +2), and 21 days (-10, +10) time windows. Z-test and the generalized sign test are applied to test the significance of abnormal returns (ARs) and cumulative abnormal returns (CARs). A set of t-tests compares two different types of prominent spokesperson behavior, i.e., incidents of moral turpitude and social activism, in terms of their impacts on the stock-market performance of sponsors. The result showed that at the 15-day marks from the incidents, the abnormal returns of the two groups of sponsoring companies became statistically different. While social activism resulted in negative abnormal returns, immoral incidents did not. It is speculated that investors perceived risks associated with social activism as more serious threat to shareholder wealth than individual spokespersons' deviant behavior.

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Professors Examine Esports and Title IX at SRLA Conference

(The following is the capturing of a presentation on Esports and Title IX at the recent SRLA Conference in Atlanta. Making the presentation were Dr. Jeffrey Levine, J.D.; Ph.D. (Drexel University), Dr. Lindsey Darvin, Janelle E. Wells, Ph. D, and Anita Moorman, J.D. (University of Louisville).

Esports has experienced enormous growth in recent years, even though we have been in a pandemic. This growing surge also means that other segments within the sports ecosystem are taking notice and wanting to get into esports and take advantage of that. And that's where we're seeing institutions of higher learning coming into play.

Now, institutions of higher education certainly are interested in esports for any number of reasons. Notably, as we see enrollments stagnating, colleges and universities are looking for a way to distinguish themselves from the competition, as well as looking for a way to attract gen Z millennials. Studies and surveys commonly show that many people in this age group are gamers, male and female.

And so, you're seeing a way to attract these individuals as well as colleges not having to spend as much money on football or basketball. Esports really does stand out. And because of that any institution, especially those are on the smaller side, are looking to invest in teams or a club by providing potential scholarships, partial or full, and then creating esport specific facilities.

The payoff is that this is a way to distinguish themselves from the competitors, creating that front porch effect and be a way to connect with students and other stakeholders, like alumni, and a way to boost their profile.

The Gender Part of the Equation

Research and studies consistently show that there are underrepresented groups – women and members of the LGBTQ+ plus in the esports community, for example. These groups report experiencing misogyny, toxic masculinity, and discrimination. Some of these problems may be tributed to the cloak of anonymity that people benefit from in an online community, where they don't actually need to be present, and they don't need to reveal their identity. So, even though women have a strong interest in gaming and esports, we see fewer female gamers participating in esports at the higher echelons of college and professional ranks. There's a significant lack of representation at those levels.

Colleges are investing in esports including the creation of dedicated gaming venues on campus and by awarding scholarships for esport athletes. This growth and investment in collegiate esports create potential legal issues when it comes to participation opportunities, as well as potential discrimination.

Up to 75 percent of esports programs are being housed under the umbrella of athletics, particularly among NCAA Divisions II and III, the NAIA, and community colleges. We have yet to find any NCAA Division I school that has put esports in their athletics program though. Regardless of the placement, Title IX will apply to any programs at the university, but placement under the umbrella of athletics should trigger Title IX compliance regulations specifically designed for athletics programs. How Title IX regulations would be applied to esports programs placed in other areas of the university, such as student affairs or campus recreation, is less clear.

From an athletics compliance perspective, esports participants should be included in the participant count. If esport athletes get scholarships, that financial

assistance should be included in the scholarship formulas, et cetera.

My position is that traditional title IX is going to apply with certainty in 75 percent of those programs right now that have situated themselves in athletics. But NCAA Division I is slow to enter the competitive esports space.

Our research revealed that more than half of the current esports programs have been created within the past two years. This is significant, because universities are required under federal law to report their athletic spending and participation as part of the Equity in Athletics Disclosure Act annual survey. This data is available for public access in a searchable database, but typically the public database represents data reported 18 months to 2 years prior. Therefore, we decided to scrape some of the EADA data and see what may be on the horizon for athletics programs sponsoring esports teams.

The first question is, of course, what activity is going to count for purposes of reporting under EADA? Is esports going to be considered a varsity team? The EADA defines a varsity team as any team identified as a varsity team by the university.

