SPORTS LITIGATION ALERT

May 6, 2022 Vol. 19, Iss. 9

Case Summaries

Appeals Court: Judge Failed to Consider Evidence in Case Involving Cycling Accident and Concussion

An Ohio state appeals court has reversed the ruling of a trial court, finding that the judge failed to properly consider evidence in a case involving a cycling accident that led to a concussion.

Specifically, the trial court failed to properly consider rebuttal evidence regarding whether a cyclist's behavior was within the bounds of the inherent risks of group cycling or whether it constituted reckless conduct.

David J. Weglicki and his wife, Laura Weglicki filed a complaint in the Geauga County Court of Common Pleas, alleging two claims for relief: (1) Mr. Valeriy A. Rachitskiy acted in a negligent, reckless, wanton, and/or intentional manner when he stopped suddenly while he and Mr. Weglicki were cycling in a pace line, causing Mr. Weglicki to crash into him (suffering a concussion), and (2) a loss of consortium on behalf of Mrs. Weglicki. Mr. Rachitskiy filed an answer, asserting

Table of Contents

Here's the latest issue of Sports Litigation Alert, the nation's only subscription-based periodical reporting on the intersection of sports and the law. We also publish 11 other sports law periodicals. Visit www.hackney-publications.com to learn more.

Hackney Publications

several affirmative defenses, including the doctrine of primary assumption of risk.

Rachitskiy filed a motion for summary judgment, contending that the doctrine applied and that he did not act recklessly or intentionally to injure Mr. Weglicki. He also pointed to his deposition, in which he testified that he dropped his left hand to show he was stopping. He further argued that a collision is a foreseeable risk when riding in a group of cyclists. A partial transcript of Mr. Rachitskiy's deposition was attached to his motion for summary judgment, as well as his affidavit. He also separately filed the complete deposition.

In his deposition, Mr. Rachitskiy testified that he and Mr. Weglicki were members of the Cleveland Touring Club. The Cleveland Touring Club would organize rides several times a week, which typically lasted an average of two hours and covered a distance of approximately 40 miles (riding at an average pace of 20 mph).

On the day of the incident, the Cleveland Touring Club held a ride beginning in Chagrin Falls. Mr. Rachitskiy and Mr. Weglicki, who had ridden together before, were in the "B group" along with several other riders, including Peter Snitzer (Mr. Snitzer) and the group leader, Craig W. Connors (Mr. Connors). Mr. Connors gave general instructions before the ride, including the admonition to "[s]tay together as a group, wait for the people who behind [sic] and keep it at the same pace. Keep a single line." The riders cycled in a "pace line," which Mr. Rachitskiy described as "one person, one rider after another in real close proximity." The purpose of a pace line is based on aerodynamics, i.e., allowing faster riding with less energy expenditure by helping the riders behind the pace leader avoid air resistance.

On the return ride, Mr. Rachitskiy decided to break away from the group and ride directly to his home instead of returning to the starting location. The group was riding westbound on Bell Street, a few miles from the starting location. On similar past rides, Mr. Rachitskiy typically broke away from the group and turned right onto Hemlock Rd. On the day of the incident, it was blocked due to construction, so he decided to turn right on Fairview Rd. He began to slow down, cognizant of the people who were riding behind him. After Mr. Snitzer passed him on the right, Mr. Rachitskiy decided to come to a complete stop to let the other riders pass before he turned right. When he stopped, Mr. Weglicki hit him from behind on Mr. Rachitskiy's left side. Mr. Rachitskiy's wrist and ribs were injured in the collision.

Before slowing down, Mr. Rachitskiy dropped his left-hand "to show that I was stopping," which is a customary sign for slowing down. He did not call out a verbal warning to the other riders. He believes he learned the hand signals used by riders to communicate in group cycling from the Cleveland Touring Group.

In their brief in opposition to summary judgment, the Weglickis contended the risk that led to Mr. Weglicki's injuries was not a foreseeable risk of cycling, i.e., the risks of cycling do not include a fellow rider riding ahead in a pace line to stop suddenly without warning. He further argues that even if the primary assumption of risk doctrine applied due to the inherent dangers of cycling in a pace line, Mr. Rachitskiy's action were reckless because he failed to adequately signal prior to abruptly stopping.

The trial court did not allow partial, court-reporter certified depositions of Mr. Weglicki, Mr. Rachitskiy, Mr. Snitzer, and Mr. Connors, as well as an affidavit and expert report of Edward M. Stewart. In sum, the testimony supported their contention that Mr. Rachitskiy was liable.

After it ruled for the defendant, the plaintiffs appealed.

"The trial court based its findings of fact solely on Mr. Rachitskiy's deposition," wrote the appeals court. "As to its conclusions of law, the trial court first found that the primary assumption of risk doctrine applied to the Weglickis' negligence claim and that Mr.

Rachitskiy owed no duty to Mr. Weglicki. Further, Mr. Rachitskiy met his initial burden on summary judgment by establishing that (1) he and Mr. Weglicki were participants in bicycling, a sporting event in which collisions are an inherent risk; and (2) Mr. Weglicki assumed all the risks inherent in the sport of bicycling. The trial court found the Weglickis failed to provide rebuttal evidence.

"Secondly, as to intentional/reckless/wanton misconduct, the trial court found that stopping is a foreseeable, customary part of bicycling and that Mr. Rachitskiy's evidence showed he intended to stop in a safe manner, allow the bicyclists behind him to safely pass, and then turn towards his home. Mr. Rachitskiy met his initial burden by establishing no harm, intentional or otherwise, was intrinsically tied to his conduct. Again, the trial court found the Weglickis failed to provide rebuttal evidence.

"Similarly, the trial court found there was no evidence to show that Mr. Rachitskiy acted recklessly because he established that (1) he acted carefully to avoid causing an accident and (2) there was no evidence to show that Mr. Rachitskiy recognized stopping would result in a significantly higher risk of the occurrence of serious harm. Thus, Mr. Rachitskiy met his initial summary judgment burden, and the Weglickis failed to provide rebuttal evidence. Furthermore, there was no evidence of wanton misconduct since Mr. Rachitskiy showed not only that he owed no duty, but that he acted carefully and tried to avoid injuring anyone, and the Weglickis failed to provide rebuttal evidence."

The appeals court went to note that it "appears the trial court did not consider the depositions. The trial court found the Weglickis failed to submit any rebuttal evidence after finding that Mr. Rachitskiy met his initial burden as the moving party on summary judgment and awarded Mr. Rachitskiy summary judgment on this basis. Even though an appellate court reviewing an award of summary judgment must conduct its own examination of the record, if the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but becomes, in effect, a trial court. Peterson v. Martyn, 10th Dist. Franklin No. 17AP-39, 2018-Ohio-2905, ¶ 51; Murphy at 360. Accordingly, the failure of the trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment constitutes reversible error. Id.

"As to the Weglickis' expert report by Mr. Stewart, the trial court found that it could not be considered because Mr. Stewart relied on facts not in evidence and cited to Rilley v. Brimfield Twp., 11th Dist. Portage No. 2009-Ohio-0036, 2010-Ohio-5181, ¶ 56, without identifying what those 'facts not in evidence' were. In Rilley, we determined that the expert report was properly excluded from consideration on summary judgment because no evidence was offered as to the expert's qualifications, and none of the documents upon which the expert based his formulation of the events of the night of the incident were attached to the affidavit, authenticated by affidavit, or in the record. Id. at ¶ 62.

"In forming his expert opinion, Mr. Stewart reviewed the depositions attached to the Weglickis' brief in opposition to summary judgment, as well as an incident police report, and personally inspected the scene

of the crash. He also reviewed Mr. Rachitskiy's deposition transcript, which was filed in the action.

"While police reports contain hearsay, portions of a report may be admissible under the public records hearsay exception, particularly in the summary judgment exercise. See, e.g., Muncy v. Am. Select Ins. Co., 129 Ohio App.3d 1, 5, 716 N.E.2d 1171 (10th Dist.1998). The fact that the expert reviewed a police report does not, standing alone, support the exclusion of his report and affidavit, when other evidentiary quality materials underlie his report and affidavit.

"Even if the report is completely inadmissible, the deposition testimony in this record could potentially support a different conclusion from Mr. Rachitskiy's, thus raising a genuine issue of material fact.

"Accordingly, we find the assignments of error have merit, and we reverse and remand for the trial court to consider whether the Weglickis' rebuttal evidence raised a genuine issue of material fact as to whether Mr. Rachitskiy acted recklessly by slowing down and then coming to a complete stop while riding in a pace line during a group bicycle ride."

David J. Weglicki, et al. v. Valeriy A. Rachitskiy; Ct. App. Ohio, 11th App. Dist.; CASE NO. 2021-G-0010; 1/31/22

Return to Table of Contents

Cleveland Browns Fan Sues Goodell, Unsuccessfully

By Jeff Birren, Senior Writer

In 2021 Patricia Breckenridge sued NFL Commissioner Roger Goodell, but not the NFL, seeking an injunction to place the Cleveland Browns in the Super Bowl. She also sought damages for Goodell's "breach" of "his NFL contract for helmet-to-helmet" collusions and because "her relative" was not allowed "to play in Super Bowl LV" (*Patricia A. Breckenridge, Pro Se Litigant v. Roger Goodell, ("Breckenridge v. Goodell"),* N.D. Ill, Case No. 21-cv-00674, (2-4-21)). The District Court dismissed the case, and Breckenridge appealed. The Seventh Circuit affirmed in April 2022(*Breckenridge v. Goodell*, ("*Breckenridge"),* Case No. 21-1618, (4-8-22)).

Facts, As Can Be Ascertained

The 2020 Cleveland Browns were 11-5 in the regular season. They defeated the Steelers in the Wild Card game but lost at Kansas City in the Divisional Playoff game. The Chiefs lost to Cincinnati the next week in the Conference Championship Breckenridge was not happy. She filed a one-page, handwritten complaint on February 4, 2021, just three days before the Super Bowl. Breckenridge sought a mere $10,000,000 in damages if the Browns were not placed in the Super Bowl, punitive damages for "malicious, intentional, willful, and reckless disregard rights of plaintiff and relatives," and damages for the "harm" suffered by her because of her "relative not being allowed to play in Super Bowl LV."

Breckenridge attached eight pages of articles to her complaint. The first one discussed helmet-to-helmet collisions, and page two quoted "foxbusiness.com" that stated that each set of Super Bowl rings are valued at $5,000,000. The following pages list "Recent Supporters." The final page is a color photograph of a helmet-to-helmet collusion. Nowhere did Breckenridge identify her "relative" that was unable to play in the Super Bowl allegedly due to Goodell. Breckenridge also filed a motion for "attorney representation" and to proceed *in forma pauperis*.

