SPORTS LITIGATION ALERT

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Case Summaries

Some of Lakers' COVID-Related Insurance Claims Are Dismissed

By Jeff Birren, Senior Writer

Sports enterprises across the country regularly purchase insurance to cover various contingencies, including physical damage to their facilities. The Los Angeles Lakers bought insurance in 2019 that covered many things, but in summer, 2019, few could anticipate COVID-19 and the losses it would generate. After the NBA shut down in March 2020, the Lakers filed claims with its insurance carrier, Federal Insurance Company, seeking to recoup millions of dollars in losses. Federal denied the claim, and litigation followed. Recently the United States District Court in Los Angeles dismissed some of the Lakers' claims (*L.A. Lakers v. Fed. Ins. Co.,* CV 21-022881 TJH (MRWx), U.S.D.C., C.D.

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Cal., (3-17-22)), __ F. Supp. 3d __; 2022 U.S. Dist. LEXIS 51563; 2022 WL 831549.

Background

The Lakers purchased the "all-risk commercial property insurance policy (the "Policy") from Federal in August 2019" (Id. at 2). The Policy covered Staples Center where they play and their Health Training Center. It was in effect from August 1, 2019, to August 1, 2020. Federal was obligated to reimburse the Lakers for lost business income and expenses incurred "caused by or result(ing) from direct physical loss or damage to the property" or impairment of their operations "directly caused by the prohibition of access to" the property but "'the prohibition of access by a civil authority must be the direct result of direct physical loss or damage to the property away from, but within one mile" of the Covered Properties.

In March 2020 some of the Lakers' tested positive for COVID-19. On March 11, the NBA suspended its season due to COVID-19. Five days later the Los Angeles Public Health Officer prohibited gatherings of more than 50 people. On March 19, Governor Newsom issued an order "which required Californians to shelter at home." Violations were a misdemeanor.

As a result of Staples' closure, the Lakers claimed that "they lost tens of millions of dollars in revenue." They also alleged that the "presence of Virus particles on fixtures and building systems caused physical alterations to the Covered Properties." This happened when "Virus particles landed on, and adhered to, surfaces such as fabric seats, elevator buttons, and air ducts, causing a physical and chemical reaction that transformed the surfaces into vectors of viral spread called fomites."

The Lakers consequently upgraded the Covered Properties by adding "new air filters, touchless light switches, toilets, and sinks; sleeves or coasting for high-touch surfaces; and plexiglass dividers" (Id. at 3). The Lakers alleged that the Covered Properties "were not usable until those upgrades were completed," and, the five Metro stations fans use to go to Staples, also had physical loss or damage due to COVID-19.

In June 2020 the Los Angeles Heath Officer allowed professional sports teams to reopen their facilities for training and events. Spectators were still banned. The Lakers consulted with the Health Officer and "made extensive and costly changes to procedures and protocols that enabled them to resume training." In April 2021, spectators were again allowed to attend live events.

The Lakers sued for declaratory judgment, breach of contract, a "Civil Authority" claim, and breach of the covenant of good faith and fair dealing on March 15, 2021. The Lakers are represented by Proskauer Rose's New York and Los Angeles offices. Federal responded with a motion to dismiss the complaint. It is represented by Daniel Petrocelli at O'Melveny and Myers. In August 2021 the Court granted the motion to dismiss without prejudice, "after concluding that the Lakers' allegations of direct physical loss or damages at the Covered Properties were mere legal conclusions couched as factual allegations, and therefore, were insufficient to state a claim." The Lakers filed their First Amended Complaint ("FAC") on October 6, 2021. It had the same claims but added factual allegations. It also relied on a recent case from the California Court of Appeal. Federal responded with another motion to dismiss.

The Court's Statement of the Law

Senior Judge Terry Hatter began by stating that a plaintiff "must allege enough facts to allow the Court to draw a reasonable inference that the defendant is liable for the misconduct alleged." It must "accept all allegations" in the complaint as true "and draw all reasonable inferences in the plaintiff's favor" but it is "not bound to accept as true a legal conclusion couched as a factual allegation."

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The Lakers were required to "establish the validity of its three insurance claims." The parties agreed that the Lakers' claims had to have "a direct physical loss or damage to the property" (Id. at 3-4), and it was the Lakers' burden to establish that. The policy did not "define direct physical loss or damage" so the Court construed those terms, applying the normal rules of contractual interpretation. The Court's goal is to give effect to the parties' mutual intent, while using the contractual terms' "ordinary and popular meaning." If the terms are ambiguous, the Court interprets the terms "to protect the insured's objectively reasonable expectations" (Id. at 4).