So, we first looked at Nichols College to see where it placed esports. And this is typically what we found for all the schools that we checked, thus far. If you go to the university athletics website, esports is listed as a "sport" within athletics. It is frequently listed as a co-ed sport together with cheerleading, under the umbrella of athletics. This meets the definition of a varsity team under the EADA.

Another one we looked at was Harrisburg University, one of the most competitive esports programs out there. They're all in. They have three separate esports teams, and they report them as three separate teams in their EADA annual survey. Harrisburg reports 27 male participants on its esports teams. While the esports team is co-ed and tryouts are open to both genders, all the players are male. There's apparently some sort of selection criteria for who gets a spot on the team based upon performance, perhaps who gets the higher score. But the selection criteria are not provided, so we don't know how many females tried out or how final scores for participants were determined. But not a single female who tried out, was able to earn a spot on this team of 27 esports athletes.

Administrators need to be really diligent. They need to think about this as they're putting these programs out there, using them as the front porch. They are not even thinking about that effect on Title IX down the road. There's also going to be some mistaken application of these rules that harkens back to Harrisburg saying that, that the women had a chance to try out well, that tryout requirement only applies to separate teams. It doesn't apply to co-ed teams. So, this could be interpreted as a form of roster manipulation.

And like we said, that separate team's approach, it is not going to apply. These are listed as co-ed sports. The Title IX regulations stipulating a tryout requirement, only applies to when and how separate teams are permitted under Title IX. These regulations permit a university to sponsor separate teams for men and women. However, if there is not a separate team for women, then women must be permitted to try out for the men's teams. But esports teams are predominately identified as co-ed, like rifle and sailing. Thus, there is no separate men's team for which women must be afforded a tryout. Instead, all women on the co-ed esports team must be treated equally with their male counterparts. Those tryout requirements are irrelevant for a co-ed team. Thus, it is Harrisburg's notation that women were allowed to try out. That may not provide them the cover that they think it will for failing to have a single female on their 27-person esports team. We may need more clarification there.

Title IX compliance gets a lot stickier though, if the esports team is not situated in athletics, because mostly our student life, our campus recreation our academic placements, or even an independent organization, they're usually very inclusive. In other words, anybody who wants to play and participate is permitted. These sport opportunities are typically participation based. And if that's the case, odds are, if it's open to anybody and just 90 percent of the participants are male and 10 percent are female, that's a gender-neutral phenomena, theoretically.

So that may not be a problem. But we just don't know yet what lens is going to be used. Are we going to look at the esports program in campus recreation and determine if participation opportunities are provided equitably within the esports program? Or are we going to look at the entire campus recreation program as a whole? Within a large campus recreation program,

esports may not have enough statistical significance to sway total participation numbers to where it would look like that the campus rec program was out of compliance or represented disproportionate opportunities. Think about if your campus recreation program had 2,000 participants over the course of a year. Well, if only 50 of those are esports participants, odds are, that is only going to be a blip on the radar, right? So, we don't know yet whether they're going to drill all the way down and would, for example, challenge availability of participation opportunities for women on the esports team, specifically, even though there are plenty of "other" participation opportunities for women within the campus recreation program.

Question from the audience: Do you think based on what those numbers are and how drastically out of compliance they would be that the small school athletic departments might push it over back to a student activity so they can avoid a potential lawsuit?

Answer: With those smaller colleges, athletics and student life are so closely connected that I'm not sure that they're really separate the way they would be on a division I, or even division II or III. The question centers on whether athletics is still paying for it.

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Activision Blizzard's Multi-Million Dollar Harassment Settlement in Flux; Will the Appellate Court Allow Third-Party Intervention?

(The following article appeared first in Esports and the Law*, a periodical produced by Hackney Publications.)*

By Jason Re, GW Law 3L

In September of 2021, the US Equal Employment Opportunity Commission (EEOC) filed a complaint against Activision Blizzard (AB), alleging that the video game publishing giant subjected female employees to sexual harassment, pregnancy discrimination, and other gender-based retaliation. More specifically, the complaint, which followed a three-year investigation, alleged that AB had systematic practices of discriminating against pregnant employees, paying female employees less than their male counterparts because of their gender, and retaliating against employees who complained about unfair treatment. Further, the complaint, which sought a jury trial, stated that employees were subjected to "sexual harassment that was severe or pervasive to alter the conditions of employment."