The case was assigned to Judge Mathew F. Kennedy. Judge Kennedy granted the motion for Breckenridge to proceed *in forma pauperis.* The order also stated that he had "reviewed the complaint" to determine if it was "frivolous or fails to state a claim upon which relief may be granted." The answer to that was yes. "The claim has no basis and is frivolous." It noted that she "makes a reference to a relative's football-related injuries, but plaintiff herself alleges no injuries, and she lacks standing to sue for harm to someone else." The Court "directed" the Clerk of the Court to enter judgment dismissing the case with prejudice and the motion for attorney representation was terminated as moot, (*Breckenridge v. Goodell,* Order, (3-10-21)). The Clerk did that the very same day. Breckenridge filed a notice of appeal in April, and it was on to the Seventh Circuit.

In the Seventh Circuit

Breckenridge filed her opening brief on May 18, 2021. It is eighteen pages with less than ten pages of argument. The NFL's rule concerning blindside blocks is Appendix A. Breckenridge again included her argument concerning the Browns. She stated that the case was "filed for the protection of Cleveland Browns' Constitutional rights under amendment 15 right to property," 42. U.S.C. Section 182 and 42 U.S.C. Section 183 (Motion To Appeal Case, at 7, punctuation in the original, (5-18-21)).

Breckenridge also sought "to decrease the debilitating and deadly outcomes of helmet to helmet collisions in NFL and other professional organizations" (punctuation in the original). The "case is filed for compensation denied to Cleveland Browns due to CTE play." Furthermore, the "case is filed in honor of my late father." This time she identified her relative that was in the NFL as her father's "great-grandnephew." Breckenridge requested "$10m for damages and pain and suffering" to her parents' "lineage for the loss of the Super Bowl LV Championship" because of the NFL's "disregard" of its rules. The claimed relative was Jedrick Willis Jr., an offensive tackle and the tenth pick in the 2020 NFL player draft (*yahoo.com,* "Goodell Prevails Over Anguished Browns Fan in Super Bowl Claims Suit", Michael McCann, (4-16-22)).

Five times Breckenridge filed a motion in the Circuit to extend her time to file an amended opening brief. Five times that was granted by the Circuit. Despite those five extensions, no revised brief was filed. Finally, her sixth such motion was opposed by Goodell's counsel at Proskauer, Rose, and the Circuit denied this request. Proskauer filed its brief in October 2021. Once again Breckenridge sought multiple extensions to file her reply brief, and those were again granted. That brief was filed on January 26, 2022. The docket sheet mentions possible future oral argument, but that was not to be.

The Seventh Circuit's Order

The Circuit's panel included Chief Judge Diane S. Sykes, and Circuit Judges Frank H. Easterbrook and Michael B. Brennan. The Order began with a footnote stating that the panel "agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court" (*Breckenridge* at 2, citing FED. R. APP. P. 34(a)(2)(C)).

The Court summarized the case in the first paragraph, stating Breckenridge "has a distant relative who played for the Cleveland Browns" in 2020-2021. She alleged that "the Browns were robbed of their 'rightful place' in the Super Bowl," and that "the NFL should do more to protect players, like her relative, from helmet-to-helmet collisions that lead to concussions."

In its second paragraph the Circuit noted that Breckenridge "sought to file her complaint without prepaying the filing fees" and therefore the district court judge "screened the complaint" and dismissed it "as frivolous." The judge "alluded to" her "reference to her relative's football-related injuries" and stated that "Breckenridge lacked standing to sue for harm to someone else."

In its third and final paragraph, the Circuit stated that Breckenridge "generally challenges the judge's ruling" but failed to "address his reasoning or make a cogent legal argument that could provide a basis for disturbing the judgment" (citations omitted.) The Circuit did not stop there. "Regardless, her claim about the Browns' defeat is legally frivolous," citing *Denton v. Hernandez,* 504 U.S. 25, 31 (1992). Finally, Breckenridge "lacks standing to bring a claim on behalf of football players who have suffered injuries, *see TransUnion LLC v. Ramirez,"* 141 S. Ct. 2190 (2021). The Circuit's Docket Sheet added that the opinion was nonprecedential and the judgment was with costs.

Conclusion

The case will now return to the District Court, and Goodell will get an order awarding him "costs" on appeal. There is no way to know at this distance whether Proskauer will try to enforce that order. Breckenridge may have been passionate about her claims that the Browns' defeat was due to officiating, but even heightened passion does not convert such beliefs into cognizable legal claims. Cheering or booing loudly on the court or stadium does not make such passions stand up in court. This may turn out to be an expensive lesson for Breckenridge, as it has for other litigant-fans in the past.

Return to Table of Contents

Nothing Left to Assume: California Court of Appeal sides with El Dorado Union High School District in High School Football Player's Request for Damages

By Gina McKlveen

A California Court of Appeal for the Third Appellate District recently affirmed an El Dorado County trial court decision that held Union Mine junior varsity football player, Nick Brown, assumed the risk of his traumatic brain injury after he and his father signed a waiver at the beginning of the 2015-2016 athletic season.

Every year in the United States nearly 8 million high school students participate in sports at the junior varsity and varsity levels. At the beginning of each of these high school sport seasons, an athletic handbook, or similar document, explaining the rules, rights, and responsibilities of the student-athlete is routinely distributed by the high school, its athletic director or its coaches, to these minors. These student-athletes are then instructed to review and sign the athletic handbook as a condition to their eligibility to play on any high school sports team. Additionally, since almost all high school students are below the age of majority, and because of their age are unable to form the requisite legal assent to form a binding agreement, a parent or guardian is also required to sign an acknowledgement they have read and understand the terms of the athletic handbook. Typically, each athletic handbook contains a release and waiver, whereas both the student-athlete and the parent or guardian gives up their right to file a lawsuit against the school district and its agents even if there is an injury, paralysis or death that occurs during a school-related sports activity since the student-athlete has assumed the risk by voluntarily participating in the sport.

In 2015, prior to Nick Brown's sophomore football season, the Athletic Director for Union Mine High School gave Nick the athletic handbook which read in part that if Nick "is hurt, injured, or even dies, I/we [i.e. the student, his/her parent/s, guardian/s, heir/s…] will not make a claim against or sue the El Dorado Union High School District [hereafter EDUHSD], its trustees, officers, employees, and agents, or expect them to be responsible or pay for any damages." Furthermore, the handbook stated that "the undersigned [parties], understand and acknowledge that the above-named student has voluntarily chose to participate in school-related activities at his/her own risk…and fully understand that said school-related activities may involve numerous risks, dangers, and hazards, both known and unknown, where serious accidents can occur." Both Nick and his father, Read Brown, signed this handbook, effectively agreeing to the terms and conditions of this release and waiver.

The contents of this signed athletic handbook became undeniably relevant to litigation following an August 28, 2015 home game where Nick played various positions including quarterback, running back, receiver, and special teams, sustaining several tackles and blows to the head, before he eventually walked himself off the field in the fourth quarter after a particularly hard hit. The only medical staff present at that game was a chiropractor, who did not consult Nick after any of his prior hits nor after the final hit which took him out of the game. A few minutes later, the game ended, and Nick got up from the bench, walked a few paces then suddenly collapsed. The chiropractor suspected heat exhaustion, but since no other medical personnel was present to confirm, he called an ambulance which arrived 10 minutes later. At the hospital, Nick was treated with an emergency decompressive surgery for a subdural hematoma, also known as brain bleed. A year later, Nick's doctor diagnosed the former football player with optic nerve damage in his left eye, a condition that the doctor concluded would have occurred at the same time as Nick's brain injury. The doctor also opined that any appropriately trained medical professional would have immediately been able to detect this condition if Nick had been examined on the sidelines after he left the field during the 2015 game.

As a result, Nick and his mother, Laurie Brown, filed suit against EDUHSD alleging that its employees, including coaches and trainers, failed to implement polices to proactively identify head injuries including concussions and other brain damage in student-athletes. Furthermore, the Browns argued EDUHSD failed to provide the appropriately trained personnel or licensed health care professionals to identify these types of head injuries and evaluate or treat student-athletes for any possible injury before returning to the game. Nick's complaint also sought damages related to a second cause of

action for EDUHSD's failure to warn his parents of the risks associated with violent contact to the head as well as symptoms resulting from this type of contact, and any increased risks associated with the lack of adequate access to appropriately trained and licensed medical professionals available to detect student-athletes' injuries.

Despite these arguments, the trial court granted a summary judgment motion against the Browns. On appeal, the presiding judge adhered to the lower court's ruling, stating that by signing the athletic handbook, "Nick and Read unequivocally agreed to assume the risk of injuries caused by the negligent acts of the District employees in coaching and supervising Nick while he played football and in treating him for those injuries." The judge pointed to the nature of the sport as a rationale for the relevant duty owed in Nick's situation, writing that "stopping players and removing them every time they suffer a blow in a football game simply is not feasible." Moreover, the judge recognized EDUHSD's effort to secure the presence of a medical doctor and though the doctor declined to attend, EDUHSD still provided a chiropractor "with some professional training in evaluating for traumatic brain injuries…and an EMT with a truck equipped with basic first aid and life support equipment" at the game. Finally, in terms of Nick's failure to warn argument, the Court of Appeal was also unpersuaded, finding that "[p]aperwork sent home as part of the handbook and signed on the same date as the release…expressly covered all injuries Nick might suffer playing football."

This decision, therefore, left nothing to assume regarding the application of the assumption of the risk for student-athletes and their parents who sign the express waivers in annual athletic handbooks releasing school districts from liability of even the most traumatic brain injuries.

Return to Table of Contents

Allegations Concerning a Pattern of Abusive Conduct Are Enough to Survive a Motion to Dismiss

By Brian G. Nuedling, of Jackson Lewis P.C.

While "simple teasing and name calling" may be insufficient to establish a claim under Title IX, the California Court of Appeal found allegations alleging a pattern of abusive conduct sufficient to survive a motion to dismiss.

Factual Background

In *John T.D. v. River Delta Joint Unified School District,*[1] the plaintiff was a member of the football team. He alleged that his coach routinely discussed sex with his wife and asked team members "how far" they had gotten with their girlfriends. John alleged that he did not participate in the discussions but was ridiculed for admitting to being a virgin.