A recent California Court of Appeal decision "is squarely on point here." That opinion used an online dictionary that defined "physical" as "having material existence; perceptible especially through the senses and subject to the laws of nature." That dictionary defined the term "direct" as "characterized by close logical, casual, or consequential relationship." It defined "damage" as "the loss or harm resulting from injury to the property." A plaintiff making such claims "must plead a casual connection between any physical alteration to that property, and any detrimental economic impact between that plaintiff claimed to have suffered."

Property Damage Claim

The issue was "whether the Virus caused direct physical damage or loss" to the Covered Properties (Id. at 5). The Lakers alleged that the Virus physically "altered surfaces at the Covered Properties by changing their chemical and physical properties" that in turn "required cleaning or replacement" before such properties were safe again. The Lakers seek "coverage for the cost of cleaning or replacing those allegedly damaged surfaces." Since the Lakers alleged physical alteration and that those alterations caused detrimental economic impact, the Court found that the Lakers had stated a claim for declaratory judgment and breach of contract.

Business Interruption Claim

This claim "depends on whether the Virus caused direct physical damage or loss that, in turn, caused the interruption of its business operations." If so, the policy required Federal to "pay for the actual business income loss (and extra expenses] you incur due to the actual impairment of your operations… during the period of restoration." Federal asserted that the policy did not apply because the Virus did not cause "impairment to the property."

The FAC stated that Staples was originally closed "due to a litany of blanket NBA and government measures." The Lakers cleaned Staples, but it was closed by government order and despite the cleaning, it "still could not have reopened until the State of California allowed it to reopen on April 15, 2021" (Id. at 6). The Lakers argued that it was the physical alterations from the Virus that brought on those orders, but those orders were not limited to Staples, but "closed everything in the City of Los Angeles save for a few exempt essential and emergency services."

Furthermore, several of those orders stated that their purpose was "to stem or slow the spread of COVID-19" within Los Angeles. The stated goal was "the preservation public health, not private property." Consequently, "there is no casual chain connecting the

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Expert Witness

Lauren McCoy, J.D.

Expertise: Assistant Professor, Sport Management Program Director, Sport and Fitness Administration, Winthrop University

Race and Gender Discrimination, Title IX, Sexual Orientation and Gender Identity Discrimination, and Title VII.

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Virus-related physical alteration" at the Covered Properties "to the properties' closure." The closure originated with government orders and "not from any alterations to the Covered Properties." Had the virus never made it to Staples it nevertheless would have been closed due to government order. Thus, the Lakers "did not and cannot, plausibly plead that the interruption of their business operations was due to direct physical damage or loss" at their properties, so the Lakers "did not, and cannot, state a claim for declaratory judgment and breach of contract relate to the Business Interruption Clause" (Id. at 6-7).

Civil Authority Claim

This claim required the Lakers to plead that its business operations were "interrupted because nearby Metro stations experienced direct physical damage and loss" and were consequently closed by a civil authority (Id. at 7). The property had to be within one mile of the Lakers' Covered Properties. The government orders that closed the relevant Los Angeles Metro stations "were aimed at limiting the viral spread in the community, not at mitigating property damage at a specific facility." The order stated that "it was prompted by Virus-related property damage, it applied to the entire City of Los Angeles" and therefore would have closed the relevant Metro stations "even if the Virus had never been present there." The Court "cannot assume that the Stay at Home Order was issued in response to direct physical loss or damage at the Metro stations." The Lakers "cannot plausibly plead that the interruption of their business operations" was due to physical damage or loss at those stations. Consequently, "the Lakers did not, and cannot, state a claim for declaratory judgment and breach of contract related to the Civil Authority Clause."

Bad Faith Claim

The implied covenant of good faith and fair dealing "obligates an insurer to, *inter alia*, make a thorough investigation of the insured's claim." The Lakers "alleged that Federal sent a form denial letter instead of thoroughly investigating the tendered claim" (Id. at 8). For the Property Damage claim, the Lakers stated a claim for breach of the covenant. However, with the Business Interruption and Civil Authority claims, "because Federal rightfully denied those claims" it "did not act in bad faith."

The Court's Conclusion

The Court granted the motion, "in part, with prejudice, to the extent that the claims are based on the Business Interruption Clause and Civil Authority Clause of the Policy." It denied the motion "to the extent claims are based on the Property Damage Clause of the Policy" and the related bad faith claim (Id.).