Soon after the EEOC's complaint was filed, AB announced publicly that it had reached an agreement with the EEOC to settle the claims and, further, to strengthen policies and programs to prevent harassment and discrimination from occurring into the future. Notably, as part of the agreement, AB would create an $18 million fund to compensate and make amends to eligible claimants–stating that any excess funds would be donated to charities that advance women in the video game industry, and/or promote awareness around harassment and gender equality issues in the space. The federal agency, seemingly, agreed to these terms and was content to accept the settlement as stipulated.

However, it seems there may be a problem. Just months before the EEOC's filing in September of 2021, an entirely separate lawsuit was filed by California's Department of Fair Employment and Housing (DFEH) against AB after a multi-year investigation. Based on generally similar facts, the DFEH's suit alleged that B, and its subsidiaries, allowed sexism and discrimination across the company. Several top executives, including Blizzard president J. Allen Brack, were named in the lawsuit for allegedly knowing about the conduct and enabling it. In fact, court documents refer to the culture at the gaming publisher as a "frat boy" workplace environment that subjects its female employees to gender-based discrimination and "constant sexual harassment." The complaint touched upon everything from failures to promote women, particular targeting women of color, discouragement of complaints to HR, rampant sexual harassment, and more. This situation of a settlement and pending case generally would bring no issue, meaning the EEOC's federal lawsuit and the California DFEH lawsuit could each carry on independent of the other. However, a unique problem has arisen.

Now, we are faced with a situation in which competing regulators, at both the state and federal level, are competing and butting heads, when their quarrel should be with their respective defendants. The state regulators with California's DFEH have sought to block AB's aforementioned settlement agreement with the federal EEOC, stating that it would hurt their case

and cause "irreparable harm" to their own litigation. The state's lawyers argue that the settlement with the EEOC would be akin to the EEOC settling the DFEH's case against Activision right out from under it or, at the very least, setting financial boundaries on what the DFEH could reasonably expect in terms of a settlement in their own case. That is to say, if the federal agency accepted the $18 million settlement, perhaps California's DFEH would be expected to accept something similar from Activision as well, even though the state law ceiling for damages is much higher and doesn't allow for mitigation. Thus, the state agency filed an *ex parte* motion with the Central District of California seeking intervention in the settlement. This motion to intervene would, if granted, effectively insert the California DFEH into the EEOC's case as co-plaintiffs, halting the proposed settlement and potentially altering and muddying the litigation process in terms of control, goals, damages, and future resolution considerations.

In December of 2021, via remote hearing, U.S. District Court Judge Dale S. Fischer denied the motion, and now California's DFEH is appealing the decision to the U.S. Court of Appeals for the Ninth Circuit. In the decision, Judge Fischer of the Central District of California reasoned that the real winner from the agencies' infighting was Activision, while the losers were the aggrieved employees of Activision. Further, the court reasoned that any intervention would only complicate the matter, and after the EEOC had finalized their settlement with Activision, then comment and concern could be filed as the state agency's suit continued in earnest. Even with this ruling, the legal world–and defendant AB–still waits on the results of the appellate process as to whether the California DFEH's request to intervene in the settlement and federal case of the EEOC will be granted or denied.

The ruling would have implications far beyond these two individual cases against Activision. The unusual skirmish between the two civil rights protection agencies could harm employees at Activision and in California at large, as this could drag out litigation and delay potential resolution or settlement. Further, this battle could cause volatility for other employers facing discrimination claims in the state, as well as employees who may not know where to turn for relief. Fights of this nature could make it more difficult to resolve similar harassment, discrimination, or bias claims in the future, as there would always be a danger of a state agency trying to step in and intervene or undermine the federal level matter. Moreover, the ruling will shape the relationship between the state and federal agencies moving forward, dictating how future litigation will be handled when both parties are bringing suit against a common defendant.

Other questions arise, such as: How will damage awards be affected by the newfound relationship, if any, between the two individual litigations? What unforeseen residual effects will this agency tug-of-war have on the legal landscape, in employment discrimination and beyond? Will the two cases be joined, and how would it impact the legitimacy or veracity of the current agreed upon settlement? Many questions remain unanswered, but the initial denial of intervention may lend towards the separation of state and federal agencies, and the independence of their respective suits.