John further alleged that football players became members of the "Brotherhood," and that one rite of passage called for younger team members to touch the testicles of the senior players. John alleged that the coach was aware of this practice. He further alleged that in one instance, when teammates demanded that he touch a teammate's exposed testicles, he ran from the room. John, who played center, also alleged that the team's quarterback intentionally grabbed and fondled John's testicles instead of merely touching his leg to indicate that he was ready for John to "snap" the football.

John alleged that he was characterized as "different," "not macho," and was perceived as possibly gay because he would not participate in the sexualized talk and the Brotherhood. John alleged that he complained of this conduct repeatedly, but that the coach allowed it to continue. John further alleged that the coach began using the "Oklahoma Drill" on John, to "make a man" out of him. The drill consisted of two players running into each other between barriers. According to John, teammates began using the phrase "FUCKJT[Year] in group chats and also yelled it out during classes.

According to the complaint, John's mother met with the principal early in the school year and complained that John was being bullied and sexually harassed, in violation of the law and the student handbook. John's mother reported that her son felt degraded, humiliated, anxious, and fearful, and that this was adversely affecting both his participation in football and his academic performance.

The complaint alleged that the principal's response was to speak with the coach. The complaint alleged that

1 No. C092665, 2021 Cal. App. Unpub. LEXIS 7014 (Cal. Ct. App. Nov. 8, 2021).

at the next practice, the coach stared at John while stating that "some people are tattletales" and "sometimes people don't know how to take a joke and you can't say things anymore in group chat that could be perceived as wrong, so knock it off." John alleged that teammates understood John to be the "tattletale," and that the coach was directing the Brotherhood to retaliate against him. According to the complaint, at the same practice, the coach began using a modified "Oklahoma Drill" in which, "practically daily," multiple players who were almost twice the size of John lined up and ran into him repeatedly, causing severe bruising.

According to the complaint, John's mother met again with the principal and complained about the continued harassment and the modified drill. The complaint alleged that the principal took no further action except to urge John to let things roll off his back and have "thicker skin." She invited John to come to the outer room of her office whenever he felt overwhelmed.

John alleged that he reported to the principal's office, upset, on almost a daily basis. He alleged that the principal saw him but never asked why he was there. John alleged that he missed school, including a span lasting a week and a half, and stopped going to football practice. He withdrew from the school before the end of the school year.

Procedural History

Plaintiff brought claims against the District, its superintendent, the former principal, and former coach, alleging sexual harassment and retaliation under Title IX of the Education Amendments of 1972.[2] With the exception of the coach, Defendants filed a motion to dismiss the Title IX claims, alleging insufficient facts to support either cause of action. The trial court concluded that John had not adequately alleged harassment based on gender or that Defendants were actually alerted to such harassment. With respect to retaliation, the trial court concluded that deliberate indifference was not a permissible theory of liability under Title IX. Accordingly, the trial court granted the motion to dismiss. Since John brought no other claims, the trial court entered judgment, dismissing John's cause of action. John filed a timely appeal, resulting in the analysis and decision by the Court of Appeal of California.

Court Analysis

As to the cause of action for gender-based harassment, the appellate court noted a holding from the United States Supreme Court that damages under Title IX cannot be recovered unless an official of the school district who, at a minimum, has authority to address the alleged discrimination and to institute corrective measures has actual knowledge of discrimination in the school programs at issue and fails to respond adequately.[3] The court further noted a Supreme Court holding that a Title IX funding recipient can be liable for student-on-student harassment, "but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs and activities" and "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[4]

The appellate court then evaluated the facts of the case under the four requirements for the imposition of school district liability under Title IX for student-on-student harassment: (1) whether the district exercised "substantial control" over the harassers and the context in which the harassment occurred; (2) whether the behavior was so "objectively offensive that it denied its victims the equal access to education that Title IX is designed to protect"; (3) whether the school district had "actual knowledge" of the harassment; and (4) whether the school district was "deliberately indifferent," i.e., that its response to the harassment was "clearly unreasonable in light of known circumstances," and that "deliberate indifference, at a minimum, causes a student to "undergo harassment" or make the student "liable or vulnerable to it."

Taking the elements in order, the court found that "substantial control" had been satisfied because the alleged misconduct occurred mainly on school grounds, and always during school hours, football practice, or at

2 A Fourth Amended Complaint was brought by John and a co-plaintiff, "N.B.," against the District, its superintendent, Plaintiffs' former principal, and Plaintiffs' former coach. Plaintiffs' first and second causes of action alleged separate claims for gender-based harassment and retaliation against the District under Title IX. The third and fourth causes of action were asserted only by N.B. against all defendants and alleged state law claims for negligent supervision and hiring that were not issue in the appeal that was before the court.

3 *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

4 *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

another team event. As to harassment, the court found that the complaint had sufficiently alleged that the misconduct was based on John's failure to conform to traditional sex stereotypes, which a plaintiff may use to demonstrate gender discrimination for purposes of Title IX.[5] In addition, and noting that John had alleged "more than simple teasing and name-calling," the court concluded that he had adequately brought facts to support a claim for harassment that was "severe, pervasive, and objectively offensive." The Court also concluded that John had adequately alleged harassment that caused the denial of educational opportunities or benefits because the alleged harassment had caused him to stop playing football, miss a significant amount of school, and ultimately withdraw from school.

As to the element of notice, the court found that reports to a high school principal were sufficient to satisfy the requirement that an individual with the authority to address and correct the problem had actual knowledge of the discrimination. Finally, as to deliberate indifference, the court noted that the school took no action beyond speaking with the coach. The court found it could not conclude that "the response was not clearly unreasonable as a matter of law."

Accordingly, and as to the first cause of action for sex-based harassment, the court concluded that the trial court had erred in granting the motion to dismiss.

As to the second cause of action, for retaliation, the court rejected the trial court's conclusion that a "deliberate indifference" standard is insufficient to support a Title IX retaliation claim. Instead, and applying this standard, the court found that John had adequately alleged a claim for retaliation because of the continuation of the conduct, even after both he and his mother had complained.

In total, the court found that John's allegations were sufficient to survive a motion to dismiss. Therefore, the court reversed the judgment of dismissal and remanded the case to the trial court.

Return to Table of Contents

5 *Quoting* Chisholm v. St. Marys City Sch. Dist. Bd. of Educ., 947 F.3d 342, 351 (6th Cir. 2020).

Fifth Circuit Affirms Magistrate Judge's Dismal of Parents' Constitutional Law Claim in Concussion Case

The panel of judges from the Fifth U.S. Circuit Court of Appeals has affirmed a magistrate judge's dismissal of a lawsuit brought the parents of a high school football player, who claimed the school district and several individual defendants violated their son's Constitutional rights when they allowed him to continuing playing football, which led to multiple concussions.

In so ruling, the panel determined that the defendants did not act with "deliberate indifference by allowing the student to participate." The decision upheld the ruling of a magistrate judge from the Eastern District of Texas for the Sante Fe Independent School District and several school officials.

Plaintiffs Donna and Troy Yarbrough, who filed suit on behalf of their minor son, were seeking in excess of $5 million in damages.

In their claim, they noted that this was "a critically important civil rights case concerning traumatic physical and mental injuries sustained by a male high school student. Each year numerous children are injured across the country participating in sporting events. A number of injuries result due to a systemic culture of winning at all costs."

They added that "in order to win championships, child athletes are subjected to training regimens that disregard their health, safety, and well-being. Drills are conducted in practice that are dangerous and are known to cause long term serious injuries while under the supervision of the coaches."

The incident leading to the concussion occurred on Sept. 21, 2016, when the minor was at football practice. Participating in a scrimmage, he collided, helmet-to-helmet, with a much larger player.

"The coaches were yelling at (the students) to line up again, and again, and again, and to hit harder, harder, harder," according to the lawsuit. "Indeed, the coaches encouraged, if not demanded, an aggressive and repetitive full-on head-to-head and upper body contact.

"The coaches ran the same drill over and over resulting in continued, repetitive head-to-head and upper

body contact. The coaches never stopped or intervened in the constant helmet to helmet contact."

Shortly thereafter, the minor began experiencing severe headaches, and two days later was diagnosed with a concussion.

In their complaint, the plaintiffs took the novel approach of alleging that the "defendants failed to enact … proper and adequate policies … relating to the prevention of head injuries resulting from athletic activities. This deliberate indifference to the health, safety and welfare of student athletes in failing to educate said student athletes on the causes, symptoms, and dangers of traumatic head injuries was the common policy and custom of the defendants."

The Magistrate Judge's Ruling

It was significant that the couple did not claim the coaches knowingly forced their son into danger involving a known victim, according to the magistrate judge. Instead, their suit focused on "the overall danger of the sport and the coaches continuously urging players to meet aggression with aggression.

"Notably, Yarbrough does not complain that the coaches knowingly forced him to continue contact drills after he suffered a concussion," the magistrate wrote.

"The present lawsuit is, in essence, a condemnation of the football culture which pervades much of society in this part of the country," Edison wrote. "Boiled down, Yarbrough contends that the game of football, with its constant physical contact, aggression and violence, is an inherently dangerous sport. Allowing high school football players to repeatedly hit each other, Yarbrough maintains, puts these youngsters in harm's way."

The plaintiffs appealed.

In its ruling, the appeals court noted that the "student's headaches started after practice concluded, and days after he was initially injured. Once school officials knew that student was injured, they immediately instructed him to avoid football until he could consult a doctor.

"Student thus failed to plead facts showing that the defendants consciously disregarded an immediate threat to his safety. Without such allegations, student's claim could not succeed even if the state-created danger theory was embraced."

The court elaborated on the theory.

"To prove a state-created danger, Yarbrough would have to show that the defendants used their authority to place him in immediate danger and did so with 'deliberate indifference' to his plight. See **Doe, 675 F.3d at 865***; see also* **Lester v. City of College Station, 103 F. App'x 814, 815 (5th Cir. 2004)** *('[L]iability exists only if the state actor is aware of an immediate danger facing a known victim.'). Football is dangerous. But football does not present such an immediate or specific danger to the players that schools and coaches can be held liable for any injuries that result. Indeed, courts have frequently rejected civil-rights claims based on football injuries—some of which involved more glaring and unreasonable dangers than those at bar. See e.g.,* **Davis v. Carter, 555 F.3d 979, 984 (11th Cir. 2009)** *(finding no liability for the death of a player who was refused water during a strenuous football practice);* **Myers v. Troup Indep. Sch. Dist., 895 F. Supp. 127, 130 (E.D. Tex. 1995)** *(same for a player who suffered nerve and muscle damage after he was ordered back onto the field moments after being knocked unconscious); see also* **Lesher v. Zimmerman, 822 F. App'x 116, 118 (3d Cir. 2020)** *(finding no liability when softball practice left plaintiff with a fractured jaw and four lost teeth).*

"Even if Yarbrough could show that football is a qualifying danger, his claim would still fail because the defendants did not act with deliberate indifference by allowing Yarbrough to participate. See **Doe, 675 F.3d at 865***. 'To act with deliberate indifference, a state actor must know of and disregard an excessive risk to the victim's health or safety.'* **McClendon v. City of Columbia, 305 F.3d 314, 326 n.8 (5th Cir. 2002)** *(cleaned up). Yarbrough does not allege that his coaches knew he was concussed and forced him to play anyway. Nor does he allege that he suffered any obvious injury during football practice, which should have led coaches to take him off the field. Rather, Yarbrough's headaches started after practice concluded, and days after he was initially injured. And, once school*

officials knew that Yarbrough was injured, they immediately instructed him to avoid football until he could consult a doctor. Yarbrough has thus failed to plead facts showing that the defendants consciously disregarded an immediate threat to his safety. Without such allegations, Yarbrough's claim could not succeed even if we were to embrace the state-created danger theory.