Conclusion

This scenario could be repeated in jurisdictions across the country as professional teams and college athletic departments seek to recoup billions of dollars in losses brought on by COVID-19. Insurers should carefully read the relevant policies before summarily rejecting claims to avoid facing tort claims for breach of the covenant of good faith and fair dealing. Insureds should also read the policies carefully before filing baseless claims that lead to further losses, including the defendant's court costs.

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Arbitration Agreements in Coaching Contracts Do Not Necessarily Cover Discrimination Claims

By Gary Chester, Senior Writer

The law tends to favor arbitration provisions because arbitration is an efficient means of resolving contract disputes. But does the general rule hold for civil rights claims? According to the Ninth Circuit, the issue is hardly a slam-dunk for employers, as discussed in *Schweyen v. University of Montana-Missoula,* 2022 U.S. Dist. LEXIS 81810 (D. Montana, May 5, 2022).

The Facts

In July 2016, Robin Selvig, for 38 years the women's head basketball coach at the University of Montana-Missoula, announced his retirement. About a month later, the University hired longtime assistant coach Shannon Schweyen to replace him. Schweyen signed a three-year contract containing a mandatory arbitration provision.

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The arbitration clause reads as follows: "If any dispute arises under this Agreement, the parties agree to attempt to resolve the dispute in good faith as follows: 1. First, by informal negotiation. 2. If informal negotiations fail to resolve the dispute, the parties agree to seek mediation using a mediator acceptable to both parties. 3. If mediation fails to resolve the dispute within 30 days of initial mediation session, the parties agree to submit to binding arbitration under the provision of the *Montana Uniform Arbitration Act, Title 27, Chapter 5 MCA*."

Despite three losing seasons, the University renewed Schweyen's contract for the 2019-2020 season. The Grizzlies improved to 17-13, but the University replaced Schweyen with Mike Petrino, who guided the team to a 12-11 mark in 2020-2021 before improving to 19-11 last year. After the University did not renew Schweyen's contract, she filed a civil complaint against the University alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

The complaint alleges the University engaged in sex discrimination by: (1) more harshly evaluating her performance as compared to the performance of her male counterparts; (2) targeting her for criticism because of her sex; and (3) not renewing her contract because of her sex.

The University moved to compel arbitration based on the dispute resolution provisions in both contracts. Schweyen opposed the motion, noting that she was not represented by an attorney in contract negotiations and the University never explained the arbitration provision to her.

The Legal Arguments

The governing statute in federal court is the Federal Arbitration Act, or FAA. The FAA states that a written arbitration provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [9 *U.S.C.* § 2.]

Schweyen argued that the arbitration provisions are unenforceable because: (1) the so-called Franken Amendment bars the University from requiring mandatory arbitration of Title VII claims; (2) she did not knowingly and voluntarily waive her rights under Montana law in agreeing to arbitrate; and (3) the University cannot prove a knowing and explicit waiver of Schweyen's rights under federal law.

The Franken Amendment to the 2010 Defense Appropriations Act restricts certain federal payments to defense contractors who compel employees to arbitrate Title VII claims. Since the University was under various contracts with the Department of Defense, Schweyen asserted that the Amendment prohibits the arbitration provision. The University argued that even if the Franken Amendment applies, it does not invalidate the arbitration provision in her employment agreement.

The court agreed with the University, recognizing that the Amendment addresses only potential breaches of contract between contractors and the DOD, and permits the DOD to withhold payments due to contractors. The Amendment does not afford aggrieved employees a remedy. The court stated that "neither the Franken Amendment itself, or the implementing regulations cited herein, provide Schweyen with enforcement rights when the University flouts such contractual obligations."

The court also rejected Schweyen's argument that Montana enforces an arbitration clause only if the agreement is "voluntarily, knowingly, and intelligently" made, and the University cannot meet that standard. However, the court ruled that the provisions of the FAA preempt state law.

Schweyen's third argument, that she did not waive her rights under federal law, was more complex. The court discussed at length the seminal cases of *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) and *Nelson v. Cyprus Bagdad Copper Corp*., 119 F.3d 756 (9th Cir. 1997). These precedents make it clear that a broad waiver of the right to a judicial forum in exchange for employment does not include Title VII or other civil rights claims.

The court ruled in favor of Schweyen, stating: "*Nelson* makes the standard clear, '[a]ny bargain to waive the right to a judicial forum for civil rights claims … in exchange for employment or continued employment must at the least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.'"