Ultimately, both the federal EEOC and the California DFEH are attempting to tackle the gaming industry's workplace issues and promote gender-based equity within the space to the maximum extent possible. While the state and federal agencies have their horns locked on the administrative procedure of their litigations, there is no doubt that Activision is in their sights, and when the appellate court hands down their ruling, those goals will no doubt be put back into action.

Justin Ward, 1L GW Law, assisted with research on the article.

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Big Ten Conference Appoints Chief Legal Officer and General Counsel

The Big Ten Conference has named Anil Gollahalli its Chief Legal Officer and General Counsel.

Gollahalli will report to Big Ten Conference Commissioner Kevin Warren, who is also a lawyer.

In his role with the conference, Gollahalli will oversee all legal, corporate governance, enterprise risk management, litigation, regulatory, corporate, and legal NCAA matters, as well as outside counsel management. He will work collaboratively with the COP/C, the athletics directors and the general counsels at the 14 Big Ten Conference member institutions and serve

as a strategic advisor to Commissioner Warren and the conference. He will also work hand-in-hand with Big Ten Conference Chief of Staff and Deputy General Counsel Adam Neuman.

"Anil will make a tremendous addition to our conference senior leadership team," said Commissioner Warren. "His immense experience in higher education, strategic approaches to collegiate athletics and entrepreneurial spirit will further ensure outstanding legal service, pioneering growth and trusted counsel for the conference, our world-class member institutions and partners."

"We are in a transformational era of collegiate athletics, and I am honored to join the Big Ten Conference and work with Commissioner Warren," said. Gollahalli. "The Big Ten offers unparalleled tradition and exciting innovation. I look forward to serving the conference and its member institutions to ensure we stay ahead of the curve and continue to provide premier academic and athletic opportunities across our 14 campuses and surrounding communities."

Gollahalli joins the conference from the University of Oklahoma, where he was vice president and general counsel. He was a trusted advisor to President Joseph Harroz Jr. and the Oklahoma Board of Regents.

He managed all major legal projects, including the privatization of the university's utilities systems, public private partnerships, consolidation of the university's health system, and the acquisition and renovation of its campus in Italy. He counseled on all television and media development, intellectual property rights, athletics and university compliance, employment matters, healthcare operations, policy development, collections, and litigation. Additionally, he played a leadership role in the Oklahoma Board of Regents' unanimous vote to enter the Southeastern Conference.

Prior to serving as University of Oklahoma General Counsel, Gollahalli was the vice president for technology development at the university. He also practiced law in Dallas, working extensively in the intellectual property fields, and served as law clerk to the United States District Court for the Western District of Oklahoma. Gollahalli received a bachelor's degree in Chemical Engineering with a minor in Political Science from the University of Oklahoma and a Juris Doctorate from the University of Chicago. Gollahalli serves on the Board of Directors for the National Association of College and University Attorneys, is currently barred in Texas and Oklahoma, and is licensed to practice before the United States Patent and Trademark Office.

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Organizations Takes Sides in Case Before Supreme Court Involving High School Coach Who Prayed After Game

The Alliance Defending Freedom (ADF) and is rallying behind a high school football coach, whose case involved his legal challenge after he was suspended because he engaged in 30 seconds of personal prayer at the end of a game.

Together with lead counsel from Wilson Sonsini Goodrich & Rosati, P.C., ADF filed a brief at the U.S. Supreme Court regarding Kennedy v. Bremerton School District on behalf of former and current National Football League players, who support the coach.

The brief reads as follows:

> *"American citizens do not give up the right to personal prayer when they accept employment with a public employer. As our brief explains, the First Amendment protects prayer because it is private speech, not government speech. Ignoring the Supreme Court's command that 'schools do not endorse everything they fail to censor,' the 9th Circuit wrongly reasoned that Coach Kennedy's personal, on-field prayers were not his own, but the government's—and worse, that even if the prayers were his own, the risk that someone might think they were the government's prayers meant he had to be censored. But the coach's prayers were not a part of his official job responsibilities, and if he had instead been saying a silent prayer in the school cafeteria before lunch, no one would have thought of attributing it to the school district. The fact that he prayed after a game doesn't change the fact that his speech is just as protected by the First Amendment, and we hope the Supreme Court will reverse the 9th Circuit and affirm just that."*

The current and former NFL players represented in the brief are Kirk Cousins, Joe DeLamielleure, Nick Foles, Phil Olsen, Christian Ponder, Drew Stanton, Harry Swayne, and Jack Youngblood.