"There is growing debate in this country about the dangers of football. The problem of concussions has reached the court system via tort suits. See, e.g., **In re: NFL Players' Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016)**. *But we do not see a role for the Constitution in the weighing of risks and benefits that participants in America's most popular sport must make."*

Yarbrough v. Santa Fe Independent School District et al.; 5th Circuit; No. 21-40519; 3/25/22

Attorneys or Record: For Chase Yarbrough, Plaintiff–Appellant: Seth Kretzer, Law Office of Seth Kretzer, Houston, TX; Lewis M. Chandler, Chandler Law Firm, L.L.P., Houston, TX; Sherry Scott Chandler, Houston, TX; James Alfred Southerland, Southerland Law Firm, P.C., Houston, TX.

For Sante Fe Independent School District, Doctor Leigh Wall, Mark Kanipes, Richard Davis, Jess Golightly, Matthew Bentley, Christopher Cavness, Raymond Buse, Marie Griffin, Taylor Wulf, Defendant–Appellees: Jonathan Griffin Brush, Amy Dawn Demmler, Clay Thomas Grover, Esq., Rogers, Morris & Grover, L.L.P., Houston, TX.

For Texas Association of School Boards Legal Assistance Fund, Amicus Curiae: Thomas Phillip Brandt, Laura Dahl O'Leary, Francisco J. Valenzuela, Fanning Harper Martinson Brandt & Kutchin, P.C., Dallas, TX.

Return to Table of Contents

Articles

Avoiding Liability in Sports-Related Sweepstakes and Contests

By Stephen J. Cosentino, CIPP, and Abigail E. Flores

With the increasing popularity of online sweepstakes, many marketing companies promote sweepstakes and online contests as an attractive way to gain customers. Sports-related organizations and teams increasingly use these promotions, attracting people to the game within the game. Sweepstakes are not without risk, however. Even with fifty states and the Federal government enforcing sweepstakes law violations, not to mention consumer litigation, the sheer volume of sweepstakes and contests being promoted online means a lot of non-compliance under the radar. Many companies will adopt rules from a current promotion without considering the potential liability and regulatory risks. Taking the position that X company is running a particular promotion, so it must be ok, is a recipe for potential regulatory fines, negative publicity, and even costly class action litigation claims.

Sweepstakes are regulated by state illegal lottery laws that typically have criminal and civil penalties. Any U.S. sweepstakes conducted online must comply with all fifty state illegal lottery laws unless participants from particular states are excluded. An illegal lottery generally consists of three elements: (1) prize, (2) chance, and (3) consideration. Because there is always a prize, the sponsor must remove either the element of chance or consideration to make a promotion legal.

E-Sports and traditional sports competitions can be structured as true skill contests. These competitions do not involve an element of chance unless they include aspects of the game that the player does not control, such as a random tie-breaker mechanism. Chance is removed by making the promotion a true skill contest. Consideration is removed by including an alternative method of entry (AMOE). This often takes the form of a mail-in entry, typically on a 3X5 card, which has been used for years. In 2022, many people don't have stamps, let alone 3X5 index cards, so your promotion's possibility of AMOE abuse is relatively slim. However, there is a risk that a regulator could find this method unreasonable, given the declining use of snail mail.

Despite the type of promotion or the AMOE, promoters also need to avoid false advertising, misrepresentations, and deceptive trade practice claims. In Inc., Coinbase recently learned this lesson the hard way with its global $1.2 Dogecoin sweepstakes after participants

filed a class-action lawsuit. Coinbase buried the AMOE in the official rules and used several marketing pieces that led individuals to believe that trading Dogecoins was the only way to enter. The court denied Coinbase's motion to dismiss claims for false advertising or misrepresentations and found the plaintiffs stated a claim that the sweepstakes advertising materials were likely to deceive a reasonable consumer.

In general, sweepstakes laws and deceptive trade practice laws require the following information to be included in the terms and conditions:

- A statement that No Purchase is Necessary and that a purchase will not increase your chances of winning. The phrase "Many will enter, few will win" is also helpful.
- Eligibility requirements – any age, geographic or other restrictions.
- Entry Instructions – specific instructions on how to enter, including AMOE.
- Odds of winning – typically expressed as X winners divided by the total entrants; however, some statutes require an estimate of the odds.
- Important dates and deadlines – the start and end date for entry and the date the winner will be selected.
- Selection details – must indicate if using a third-party vendor to conduct the random drawing.
- Details of the prize – a description of the prize and the retail value.

In some situations, state law may have further requirements. For example, most states require that records be kept and that a winners list be made available. Florida and New York require that the sponsor post bond for the prize and register the promotion with the state. Also, promoters should prepare short, abbreviated rules to use in advertising copy that include the basic material elements of the sweepstakes and clearly state that no purchase is necessary and that there is an AMOE. Promoters must also comply with the "equal footing" rule, meaning that participants using the AMOE must have the same chance to win as those who pay an entry fee or purchase a product. To be safe, promotors should limit any actions required by AMOE entrants to receive the prize. States also have restrictions on using specific phrases, such as "You Are a Winner" or "Enter to Win."

If conducting a Sweepstakes through social media, the sponsor will need to comply with the rules of the particular platform it chooses to use, and the endorsement guidelines from the FTC may require a participant to disclose that the post is related to a promotion. In the terms and conditions of the sweepstakes, a sponsor should release the social media platform from liability and state that the platform is not sponsoring, endorsing, or affiliated with the promotion. Specific platforms have rules on which entry methods are permitted, such as commenting on a post or following a particular account.

While there are many potential pitfalls in conducting sweepstakes, these promotions will continue to be a valuable marketing avenue for companies, including those in e-sports and online gaming. Companies should have their rules and marketing materials reviewed by experienced counsel and keep current with new developments in this ever-evolving field.

Stephen J. Cosentino, CIPP is a partner in the firm's Kansas City office. He may be reached at steve.cosentino@stinson.com.

Abigail E. Flores is an associate in the firm's St. Louis office. She may be reached at abigail.flores@stinson.com.

Return to Table of Contents

Use of School Colors Poses yet Another Potential Legal Issue on NIL Landscape

By Steve McKelvey, J.D. and Anita Moorman, J.D.

There has been an avalanche of endorsement deals for college athletes since NCAA bylaws restricting promotional activities were relaxed in June 2021. Almost 30 states now have enacted specific legislation preventing educational institutions and amateur athletic organizations from enforcing rules that limit athletes' ability to use their name, image, and likeness

(NIL).[6] In addition, now most universities have adopted institutional NIL policies describing how NIL activities should be conducted by their athletes. Some legislation and NIL policies expressly permit athletes to use institutional intellectual property (school IP) with written permission or through existing licensing partners; while others expressly prohibit any use of school IP by athletes in their NIL activities.

As athletes enter into endorsement agreements with companies (NIL deals), they may be featured in advertising or engage as a brand influencer through social media. In so doing, they must carefully navigate the school NIL policy and the use of school IP. Even if they do not use official school IP, how they represent their affiliation with their respective universities can still create challenges. One way in which their affiliation may be recognized or acknowledged is from the apparel they wear in their advertising and social media posts.

NIL Deals and University Intellectual Property

While in one of the earliest national NIL deals, Dr. Pepper saw it advantageous or necessary to feature Clemson QB D.J. Uiagalelei in a generic "Clemson" **orange football jersey**[7], other companies and brands may find that there is a genuine appeal to aligning with student-athletes without incorporating any school colors or **uniforms** in their advertisements. However, a large part of an NIL deal is the opportunity for a brand to **align with both the athlete and the school**.

However, if use of school IP is not permitted, or if the company cannot afford an official sponsorship or licensing arrangement, or if a competitor has exclusivity for a sponsorship category, the company can choose to feature the athlete in what we affectionately refer to as "pajama-wear" – generic uniforms void of school IP but showing the school color or color combination. One such example is Chris Rodriguez, Jr., University of Kentucky football player, who was featured on a billboard and festival signage in Lexington, Kentucky promoting Bluegrass Roofing & **Consulting.** Rodriguez is featured fully clad in a blue and white football uniform (including the checkerboard design on the shoulder) and helmet but without any official marks or logos of the University of Kentucky.[8]

In scenarios such as this, might a university have a potential cause of action against an advertiser for use of their university colors or uniform color schemes? For color to meet the legal requirements of a trademark, it must possess those basic legal requirements of distinctiveness, source identification, and non-functionality. The color or color combination must have acquired what is referred to as "secondary meaning": a mental association in the mind of the consumer that links the color(s) with a single source.[9] Think the iconic **Tiffany blue** for Tiffany & Co. and the combination of green-and-yellow on John Deere **tractors**.

University Color Schemes and Trademark Infringement

The Fifth Circuit's decision in 2008 in *Board of Supervisors of LSU, et. al. v. Smack Apparel Company*[10] provides some guidance for a Lanham Act claim for trademark infringement based on uniform color schemes. In *Smack*, LSU, Oklahoma, Ohio State, and USC sued an apparel company for using the schools' colors on t-shirts. The universities asserted that their color combinations functioned as source identifiers, were distinctive colors used to represent their universities, and thus had acquired the requisite secondary meaning to warrant trademark protection. The Fifth Circuit affirmed the trial court's finding that the universities had established secondary meaning in their color schemes and designs. One important fact to note though is that, in addition to using the color combinations, Smack Apparel also included references to the universities' athletic achievements that further reinforced the connection between the t-shirt and the

6 Tracker: Name, image and likeness legislation by state. (2022, March 10). Business of College Sports. https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/

7 South Carolina's NIL state law was thought to prohibit athletes from using institutional trademarks, but Clemson's NIL policy at the time expressly permitted athletes to wear clothing in advertising featuring Clemson's purple and orange colors so long as school IP was not used. Clemson University. (2021). Clemson compliance: Student-athlete education – eligibility edition. **https://clemsontigers.com/nilinfo/**

8 Bluegrass Roofing & Consulting. (2021a, July 27). **https://www.facebook.com/bluegrassroofingandconsulting/photos/170978881765605**. UK's NIL policy only permits student athletes to use the university's trademark consistent with its licensing program.