The court concluded that the arbitration provision may have notified Schweyen that she was required to arbitrate contractual disputes relating to her job as

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head women's basketball coach, but "[n]othing in the agreement explicitly notified her that non-contractual employment disputes, such as a Title VII claim, would have to be arbitrated."

The Takeaways

- Although the court permitted the lawsuit to continue, it is still advisable for a contract employee to use an attorney to review a proposed contract before signing on the dotted line.
- Attorneys for employers should update employment contract forms frequently so all provisions comply with state and federal law.

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Court: Parent Was Not Required to Prevent Son from Striking Fellow Youth, Causing Head Injury

A Connecticut state court has delivered a partial victory to a baseball coach, who was sued by the mother of youth (D.D.) after D.D. suffered a head injury during a practice when another youth carelessly swung his bat, striking D.D.

The incident occurred on September 5, 2017. D.D. and S.M. (the youth who swung the bat, were teammates on a team known as the Black Team in a youth baseball league known as Cheshire Youth Baseball, in Cheshire, Connecticut. The defendant baseball coach, Mountain MacGillivary, was also the parent of S.M.

During a practice, MacGillivar instructed the team to pick up the baseballs that were on the field and then meet in a dugout adjacent to the field. While D.D. was in the process of picking up baseballs in the field, S.M., who was walking or standing close by and holding a baseball bat, "suddenly and unnecessarily, and without warning, swung the bat he was holding full force, thereby striking D.D. directly in the head with the bat and causing serious and permanent injuries and damages," according to the court.

Sandhya Desmond, on behalf of son D.D., sued five defendants. In count two, the plaintiff alleged that D.D.'s injuries were caused by "the negligence and carelessness of the defendant (MacGillivar)."

On June 24, 2021, the defendant moved for summary judgment.

In considering that motion, the court reviewed the plaintiff's allegations that the defendant, as the coach, was negligent in numerous ways, including the:

- failure to establish reasonable and appropriate instructions, policies, guidelines, rules, and regulations concerning the use and non-use of baseball bats;
- failure to train and instruct his players;
- failure to properly supervise his players;
- failure to enforce reasonable and appropriate instructions, policies, guidelines, rules, and regulations;
- failure to take reasonable measures to avoid harm to the plaintiff; and
- failure to have an adequate number of coaches, instructors, or assistants to assist in supervision of players.

The defendant argued in his motion for summary judgment that the plaintiffs' claim is absolutely barred by the Volunteer Protection Act, 42 U.S.C. § 14503 (a).

The plaintiffs, in their objection, argued that the Act only protects against ordinary negligence, but not gross negligence and that there is a genuine issue of material fact as to whether the defendant's conduct rises to the level of gross negligence. The defendant, in his reply, made two arguments: (1) the plaintiffs cannot raise an allegation of gross negligence for the first time in their opposition to a motion for summary judgment, and (2) the conduct alleged by the defendant does not rise to the level of gross negligence as a matter of law.

42 U.S.C. § 14503 (a) provides in relevant part: "[N]o volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission; (2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in

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the nonprofit organization or governmental entity; (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—(A) possess an operator's license; or (B) maintain insurance."

The defendant first argues that the plaintiffs cannot avail themselves of the exception to the Act because they did not allege gross negligence in the complaint. The defendant specifically argues that the plaintiffs did not allege anything beyond ordinary negligence in their complaint, thus, the plaintiffs' argument that the defendant's conduct exceeded ordinary negligence should be summarily rejected. The plaintiffs, at oral argument, argued that there is no special pleading requirement for gross negligence, allegations of ordinary negligence adequately address gross negligence and the determination of degrees of negligence are for the trier of fact.

"Because Connecticut does not recognize a separate cause of action for gross negligence, it would have been improper for the plaintiff to allege gross negligence," wrote the court, citing *Bost v. Hamden*, Superior Court, judicial district of New Haven, Docket No. CV-09-5031935-S (August 29, 2013, *Nazzaro, J.*)

"Moreover, gross negligence and ordinary negligence are merely varying degrees, (citing Commerce Park Associates, LLC v. Robbins, 193 Conn. App. 697, 730, 220 A.3d 86 (2019), cert. denied, *334 Conn. 912, 221 A.3d 448 (2020))*. Thus, by pleading negligence in the complaint, the plaintiff encompasses all degrees of negligence, including gross negligence.

The defendant's alternative argument is that the allegations in the plaintiffs' complaint do not, as a matter of law, rise to the level of gross negligence. The plaintiffs argue in response that there is a genuine issue of material fact as to whether the defendant's conduct rises to the level of gross negligence.