The Other Side

In contrast, Americans United for Separation of Church and State, which represents the Bremerton School District in Kennedy v. Bremerton, celebrated a "broad and diverse coalition of organizations and individuals who filed amicus briefs this week with the U.S. Supreme Court in support of the public school district's decision to stop a coach who violated the religious freedom of students when he pressured them to join his public prayers at the 50-yard line at public high school football games."

> *"Today, dozens of organizations and people that represent religious, education, sports, civil rights and religious freedom communities joined us in fighting to protect students', and everyone's, First Amendment rights," said Rachel Laser, president and CEO of Americans United. "The diversity of this coalition demonstrates the widespread approval for the bedrock constitutional principle of church-state separation. The facts of the case, the laws of our country, and the majority of Americans are on the side of protecting students' religious freedom."*

Chris Kluwe, a retired NFL punter and current high school football coach, added that "every football player is conditioned to view his team as a family that sticks together no matter what. And the coach is unquestionably the head of that family. The coach has the power to decide whether kids get to play and has influence over how they get along with teammates. It's deeply wrong for any coach to put high school students in the position of turning their backs on the team family if they don't want to join the coach's very public prayers on the 50-yard line after games. That's why the law is so clear that coaches, as authority figures, cannot and should not compel athletes under their care to engage in prayer, either explicitly or implicitly."

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Champion Women, Others Sued for $250 million by Coach Banned by the U.S. Center for SafeSport for Sexually Abusing Underage Athletes, Seeks Help

(Editor's note: The following was shared early this morning.)

We're being sued for $250 million by a coach banned by the U.S. Center for SafeSport for sexually abusing his underage athletes.

Why us? We weren't quiet; we told the volleyball community about his bans. Now we need a legal defense.

We have launched a **GoFundMe** to pay for our legal defense, our lawyer, **Ryan Jacobson.**

The **U.S. CENTER FOR SAFESPORT** banned Rick Butler from USA Volleyball for sexual abuse of a minor, and he's now filed a $250 MILLION LAWSUIT AGAINST US: Nancy Hogshead-Makar, Debra DiMatteo, and **Champion Women**, a non-profit that makes sport safer for all athletes.

- **Rick Butler** has been banned for life from membership or coaching in USA Volleyball, the AAU, and has received an "indefinite suspension" from the Junior Volleyball Association, an organization he helped found. In addition, Rick Butler has been **banned from all Walt Disney/ ESPN's properties**, one of the hosts of the AAU National Volleyball Championship, with over 2000 VB teams.
- **According to the U.S. Center for SafeSport**, Rick Butler engaged in "sexual misconduct involving a minor." Six women have now come forward alleging Rick Butler used his position as their coach to sexually abuse them when they were his underage players.
- Why is he suing us? He's mad that we told the sports community about his multiple bans. Rick Butler is NOT suing USA Volleyball, the AAU, the JVA or Disney. No. He is suing us, because we are small and he has wealth. **Champion Women is a non-profit**dedicated to improving the sexual safety of athletes, particularly in the Olympic Movement. We worked tirelessly to share publicly

available information, like **his Wikipedia Page**, with the volleyball and sports community. We think parents and athletes **should know if a coach has received a formal sanction for sexually abusing minors**. We think our work is important and meaningful, and that we should be getting pats on the back, rather than being sued. Don't let them get away with it!