9 Wal-Mart Stores, Inc. v. Samara Bros. Inc., 529 U.S. 205 (2000).

10 550 F.3d 465 (5th Cir. 2008).

respective universities (i.e.,"Bourbon Street or Bust" referring to a team's upcoming appearance in the Sugar Bowl).

Having established that the schools had protectable trademarks in their color schemes, the next step was to assess whether Smack's unauthorized usage violated § 1125 of the Lanham Act. Section 1125 prohibits false or misleading representations that are "**likely to cause confusion"** as to the origin, sponsorship, or approval of the goods, services or commercial activity.[11]

In assessing "likely to cause confusion," the court applied the so-called "digits of confusion" which include 1) the type of mark, 2) similarity of the marks, 3) similarity of the products or services, 4) the identity of the retail outlets and purchasers, 5) the identity of the advertising media used, 6) the defendant's intent, 7) evidence of actual confusion and 8) sophistication of the buyer.[12] In this particular case, virtually every factor weighed in favor of the plaintiff universities, particularly given that both plaintiffs and defendants were selling the same product (t-shirts) in the same retail environments to the same consumers. The court also placed strong weight on the intent of the defendant (digit 6); in fact, the defendant admitted as much that they "used the school colors and 'other indicia' with the intent of identifying the university plaintiffs as the subject of the message expressed in the shirt design."[13] On the heels of the universities' victory in *Smack Apparel* at the trial court level, this precedential case was followed by a similar decision in *Texas Tech University v. Spiegelberg*[14] (use of red and black color scheme on T-shirts found to cause consumer confusion).

Applying *Smack* to NIL deals

Turning now to the unauthorized use of university color schemes in NIL advertising campaigns, we now ask to what extent *Smack Apparel* might apply and support a university's cause of action?

The initial step in this inquiry requires the university to establish that its color scheme has in fact acquired secondary meaning such that it has a valid trademark to protect in the first place. While *Smack Apparel* and *Spiegelberg* provide precedent, it is by no means a slam dunk. There has been a myriad of non-sport cases, as well as one college case in particular (*University of Kansas and Kansas Athletics v. Sinks*)[15] refusing to acknowledge that a color or color scheme has acquired secondary meaning. Similarly, the Trademark Trial and Appeal Board (TTAB) determined that the University of Alabama's houndstooth pattern lacked acquired distinctiveness to function as a source or sponsorship indicator.[16] Even though this decision was later vacated due to a settlement between the parties, the TTAB analysis suggests universities may have challenges to establish secondary meaning in their color schemes or uniform designs/patterns.

Let's assume however, for purposes of this discussion, that the university has successfully established secondary meaning in its color scheme and hence brings a cause of action against an advertiser using an athlete adorned in its color scheme? The next hurdle would be to establish a "likelihood of confusion" amongst the relevant consumers. This, too, is no chip shot! As noted in *Smack Apparel*, likelihood of confusion "is synonymous with a probability of confusion, which is more than a mere possibility of confusion."[17]

The type and similarity of the mark (digits 1 and 2) are typically going to squarely favor the university. However, the first major hurdle arises related to the nature of the product, method of advertising, and distribution channels (digits 3-5). Smack involved a tangible product (t-shirts) offered for sale through retail outlets to local sport fans. Hence, in seeking to apply digits

11 Lanham Act, 25 U.S.C. § 1125

12 Westchester Media v. PRL USA Holdings, Inc., 214 F. 3d 658, 663 (5th Cir. 2000)

13 Smack Apparel, at 661. See also, Univ. of Ga. Athletic Ass'n v. Laite, 756 F.2d 1535 (11th Cir. 1985), on extra weight afforded defendant intent: "[T]here can be no doubt that Laite hoped to sell 'Battlin Bulldog Beer' not because the beer tastes great, but because the cans would catch the attention of University of Georgia football fans." Id. at 1545.

14 Texas Tech University v. Spiegelberg, 461 F. Supp. 2d 510 (N.D. Tex. 2006).

15 2008 U.S. Dist. LEXIS 23765 (D. Kan 2008), jury verdict, Case No. 06-2341-JAR (D. Kan. 2008) (in addressing the issue of protection of Kansas's color scheme as used the t-shirts, the court held that "…the distinctiveness acquired by plaintiff's for its mark does not dictate a finding of liability against defendants for every blue and red shirt it produces with a possible reference to KU on it.").

16 Board of Trustees of the University of Alabama v. Pitts, 2013 TTAB LEXIS 370 (TTAB 2013). https://ttabvue.uspto.gov/ttabvue/ttabvue-91187103-OPP-71.pdf

17 Smack Apparel at 478, citing Westchester Media v. PRL USA Holdings, Inc.,214 F.3d 658, 663-64 (5th Cir. 2000).

3-5 in that case, there was strong overlap between the university's product, advertising, and distribution and that of Smack. The university was selling t-shirts in the same retail locations to the same consumers, and hence it is also much easier to grasp the economic harm or loss here for the university.

The NIL activities in scenarios such as Bluegrass Roofing is not as clean a comparison and the similarities not as stark when you consider the use of a color scheme in a billboard advertisement for roofing services. Bluegrass is by and large marketing a different service, in a different place, to a different consumer. The much closer analogy to *Smack Apparel* would be if a company were providing educational services or sport entertainment services and thus creating more likelihood of confusion with what the University of Kentucky does. And even more dubious example would be a company that is providing products or services similar to an official university partners' products or services, but dissimilar to any products or services of the university.

Another important factor in *Smack Apparel* was that the court reasoned that it was not only the color scheme that created the likelihood of confusion, but it was the color scheme *in concert with the other messaging* that solidified the association between the products and the universities. One argument could be that the mere identification or recognition of the athlete as an athlete at a particular university in connection with that athlete's NIL activities is sufficient "other indicia of the university" to trigger a potential trademark infringement claim if the athlete incorporates the university colors and color schemes in their promotional activities. Conversely, one could argue that so long as the athlete was not using official school IP or promoting similar commercial products as the university produces, such as, t-shirts, apparel, souvenirs, caps, etc. – the mere fact that the athlete's association with the university is recognizable would not satisfy the likelihood of confusion standard for proving trademark infringement.

Finally, the court in *Smack Apparel* placed a heavy weight on the defendant's intent to cause consumer confusion. This construct has always been at the core of traditional "ambush marketing" as well (an intentional effort to confuse consumers as to who is the property's official sponsor), but it is also difficult to establish this digit of confusion (absent an admission from the defendant).

Conclusion

In sum, it will be an uphill battle from a legal standpoint for universities bringing trademark infringement claims based on the unauthorized use of a university's color scheme in athlete NIL advertising. The burden is on the university to establish acquired distinctiveness for their color schemes and to prevail on the digits of confusion analysis. Additionally, the use of color schemes in advertising (e.g. a social media post) is far different than on tangible products (e.g. t-shirts/jerseys). Even though the legal path may be difficult, the university is not without leverage. Obviously most athletes would not want to risk the university's ire for partnering with an advertiser who engages in potentially questionable or disruptive marketing practices. However, preparing and litigating these types of cases (often requiring robust consumer surveys) is both time-consuming and costly. Most universities are reticent so sue local businesses … especially when that lawsuit would implicate that university's own student-athlete. Conversely, at a time when universities are actively engaged in lucrative licensing programs dependent upon the value of their intellectual property, and the potential importance of asserting trademark protection for color and color schemes to that overall value proposition, it is not a good time to be acquiescing when infringing activities occur. We suspect that, as the NIL marketplace continues to expand, there will arise "the perfect storm" scenario where we'll get to see *Smack Apparel* put to use![18]

Professor Steve McKelvey, J.D., is Department Chair of the Mark H. McCormack Department of Sport Management in the Isenberg School of Management at the University of Massachusetts Amherst. Anita Moorman, J.D. is a Professor in the Sport Administration Program at the University of Louisville. This article has been adapted from a presentation made at the 36th Annual Sport and Recreation Law Association (SRLA) Conference in Atlanta last month.

Return to Table of Contents

18 See, generally, John Grady and Steve McKelvey. Trademark Protection of School Colors: Smack Apparel and Sink decisions trigger color-ful legal debate for the collegiate licensing industry. Journal of Legal Aspects of Sport, 18(1), 207-242.

Former Professional Athlete, Now Financial Advisor, Shares Insights About Working with Athletes and Executives in the Sports Industry

As a founding partner at JL Strategic Wealth, Registered Investment Advisor Jacob Turner brings a unique perspective to the sports industry. After all, he was top 10 draft pick in Major League Baseball, who went on to play the sport professionally.

We recently sought out Turner to get his insights about being an advisor and what he has learned about working within the professional sports industry.

Question: What led you to become a financial advisor to athletes and other individuals in the sports industry?

Answer: The two main drivers that led me to become an advisor to athletes were my own experiences and my desire to help educate athletes financially in their careers. In 2009, I went from being a high school student to a top 10 draft pick in a matter of a few days. This experience left me with a set of financial challenges I had never experienced. I was trying to determine how to qualify people for my advisory team without having any idea what questions to ask. Many of these experiences left me with more questions than answers. As a professional athlete, you are hyper-focused on your career on the field but understand the decisions you make off the field have effects far past your playing days. As my career progressed, I found a passion for personal finance and investing. I knew when my playing career was over that I wanted to help educate the next generation of athletes to be good stewards of the money they earn in their careers.

Q: How does being a former athlete help you?

A: Being a former athlete helps tremendously in my work today because it allows me to truly understand what our clients are walking through. My career was certainly not a straight line of success and many of those experiences helped to shape the advice I give today. I remember going from having a few hundred dollars in my bank account to being an instant millionaire overnight. Those experiences are hard to replicate or understand if you haven't walked through them. I also experienced the ups and downs of professional sports from making my MLB debut at the age of 20 to being back and forth between AAA and Big-League Club by the age of 25. These experiences help me to educate our clients about the shelf life of a professional athlete.

Q: What is the biggest challenge of working with athletes?