- The lawsuit does not claim that we or Champion Women defamed him for telling the wider volleyball community about his formal sanctions for sexually abusing his athletes.
- Instead, the 49-page lawsuit claims that we interfered with Butler's business and that we "intimidated (his customers) into cutting ties with the Butlers and GLV, Inc."; that he "lost profits from contracts, reputational harm, and other intangible economic injuries," and that "the Butlers have been subjected to public hatred, contempt, scorn, obloquy, and shame," and "are now unemployable" and that we carried out "an extraordinary campaign of business interference carried out as part of a conspiracy to destroy Rick Butler, Cheryl Butler, and their business, GLV, Inc."
- The case file is publicly accessible, and it can be found online in Chicago, Illinois federal court, Case No. 1:21-cv-6854.
- **Champion Women** is a non-profit, run by **Nancy Hogshead-Makar,** a three-time Olympic Gold Medalist Swimmer, and a civil rights lawyer. The organization provides legal advocacy for girls and women in sports, including advocacy to address sexual abuse in sport.
  - — **Champion Women gathered members of the Olympic Movement** to support two new federal laws that protect athletes from abuse.
  - — **Champion Women created a website** that details how fairly every college and university's athletic department treats it's women athletes.
  - — And Champion Women is working to get **sports organizations to prioritize fairness for girls and women when crafting eligibility rules for transgender athletes.**

  Sports Illustrated Magazine listed her as one of "the most powerful, most influential and most outstanding women in sports right now—the game-changers who are speaking out, setting the bar and making a difference."
- **Debra DiMatteo** is a retired Professor Emeritus of Sports Marketing and Management, having spent a 37-year career as a professor and a college coach of volleyball and fastpitch softball. Her resume includes 21 years at the College of DuPage, 15 years at Benedictine University, and one year at MacMurry College. She has won four national NJCAA softball championships and had a record 13 consecutive appearances in NCAA Division III postseason play with three Final Four appearances. She has coached 97 All Americans in softball and volleyball, and is an inductee in 3 Hall of Fames: Lewis University, Benedictine University, and the Great Lakes Valley Conference. DiMatteo served as a volunteer on the Great Lakes Region BOD in four decades and is **President of Midwest Junior Volleyball, Inc**. which helps raise funds for women's college athletic programs and internships for students in sports management/marketing. She doesn't deserve this legal harassment.
- **Sarah Powers-Barnhard** has been dismissed from the lawsuit. (Yay!) **She is the true hero in the story.** She was one-of-6 Rick Butler's former players to come forward about the sexual abuse she suffered as an underage teen, while she was competing for Sports Performance Volleyball Club – but Sarah was the loudest, and absolutely unrelenting. Sarah went on to be an All-American at Western Michigan University, and played professional volleyball for the Chicago Breeze from 1987-89. She is now a Hall of Famer at WMU and the MAC Conference. She is the Director/Owner of **Powers Volleyball Club**in Florida. As detailed in the **Chicago Sun Times by Jon Seidel and Michael O'Brien,** Sarah sued the AAU to remove Rick Butler from coaching, with reports that she and up to 5 other female teenagers were sexually abused by Rick Butler when they played for Sports Performance in the 1980's. Sarah and Rick Butler's other sexual abuse victims bravely fought for decades to bring justice to their molester.

We are proud of our actions to make sport safer for

athletes. We think kids are safer when sports organizations ban abusive coaches and when the sport community knows about those bans. Perhaps sports organizations should be the ones to tell the sports community about the bans, but …it was up to us. We would do it again.

But make no mistake: Champion Women and Debra Dimatteo cannot afford this harassment.

Please help us! The Butlers have the resources to make our lives miserable, for doing the right thing. We want to continue our work without fear of scare tactics like this one.

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'Diversity Coach' Opines on Why There Are So Few NFL Coaches & Managers

Dr. James O. Rodgers, who bills himself as the "Diversity Coach," has listened to a dozen of news shows talking about the dismal state of so-called diversity in NFL leadership.

He says the stats have led to "righteous indignation," which is "palpable."

What people don't seem to explore is why do they see the stats as disappointing and what is the source of those disappointing stats, according to Rodgers, who has coached senior executives, both white and black, over the last 30 years.

"(S)uccess in organizational life is about more than skills, capabilities, and performance," said Rodgers. "In fact, performance is the least predictive element of upward mobility. More important are the relationship elements, how you are viewed by decision-makers, and do those decision-makers know you, like you, and trust you. It surprises some people to learn that those elements are also manageable. It is easy to look at stats and declare 'oh, ain't it awful.' It is easy to assume that the problem can be fixed if only the people in power would agree to 'give' those good jobs to a broader range of people. With a little more thought I believe we can uncover the real source of the imbalance. After all, it is not in the best interest of CEOs or owners to have lesser qualified people in key positions."

So, the issue is what constitutes qualified for top-level positions?

Dr. Rodgers pointed to a recent Sunday morning news show, which displayed stats that on their face looked damning and disturbing. But, among the stats was the percentage of existing head coaches who have family ties to NFL coaches, managers, and owners, according to Dr. Rodgers.

"That number was surprisingly high, which gives a hint about why this is the current situation. It is not just the most successful assistant coaches who are candidates for head coaching jobs. The owners and general managers exercise their right to select head coaches that are 'low risk' selections. Not only must they be sure they can do the job. They also need to know that they will 'fit' in the inner circle of the game's management. They need to know the man, his family, his lifestyle, his core beliefs, his philosophy of life, his trustworthiness, and his willingness to support the principles that sustain the business of the game.

"I wrote a similar article in 2021 about why there are so few Black CEOs. In it, I observed that a major misstep that Black senior executive candidates make is their reluctance to hang out with white people (especially those who have influence and decision-making power) away from the job. Since then, I have taken on a role as Director of an Executive Academy, in which I alert Black executives about the rules of the game. If Black coaches really want to break through, they need to be deliberate in allowing others to get to know them, not just their coaching record. They need to know that the final selection will not be made based on how well they interview. It will be based on how many sponsors step up to vouch for them when the doors are closed."

Rodgers added that he believes that people can either continue to decry the decisions of NFL owners (they are rich enough to withstand the heat) or, people can look at both sides of the issue and address those things that Black coaches can actually control. "Let's move past dependence on the grievance. Instead, let people get to know you and help others to get known," concludes Rodgers.

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CSRI Awards Professor Ellen J. Staurowsky wins Sonny Vaccaro Impact Award

The College Sport Research Institute (CSRI) at the University of South Carolina celebrated the in-person return of its annual conference by recognizing a legend in the world of college sport.

Ellen J. Staurowsky, Ed.D., is the 2022 recipient of the Sonny Vaccaro Impact Award, given to individuals who have made a positive impact on college sport by advocating for or defending college athletes' fundamental civil and human rights. Dr. Staurowsky is a long-time Senior Writer for Hackney Publications.

"CSRI is proud to recognize Dr. Staurowsky with the Sonny Vaccaro Impact Award. There is no scholar who has had a larger impact on college sport research than Dr. Staurowsky," says CSRI Director and University of South Carolina Professor of Sport and Entertainment Management Richard Southall. "Her groundbreaking research has laid bare the exploitation of NCAA profit-athletes, and informed and inspired an entire generation of scholars."

Staurowsky, a professor of sports media in the Roy H. Park School of Communications at Ithaca College, is a widely renowned teacher, author and researcher, internationally recognized as an expert on social justice issues in sport. She has earned numerous previous honors, including the Women's Sports Foundation Researcher of the Year award, the National Association for Girls and Women in Sport's President's Award, the Laughlin Education Award from Ursinus College and the CSRI Lifetime Research Achievement Award.

"It is deeply humbling to have been selected for the Vaccaro Impact Award. Sonny Vaccaro is an exemplar in speaking truth to power," says Staurowsky. "To be recognized as someone contributing to and carrying on his legacy is a tremendous honor."

Staurowsky is a leading advocate for gender equity and Title IX, pay equity and equal employment opportunity, college athletes' rights and ending the exploitation of college athletes, the faculty role in reforming college sport, representation of women in sport media, and ending the misappropriation of American Indian imagery in sport. She is co-author of the College Athletes for Hire: The Evolution and Legacy of the NCAA Amateur Myth and editor and author of Women and Sport: A Continuing Journey from Liberation to Celebration. She has published research in many scholarly journals and given expert analysis and commentary for many media outlets, and was the lead author on the Women's Sports Foundation's research report, Her Life Depends on It: Sport and Physical Activity in the Lives of American Girls and Women.

She currently serves as a contributing / senior writer with Sports Litigation Alert and Legal Issues in College Athletics and has served as a research consultant to the National College Players Association, co-authoring several reports addressing issues regarding college football and basketball player value.