A: The biggest challenge and the biggest joy for me are that athletes are often a blank slate when it comes to personal finance. For most top athletes, you are coming into significant wealth between the age of 18 to 22 years old. They do not have the advantage of having a lifetime of financial experience that most corporate professionals do. Peak earning windows for most professionals comes from age 50 to 60 after decades of financial lessons. The financial arc for athletes is so accelerated that it is paramount that we work to educate our clients about money. I have found that this focus on education for athletes creates better engagement which ultimately leads to better results. We have the distinct opportunity and responsibility to be a trusted partner for our clients both during and after their careers.

Q: What do you like the most about this niche?

A: The part that I enjoy the most is the impact that I can make on our clients. Having had so many unique experiences in my career it is rare for a client to be walking through something I did not. Ultimately, becoming a trusted partner for our clients and families is incredibly rewarding. That impact extends far past just financial decisions. It allows us to be a small part of their journey and help support them in the best way possible to maximize their talents.

Q: What makes an athlete's finances unique?

A: Athletes are unique in several ways. The most obvious is the earning window is condensed into just a few years. This level of acceleration requires that there be an immediate focus on lifestyle creep. The question that I always ask our athletes is, "What does it cost to be you?" If their career were to end tomorrow could they continue to support and live the lifestyle they are living? Two other elements that stand out for us are tax planning and estate planning. The single largest expense for an athlete will be their tax bill. We want to ensure that we are being proactive in maximizing their on-field and off-field income. Athletes are unique in that they can have years of significant income followed

by years of little income. These career structures create an opportunity for us to work in coordination with their CPA to implement tax strategies specific to them. We are always thinking about our tax planning for athletes in terms of minimizing taxes over their lifetime. The second element that stands out to me is estate planning. Athletes are young and often are not thinking about estate planning, but we see this as a crucial part of their financial picture. It allows them to better protect their assets and dictate how their wishes are carried out. In addition, many top athletes have an opportunity to earn significant income often creating an estate tax liability. Tax and estate laws are always changing, and our clients rely on us to ensure coordination and planning with the other members of their team. These tax and estate planning strategies are just two ways that we are serving as our client's strategic partners with a focus on their entire financial picture.

Q: Is there an investment philosophy you embrace?

A: Our investment philosophy is based on three pillars: each client is unique, costs matter, and follow the evidence. The first pillar is the foundation of our philosophy. Every client has been shaped by the financial circumstances and experiences that have happened in their lives. It is our job to understand these elements as it influences their view of money. The second pillar is focused on data from leading academic research that shows that cost is a main driver of returns. We break these costs into two distinct categories. The direct cost of the investment strategy and the indirect cost of the structure. We seek to gain an advantage through implementing low-cost, tax-efficient investments into client portfolios. The final pillar is that we believe in being truth tellers and always following the evidence. The foundation of our investment portfolios is rooted in Nobel prize winning research. Our focus is on building long term investment strategies that provide the highest odds of success.

Q: Who are your typical clients within the sports industry?

A: Our firm's focus is solely on clients that are navigating sudden wealth. With this acceleration in their financial arc, it leaves quite a bit of complexity that needs to be navigated in their financial picture. Our clients appreciate that we step in as their strategic partner to help build and coordinate their team of professionals. We work with athletes from start to finish. Our athlete clients range from players just starting their professional careers to clients that are All-Stars. This gives us a wide range of experiences to draw on for our clients ultimately creating a better client experience. We believe that the wealth management industry has for a long time provided far too general advice and having a specific niche focus provides more actionable advice for clients.

Return to Table of Contents

NIL Opportunities and the Impact on Student-Athletes Entering the NCAA's 'Transfer Portal'

By Robert J. Romano, JD, LLM, St. John's University

In October 2018, the NCAA's Division I Council enacted a 'notification-of-transfer' rule which has come to be known as the 'transfer portal'. This 'transfer portal' allows student-athletes, without the permission of either their current coach or athletic department, to transfer one time during their college athletic career from one four-year NCAA member institution to another.[19] All a student-athlete needs to do under the portal system is inform his or her current school of an intent to transfer, which then requires that institution to enter the student-athlete's name into a national transfer database within two business days.[20] Once entered, coaches from other NCAA colleges or universities are free to contact that student-athlete without fear of violating any NCAA rules or regulations.[21] The 'transfer portal' system also allows for transferring student-athletes to compete immediately, without the need to sit out a year in residence as required under the old rule, provided the athlete is academically eligible.[22]

19 This one-time transfer exception doesn't apply to baseball, men's or women's basketball, football or men's ice hockey. Student-athletes in these sports must file for a waiver to be able to compete without sitting out a season

20 https://www.ncaa.org/news/2018/6/13/new-transfer-rule-eliminates-permission-to-contact-process.aspx

21 https://www.ncaa.org/news/2018/6/13/new-transfer-rule-eliminates-permission-to-contact-process.aspx

22 Until the rule adoption in 2018, student- athletes had to be granted permission from their current school to transfer and then they were

Three years after the 'transfer portal' system went into effect, in July 2021, the NCAA, as various state laws were scheduled to go into effect, implemented rule changes that would now allow student-athletes to monetize their Name, Image and Likeness (NIL) without the fear of losing either their scholarship or athletic eligibility. Although the NCAA did not officially adopt its own rule allowing student-athletes to monetize their NIL, what it did was approve a policy which states that "if a student-athlete elects to engage in NIL activity that is consistent with and protected by a valid and enforceable law of the state in which the institution at which such individual enrolls is located, the individual's eligibility for intercollegiate athletics will not be impacted by application of Bylaw 12."[23]

When the transfer rules were amended by the NCAA in 2018, student-athletes would enter the 'transfer portal' for a number of different reasons: their coach took a position at another institution, thinking they could get additional playing time to showcase their talents and skills elsewhere, a bigger program, a smaller program, or simply because a change of scenery was needed.[24] With the modification to the NIL rules, however, there is speculation that colleges and universities with the most attractive or advantageous NIL policies, provided to them either through their state's law or their own initiated guidelines, are using such as a recruiting tactic to lure student-athletes utilizing the 'transfer portal' system to their schools.

According to Rick Allen, co-founder of *InformedAthlete.com*[25], such speculation is true . . . to a limited extent. When interviewed on the subject, Mr. Allen stated that, "In most college sport, the non-revenue sports, I don't see a direct connection when it comes to transfer athletes choosing a school based on its NIL rules. I do, however, see a connection when we talk about the revenue producing sports of football and men's basketball." And even though the NCAA's policy states that "NIL opportunities may not be used as a recruiting inducement . . . ,"[26] this belief that transfer students will be courted by programs with promises of profitable off-the-field opportunities was affirmed by Mike Hughes of Journal Enterprise when he was quoted saying, "What we are going to see happen is that bigger colleges with winning histories are going to use NIL to their advantage." But favorable NIL policies or not, the question remains, how significant are these NIL agreements for student-athletes, whether a transfer student or not?

Current data, though limited, suggest that the impact is nominal, with most student-athletes making some, but not a significant amount of money from a NIL arrangement with a brand or company. For instance, one athlete marketing and NIL platform reported that from July 1, through December 31, 2021, NIL deals passing through its platform earned a student-athlete an average (not median) of $1,036.00.[27] A second marketing and NIL platform called *INFLCR* reported the same average of $1,306.00, but, interestingly, a median dollar amount of just $51.00.[28] In terms of which sports and schools are benefiting the most, another platform stated that approximately sixty-four percent of the NIL deals involve football, followed by men's basketball and women's volleyball, with a large percentage of the endorsement money going to athletes playing for colleges or universities within the Big Ten, Big 12, ACC, and SEC.29

Although there is no significant data to date to determine whether or not favorable NIL rules influence a transfer student's decision-making process, the available data does indicate that NIL deals, for the most part, have little impact on a student-athlete's overall finances. That being said, all indicators do suggest that top-tiered colleges and universities, in spite of NCAA rules to the contrary, will continue to use the lure of

required sit out a year as a penalty for transferring. If a transfer was denied a by the coach or athletic department, a long process would follow.

23 NCAA Interim NIL Policy.

24 https://georgiastatesignal.com/nil-deals-shaping-the-future-of-recruiting-and-the-transfer-portal/

25 Informed Athlete is a consulting service that helps guide student-athletes through the transfer process. Additional information can be found at: https://informedathlete.com/

26 https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf

27 *NIL Industry Insights*, Opendorse (Dec. 31, 2021), **https://opendorse.com/nil-insights/**.

28 Alan Blinder, *The Smaller, Everyday Deals for College Athletes Under New Rules*, New York Times (Dec. 9, 2021), **https://www.nytimes.com/2021/12/09/sports/ncaafootball/college-athletes-nil-deals.html**.

29 Id.

potentially lucrative NIL deals as an enticement to draw transfer athletes to their institution.

Return to Table of Contents

Lewis Brisbois Strengthens National Sports Law Practice with Hire of Clifton; Jackson Lewis Names Paul Kelly as Chair of Practice Group in Clifton's Absence

Lewis Brisbois has hired seasoned sports law attorney Gregg E. Clifton as a partner in the firm's national Entertainment, Media & Sports and Labor & Employment Practices. Clifton joins from Jackson Lewis, where he served as the co-chair of its Collegiate and Professional Sports Industry Practice Group for the past 11 years. Clifton is well-known throughout the sports industry.

Clifton has deep experience in the collegiate and professional sports world, advising numerous professional franchises on a range of labor and employment issues, including Title III ADA regulatory compliance, wage and hour, collective bargaining negotiations, representation cases, arbitrations, and matters before the National Labor Relations Board (NLRB) and various state employment agencies. Notably, Clifton serves as lead counsel for several Major League Baseball teams in salary arbitration matters and has represented numerous collegiate clients from the National Collegiate Athletic Association (NCAA) and National Association of Intercollegiate Athletics (NAIA) on rules compliance and investigatory matters, and in disciplinary hearings. He has also handled Title IX investigations and compliance issues for NCAA and NAIA member institutions.

Clifton has also worked extensively in agent regulation and enforcement in both professional and college sports and regularly provides counsel on issues relating to NCAA and NAIA amateurism issues and athlete eligibility questions. He has also served as an expert witness in matters involving sports agents' work and responsibilities, as well as athlete compensation issues.