The Sonny Vaccaro Impact Award was established by CSRI in 2017 in honor of Vaccaro, who became famous for his tremendous success over decades as a sport marketing executive with Nike, Adidas and Reebok. Vaccaro's greatest legacy, however, comes from his continuing work to change the fundamental structure of college sport. His relentless championing of the rights of high school and college athletes has included speaking on college campuses across the country, granting interviews and providing context for countless journalists, historians, documentary filmmakers, congressional staffers and college sport reformers, and convincing several lawyers to file lawsuits against the NCAA. He continues to speak truth to power and hold those who deny college athletes their fundamental rights up for public scrutiny.

CSRI, a research center within the University of South Carolina's Department of Sport and Entertainment Management, is dedicated to supporting interdisciplinary and inter-university collaborative college sport research. It serves as a research consortium for college sport researchers from across the United States and disseminates findings to academics, college sport practitioners and the general public. Its annual CSRI Conference provides scholars and students from across the U.S. with a forum for sharing their innovative work on college sport research.

CSRI also sponsors the Journal of Issues in Intercollegiate Athletics (JIIA) — a peer-reviewed, open-access resource that promotes discussion and examination of vital issues facing college athletics.

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News Briefs

Texas Rangers General Counsel Leaves Post to Join New York Mets

Katherine Pothier is coming home. Pothier, who spent six years with the Texas Rangers and eight years with the San Diego Padres, has reportedly been named the chief legal officer of the New York Mets. A New jersey native and graduate of Rutgers Law School, she replaces David Cohen, who left last year following an internal workplace review allegations of sexual harassment and discrimination by former Mets employees conducted by Wilmer Cutler Pickering Hale and Dorr. Prior to her work in MLB, she was a litigation partner at San Diego law firm Wilson Turner Kosmo.

Celebration of Life for Sports Business Professor Jim Riordan Set for April 28

Florida Atlantic University's College of Business will hold a Celebration of Life on April 28 for Jim Riordan, Ph.D., who founded FAU's MBA in Sport Management Program in 2000. The event will be held at 5 p.m. on the Hyundai Deck at FAU Stadium. Food and beverages will be provided. In his honor, the College of Business has established the Dr. Jim Riordan Student Support Endowment. He helped his students in many ways, including supporting them financially with his own money. Last year, the FAU program was ranked No. 19 among the world's top 40 postgraduate sports management degrees. The ranking by SportBusiness, a London-based global intelligence service, improved 11 spots from the prior year. To augment classroom instruction, Riordan regularly organized presentations for his students, attracting celebrities, coaches and executives. Recent speakers included: former Duke University women's basketball coach Joanne P. McCallie and Richard Krezwick, a renowned stadium and arena executive. Some of the organizations that have hired FAU sport management students include: the Miami Dolphins, Miami Heat, the Boston Bruins the University of Miami Hurricanes, the LPGA and the Atlantic Coast Conference.

Gabelli Announces Launch of Sports Business Initiative

Fordham University's Gabelli School of Business has launched the Gabelli Sports Business Initiative to explore, debate and propose solutions to the many important issues involving the sports industry. The Initiative, to be led by Mark Conrad, Associate Professor of Law and Ethics and a longtime writer and observer of the industry, will bring together experts in the areas of professional, collegiate, amateur and international sports for a series of symposia, podcasts and lectures examining the many cutting-edge issues affecting sports today. Geared toward academics and non-academics, students, alumni and the general public, the Initiative hopes to be the "go-to" place for sports business issues not only in the New York – Metropolitan Area, but also in the national and international spheres. To guarantee maximum exposure, events will initially be remote, so that our guests and our interested audiences from all over the world can participate. The Initiative will include podcasts, symposia for academic and public audiences will be uploaded and streamed.

Among the topics covered are:

- Diversity, Equity and Inclusion
- Human rights and political issues and sport – domestic and international
- The professionalization of college sports
- The effects on legalized betting on the sports landscape
- Gender and sports
- New technologies and monetization of sports
- The role of government in ensuing governance and transparency

In the coming academic year, the Initiative plans to discuss topics like "Sports at a Time of War" – the Ukraine War and the Effect on International Sports; "Diversity in the Sports Space – What Can be Done, What Should be done?" and "Legalized Sports Betting – The Money, the Risks and the Public Health Issues."

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