In addition, Clifton is a recognized leader on emerging trends in sports law, such as the current efforts by the NLRB to reclassify student-athletes as employees of their universities and the complex legal issues arising from the status of student-athlete Name, Image, and Likeness (NIL) rights and the immigration issues involving international athletes and restrictions on their NIL rights. He frequently serves as an expert speaker to law schools – including Harvard University, Boston College, Hofstra University, New York Law School, and Arizona State University – and bar associations on a wide variety of sports law issues, and is often called upon by national news media as a source for his commentary and opinion on legal issues in sports. Clifton currently serves on the Board of Directors for the Sports Lawyers Association, an international non-profit organization dedicated to the understanding, advancement, and ethical practice of sports law.

Clifton received his bachelor's degree from Harvard University, cum laude, and his law degree from the Maurice A. Deane School of Law at Hofstra University. He is admitted to practice in New Jersey, New York, and Arizona.

"Gregg's background serving in a leadership role in his former firm's sports practice will complement our continued growth in the entertainment and sports law areas, said Jonathan D. Goins, Vice-Chair of the firm's Entertainment, Media & Sports Practice,

Rising Star on Jackson Lewis' NCAA Compliance Team Also Joins Lewis Brisbois

A few days later, Lewis Brisbois announced that another former Jackson Lewis sports law attorney, John Long, would be joining the firm as a partner in the firm's Houston office.

Lewis Brisbois noted that the addition of Clifton and Long creates "a powerhouse team of sports law practitioners."

Long has extensive experience and success in higher education matters involving collegiate athletics, representing dozens of universities in NCAA compliance and infractions matters. He is considered the most accomplished NCAA infractions appeals attorney in the country, and brings to the firm over 11 years of experience in the field.

His work representing Georgia Tech's appeals on NCAA sanctions has earned industry-wide praise, and likely solidified his promotion to partner.

"John's experience at all levels of the NCAA infractions process will greatly benefit our practice. I look forward to working with him as we continue to handle increasingly complex matters involving collegiate athletics, including issues involving student-athlete name, image, and likeness," said Goines

Long's prior experience exclusively focused on counseling institutions, athletics conferences, affiliated corporations and individuals in collegiate sports law matters, including those involving NCAA infractions, NCAA compliance and Title IX. He has conducted investigations, provided advice and counsel, and appeared before various NCAA committees on behalf of his clients.

Long has vast experience representing institutions in cases before the NCAA Committee on Infractions and the Infractions Appeals Committee. Additionally, he is deeply experienced in providing advice and counsel to institutions and affiliates regarding legislative relief waivers, student-athlete reinstatement, the NCAA Academic Performance Program, Title IX Gender Equity concerns and in conducting internal investigations and reviews.

Long received his bachelor's degree from The University of Texas at Austin, and his law degree from Marquette University Law School, where he earned the National Sports Law Institute's Certificate of Sports Law.

He has been published in numerous sports law publications, including the Journal of NCAA Compliance and Sports Litigation Alert.

Meanwhile, at Jackson Lewis, it was confirmed earlier this week that Paul Kelly, who shared the Chair position of the sports law group with Clifton, would be the sole Chair of the group going forward.

Return to Table of Contents

Looking Back at Cannabis for the Way Forward in Name, Image and Likeness

By Jonathan Wynne

The 2021 US Supreme Court decision in *NCAA v. Alston* cleared the last major hurdle preventing college athletes from profiting off of their name, image and likeness (NIL) while still in school. Much has been made of the infant and rapidly changing business and legal landscape at the start of this new reality. Sparse rules and laws shape the path that numerous stakeholders now run, including college athletes, businesses looking for a slice of the pie, and the NCAA athletic bodies and schools trying to keep up.

However, the fledgling NIL industry is not without a roadmap during these early times. The cannabis industry in the US has evolved and grown in fits and starts over the roughly 25 years since California legalized medical cannabis. Massachusetts, having introduced medical cannabis in 2012 and recreational use in 2016, collected a reported $74.2 million in marijuana excise taxes halfway through the current fiscal year. Alcohol taxes during the same time totaled only $51.3 million.

Differing tax rates impact those swings today, but these tax revenue trends follow the impact that other state coffers have seen as legalization progresses through the country. The cannabis industry foothold is strong, despite federal prohibition of the product. NIL for its part is now permitted and enjoys the luxury of far fewer rules and regulations. That said, the early landscape is comparable to the wild west in which cannabis has resided for the last quarter century.

How We Arrived at Today

Arguments for and against collegiate athlete compensation and the spirit of 'amateurism' are as old as the NCAA itself. The ball that set today's landscape in motion was set rolling with the 2014 O'Bannon lawsuit against the NCAA. Former college basketball star and professional player Ed O'Bannon argued for a post-graduation scheme of student-athlete compensation for the NCAA's commercial use of their image. O'Bannon brought suit upon his surprise at seeing himself in a popular college basketball video game, over a decade after his collegiate career had ended. He had received no notice and no compensation for his appearance in the game.

The US District Court for the Northern District of California initially held that the NCAA's prohibition against players cashing in was an unreasonable restraint of trade that violated antitrust law. District Judge Claudia Wilken permitted schools to offer full cost-of-attendance expenses (including living expenses) that

were not included in NCAA scholarships at that time. Schools would also be permitted to put money in trust and make it available to student athletes upon leaving.

The 9th Circuit on appeal did away with the trust component, but affirmed crucial aspects of the *O'Bannon* decision. Namely, the Court found that the NCAA's compensation rules were in fact subject to antitrust laws, and were also deemed to be an unlawful restraint of trade under the three-step framework of the antitrust Rule of Reason.

The result maintained certain caps on student-athlete academic benefits for a brief time. On the heels of *O'Bannon*, the case line of *NCAA v. Alston* challenged the anti-competitive nature of the remaining caps.

After return trips to both Judge Wilkens' courtroom and the 9th Circuit, the US Supreme Court in *Alston* handed down a 9-0 decision that struck the remaining caps on antitrust grounds. The Summer of 2021 decision, coupled with the NCAA's subsequent (and almost immediate) interim policy to suspend amateurism rules related to NIL, opened the door for student-athletes to cash-in ahead of the Fall sports season.

And cash-in they did. In a spectacular flex of branding and marketing muscle, University of Alabama Quarterback Bryce Young generated over $800,000 in NIL endorsements during the first *month* after *Alston*. Young earned this money before he ever started a single game for Alabama. The investments proved prudent, as Young's on-field exploits led Alabama to an appearance in the National Championship game. Young was also awarded the Heisman Trophy for the sport's most outstanding player of the year. Some would argue that $800,000 turned out to be a bargain.

What is to come?

Most folks did not anticipate paydays approaching seven-figures in the first month of NIL. Predicting what the industry will look like, even a year from now, is largely a fool's errand because too many variables remain unsettled. That said, the wild west development of the cannabis industry can offer some insight on what to expect in the near- and longer-term.

This article will touch on the 'wait and see' concept, along with the stakeholder interest and lobbying potential in NIL. Additional discussions for another article include brand and market entry, a deeper dive on taxation, revised state and federal laws, potential employment rights of student-athletes, group licensing schemes, and even the odd NCAA enforcement action if that body starts to feel neglected. New issues will arise as the industry matures, but for now the foundations deserve attention.

Wait and See

Sports agencies dove in headfirst, securing collegiate clients as fast as they could and betting (correctly) that they could figure out how to activate marketing opportunities later. Major companies were not as fast to sign onto deals with these athletes, opting for an initial 'wait and see' approach. That approach may have been dictated by marketing budgets that were not prepared for the US Supreme Court to ostensibly open the market for business, and then for the NCAA to throw up its rule-making hands, all in the same month. As fiscal years turn over and this revenue stream takes shape, companies large and small are catching up.

Cannabis remains in a 'wait and see' atmosphere as far as larger companies are concerned. Questions of federal regulations and tax rates stand between potential innovations such as CBD soft drink offerings, branding partnerships, and whatever else companies can cook up. These businesses have had over two decades to tinker with their ideas, and the long approach may yet pay off as everyone slowly but surely follows the money.

Market and regulatory risk will be longer term drivers in NIL branding decision making. This was especially the case for cannabis as different states entered the market. Cannabis encountered a landscape where laws differed vastly from one state to the next, crowded under the umbrella of federal prohibition. For example, some states followed a limited license structure, allowing for a predetermined and typically small number of licenses to operate (Florida, Missouri, New Jersey). Others started with no limits at all (Oklahoma). California took a macro/micro approach where it legalized at the state level but permitted counties and cities to decide if and how cannabis would be permitted within their borders.

NIL faces similar uncertainty in light of the blanket decision by the NCAA to throw up the white flag and refrain from enforcing its amateurism rules. The

NCAA will never be accused of innovation in this field, and the body took the position that schools, states, and maybe one day the federal government would be responsible for creating the rules and enforcing them going forward.

For now, each school and each state set the rules, and everyone is waiting to see what will happen. This is cold comfort to large and small universities and colleges alike, none of which operate in a vacuum. Sports programs rise and fall, players and coaches move for greener pastures and the professional ranks, and universities occasionally pick up and move from one conference to the next, in search of the next multi-billion-dollar television deal. But with major money to be had in NIL, these larger stakeholders likely will not sit on the sidelines for long.

Stakeholder Influence and Future Lobbying

The battle for influence is just starting in NIL. Student-athletes sit in a unique and challenging position. On the one hand, profiting from name, image and likeness no longer comes with the specter of running afoul of rules and losing eligibility (and accompanying scholarships). However, students must still remain academically eligible, attend workouts and practices, and compete in actual games. Despite what any good civil litigator may tell you, there are only so many hours in the day.

Businesses and sport agencies must consequently decide into which 18-22-year-olds they will invest serious time and money, a risky venture no matter the industry. For every Bryce Young that succeeds, there are countless worthy individuals for whom things simply do not pan out. The athletic institutions (colleges and universities, coaches, conferences, and divisions) still have compliance rules to follow. They must navigate the influx of influence, with limited help from the outside world. All the while, millions upon millions of dollars are changing hands.

There is no dominant lobby representing the student-athletes involved in this discussion. Historic disadvantages dog this population in large part due to the transient nature of a college career, which generally ends after four years. Consequently, NIL, among other issues, easily falls into the realm of 'capable of repetition, yet evading review.' Danger lies in the possibility that other stakeholders may decide, rightly or not, that the value of NIL is too great for a proportionate balance in the hands of students in search of a shorter-term payday.

Ultimately, whoever makes the first move may come out on top. Student athletes will likely not enjoy a say. The early California cannabis industry is again instructive. California took a me-first approach on two fronts which gave it a stranglehold. First and more obvious, California said cannabis taxes would be high, and they are. In Los Angeles county the final sales tax today approaches 40%, a great number for state budgets, but harder for businesses and consumers.

California also maintained control. The state openly explained that it would heavily regulate the industry to intentionally cause market inefficiency. This would prevent the cannabis industry from generating the money needed to form the powerful types of lobbying groups that Americans are accustomed to seeing in billion-dollar, multi-national industries. To date, this approach has worked for California, as those lobbies have not materialized.

The NIL realm is one large unsettled power dynamic, flush with new money, new players, and the possibility of 50 different versions of state rules to contend with. In short, a vacuum to be filled, and time will tell who takes control.

Special and sincere thanks to an old and dear friend Erick Gustafson for sharing his vast knowledge and experience in the California and US cannabis industry.

This article initially appeared in the March / April 2022 issue of the Massachusetts Bar Association's Section Review.

Jonathan Wynne sits on the Young Lawyer Division Board of Directors at the Massachusetts Bar Association. He is an attorney and negotiator, breaking into the ever-changing world of sports and entertainment representation.

Return to Table of Contents

Female Athletes Add Unequal Treatment, Retaliation Claims to Title IX Sex Discrimination Class Action Against San Diego State University

Seventeen female varsity athletes, who sued San Diego State University (SDSU) for depriving women of equal athletic financial aid in February, have now charged the school with denying women athletes equal treatment and benefits, too — and retaliating against them for trying to make SDSU comply with Title IX.

Their Amended Complaint, filed in federal court in San Diego, seeks court orders requiring the school to treat its female and male student-athletes equally and prohibiting SDSU from retaliating against its female athletes in the future. It seeks damages from SDSU for retaliating against its women athletes. And it continues to seek over $1.2 million for the equal athletic financial aid the women athletes were deprived of in the last two years, the additional money they are illegally being denied this year, and a court order requiring SDSU to provide equal athletic financial aid in the future.

Title IX of the Education Amendments of 1972 prohibits all educational institutions that receive federal funds, including SDSU, from discriminating on the basis of sex. It requires schools to provide male and female student-athletes with equal athletic financial aid and equal treatment and benefits. And it prohibits all schools from retaliating against anyone for speaking out about or challenging sex discrimination at the school.

"SDSU has been cheating its female student-athletes out of hundreds of thousands of dollars in equal athletic financial aid each year," said Arthur H. Bryant of Bailey & Glasser, LLP, in Oakland, CA, lead counsel for the women. "It is giving its male student-athletes far better treatment and benefits than its female student-athletes. And now it has blatantly retaliated against its female student-athletes for standing up for their rights and trying to hold the school accountable. This is not the way SDSU should be marking Title IX's 50th anniversary."

The original SDSU Title IX lawsuit was filed on February 7, 2022, charging the school with depriving women of over half a million dollars annually in equal athletic financial aid. At that time, SDSU knew the women were preparing to file a claim to require SDSU to provide equal treatment and benefits going forward, unless SDSU agreed to do so. It also knew that such a claim could only be pursued by current female varsity student-athletes, that the only current athletes who had sued for equal athletic financial aid were five women on the women's track and field team, and that those women had sued on behalf of all of the past and current female student-athletes at the school.

On February 16, 2022, a previously-unscheduled Zoom meeting of the women's varsity track and field team was called on short notice to discuss the team's upcoming meet, held, and recorded. At the start of that meeting, SDSU made clear to the five women and over 40 of their teammates that it was disappointed with the team members who had filed the Title IX suit. That was blatantly illegal retaliation. It adversely affected the five women athletes and their ability to pursue their claims. It also had a chilling effect on the other women athletes, making them wary of pursuing their claims and helping the women who had filed suit prove their claims on behalf of all women athletes. When the women who had sued asked SDSU to take specific steps to minimize the harm caused by this illegal retaliation, SDSU refused.

"SDSU needs to take Title IX seriously and give its women athletes the equal athletic financial aid and treatment they deserve," said women's track and field team member Kailin Heri. "We're being taught to think and stand up for ourselves, but, when we do so, SDSU retaliates against us—and refuses to fix it—even though SDSU is violating the law. We're going to keep fighting for equality. SDSU needs to stop discriminating and comply with Title IX."

The lawsuit was filed by past and current SDSU student-athletes Kailin Heri, Madison Fisk, Raquel Castro, Greta Viss, Clare Botterill, Maya Brosch, Olivia Petrine, Aisha Watt, Helen Bauer, Carina Clark, Natalie Figueroa, Erica Grotegeer, Kamryn Whitworth, Sara Absten, Eleanor Davies, Alexa Dietz, and Larisa Sulcs.

In addition to Bryant, the women are represented by Bailey Glasser's Lori Bullock in Des Moines, IA. Other attorneys representing the plaintiffs were affiliated with Haeggquist & Eck, LLP and Casey Gerry.

Bryant has successfully represented more female (and male) athletes and potential athletes in Title IX litigation against schools and universities than any lawyer in the country. He leads the Bailey Glasser Title IX team that has recently won groundbreaking settlements for female student-athletes at eight universities that announced they were eliminating women's varsity intercollegiate athletic teams: **Brown University**, **the College of William & Mary**, **the University of North Carolina at Pembroke**, **East Carolina University**, **Dartmouth College**, **the University of St. Thomas**, **La Salle University**, and **Dickinson College**. The team also won a historic settlement – the first Title IX victory ever for male student-athletes – with **Clemson University** after the school became the first facing class actions suits by both its male and female student-athletes for violating Title IX by discriminating against them in different ways.

To see the Amended Complaint filed by the SDSU women, click **here**.

Return to Table of Contents

Blackhawks Name Attorney Jeff Greenberg Associate General Manager

Chicago Blackhawks General Manager Kyle Davidson has announced Jeff Greenberg has been hired as Associate General Manager, overseeing the strategic systems and processes that will fuel the entire Hockey Operations group. The hiring completes the executive team within Hockey Operations, with Greenberg joining Davidson and fellow Associate General Manager Norm Maciver as the core brain trust that will continue to build out its senior leadership team this offseason.

"Our journey is just beginning as we build a next-generation foundation for this team, and that starts with a focus on modernizing and improving the Hockey Operations infrastructure in our front office," said Blackhawks General Manager Kyle Davidson. "We will only get back to being best-in-class on the ice if we are working with best-in-class information and ideas behind the scenes. Together, this executive leadership team is looking forward to developing great talent throughout all levels of our organization and adding the tools we need across scouting, analytics, player development, coaching and more to return to competitive hockey."

Greenberg officially begins his role with the club on Monday, May 9 where he will work alongside all Hockey Operations functions (including scouting, development, coaching and operations) to establish and optimize a modern, continually evolving approach using systems, technology, data and talent. As a strategic partner to the entire organization, Greenberg's team will help foster a culture focused on exponential growth and delivering long-term, sustainable competitive advantages.

"Jeff will be both an architect and connector of the hockey operations group, ensuring that we're always at the forefront of professional sports," added Davidson. "He reached out to congratulate me after I was named General Manager, and we connected instantly over our parallel paths, shared love for hockey and vision for this sport's future. I'm excited for our fans to see what he, alongside Norm, can bring as key voices at the table — a table that will continue to grow with other leaders we will add to the team."

"What I've learned about the Blackhawks is they're serious about using this rebuilding period to not only set this franchise up to be the best in hockey, but the best in all of sports moving forward," said Greenberg. "There couldn't be a more exciting time to get in on the ground floor of this journey and pursue every possible solution to put this team back on the path to winning hockey."

Greenberg joins the Blackhawks after 11 seasons in baseball operations with the Chicago Cubs, most recently serving as Assistant General Manager. He previously held roles as Director of Pro Scouting and Baseball operations, Director of Baseball Operations and Assistant to the General Manager. As he worked his way up within the organization, he was instrumental in creating the systems and strategies that help the Cubs scout and develop talent and worked closely with team management during a rebuild that eventually led the team to winning the 2016 World Series in addition to four other postseason appearances.

"Jeff is simply one of the best teammates I have worked with in baseball," said Cubs President of Baseball Operations Jed Hoyer. "He has done so much to the make the Cubs a better organization over the last 10 seasons with his powerful combination of intelligence,

work ethic, leadership and integrity. He was critically involved in forward-looking decisions as we built the core of a world champion."

"As the Blackhawks look to build their next championship team, Jeff is an ideal hire," added Hoyer. "While I am sad to lose such a terrific employee and friend, I am thrilled that his future success will continue to benefit the city of Chicago."

Prior to his time with the Cubs, Greenberg worked in the Arizona Diamondbacks and Pittsburgh Pirates front offices as well as for Major League Baseball in labor relations. He graduated from University of Pennsylvania in 2008 and Columbia Law School in 2011.

Return to Table of Contents

News Briefs

Sports Lawyer Joins Furman Athletics Staff as Director of Compliance

Jeff Parry has joined the Furman athletics staff as the department's director of compliance, according to associate athletics director for compliance Kara Carpenter. Prior to joining the Furman staff, Parry served as a compliance assistant at Old Dominion. He also has previous experience in compliance at the University of North Carolina and BYU and as a general counsel legal extern at the University of Florida. In addition, Parry worked as an extern for the NCAA's Office of the Committees on Infractions. A native of Lewiston, Utah, Parry received a bachelor of arts degree in communications with an emphasis in advertising from BYU in 2017. He went on to earn his Juris Doctor degree from the University of Florida Levin College of Law in 2021, graduating with honors.

Diamond Sports Announces Addition of Sports Lawyer to Board of Managers

Diamond Sports Group, LLC (DSG), a subsidiary of Sinclair Broadcast Group, Inc., has announced the appointment of a new slate of directors to oversee DSG in conjunction with the recent closing of a new $635 million facility to enable DSG to expand and strengthen its operational platform including emerging opportunities in the direct-to-consumer sports streaming space. Among those joining the new board is Bob Whitsitt, previously a senior executive in both the NBA and the NFL. Whitsitt has more than 30 years of experience in multiple sports industries and business operations, as well as deep relations with team leagues and owners. He previously served as President and General Manager of the Portland Trailblazers, as well as the Alternate Governor in representing the franchise at NBA owners' meetings for nine years and Seattle Supersonics for eight seasons. During his nine-year tenure as the NFL's Seattle Seahawks President, he negotiated Paul Allen's acquisition of the franchise and served as his representative at league owners' meetings. He has also served as President of Seahawks' stadium, Trailblazers' arena, Rose City Radio, Action Sports Media, and the WNBA Portland Fire. He was the Chief Sports Advisor for Wildcat Capital Management assisting in its efforts to construct a new arena in Seattle and its launch of the Seattle Kraken NHL expansion franchise. Whitsitt is an attorney, licensed to practice law in the State of Washington.

Return to Table of Contents