"Viewing the allegations in the light most favorable to the plaintiff, the determination of whether the defendant's alleged conduct rises to the level of gross negligence is not suitable for summary judgment," wrote the court, denying the defendant's motion on this point.

In count two of the plaintiffs' amended complaint, the plaintiffs alleged that the defendant failed to exercise control over his son, S.M., creating parental liability. The defendant argued, in his motion for summary judgment, that he cannot be held liable for his son's negligence because there is no evidence to suggest S.M. had a propensity to strike others with a baseball bat.

"The plaintiffs, in their objection, concede that there is no evidence that S.M. had a propensity to strike others with a baseball bat," wrote the court. "However, the plaintiffs argue that the defendant failed to exercise reasonable control over his son while he entrusted his son with a dangerous instrumentality. In reply, the defendant argues that the plaintiffs did not allege in their complaint that the defendant negligently entrusted a dangerous instrument to his son, thus, without such an allegation any parental liability claim fails as a matter of law. Alternatively, the defendant argues that a baseball bat at a little league baseball practice is not a dangerous instrumentality as a matter of law."

In the court's analysis, it noted that the plaintiffs "specifically allege that the defendant is negligent for the acts of his son by claiming that he 'knew, or in the exercise of due care should have known, that his son was swinging a bat while the other players were picking up baseballs on the field but failed to instruct his son to drop the bat or otherwise move to an area where there were no other players nearby . . . failed to exercise proper control over his son, the defendant, [S.M.].'

"The plaintiffs do not allege anywhere in the complaint that the defendant negligently entrusted a dangerous instrumentality to his son. See *Santagata v. Woodbridge*, Superior Court, judicial district of New Haven, Docket No. CV-96-0384914-S (December 26, 1997, *Zoarski, IT.R.*) (striking parental liability claim where plaintiff did not allege that parent negligently entrusted child with dangerous instrumentality). The plaintiffs have conceded that the defendant did not have a duty to restrain his son from a known dangerous propensity. Thus, without an allegation that the defendant negligently entrusted his son with a dangerous instrumentality, any claim that the defendant is liable for the alleged negligence of his son must fail as a matter of law."

Desmond et al. v. Macgillivray et al.; Super. Ct. Conn., Judicial District of New Haven; DOCKET NO.: NNH-CV-19-6103788; 4/12/22

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Court of Appeals Affirms Ruling for NASCAR Team in Spat over Worker's Disability

A North Carolina State Court of Appeals had affirmed the ruling of the Full Commission of the North Carolina Industrial Commission, which found that a former "tire carrier" for a NASCAR team was not entitled to disability payments because of an injury he suffered, while employed as a tire carrier.

The appeals court concurred that the "reduced wages were not caused by his injury, but by his … relatively inferior ability as a tire carrier, the reduction in available positions, and the increased requirements of those positions."

The plaintiff was Matthew Donley, who started working in 2017 as a tire carrier for Chip Ganassi, earning a yearly salary of $135,000 plus bonuses. As a tire carrier, Donley was required to carry a 65-pound tire during pit stops and was occasionally required to carry two tires at once. As part of his employment, he was also required to participate in team workouts and strength training, which included lifting more than 70 pounds at a time.

At the end of the 2017 NASCAR season, the employer learned that a new rule would halve the number of tire carriers per team in 2018, which would thereafter require each tire carrier to carry 130 pounds in tires during every pit stop. Because the team would be able to retain only four of its eight tire carriers, the employer's pit crew coach assessed the tire carriers' performance under the more physically demanding requirements of their revised role during practices and training from November 2017 through February 2018. At the start of the 2018 season, Donley's job title was changed to "backup tire carrier." he did not travel to or participate in any NASCAR races during the 2018 season, and the employer's pit crew coach did not consider him as one of the team's top four carriers under the new format.

On January 31, 2018, Donley injured his back during a team workout. He was evaluated by a physician on February 7, 2018 and received pain medication and a Toradol injection. Donley continued to practice with the team as a backup tire carrier until he and the other backup tire carriers were terminated on April 10, 2018. At the time of his termination, Donley did not have any work restrictions relating to his back injury.

Following his termination, Donley tried without success to gain employment with other NASCAR teams. He attended real estate school, obtained his real estate license in July 2018, and became a licensed real estate broker in 2019. He did not look for any other non-racing jobs.

In August 2018, Donley was referred to a spine specialist, who recommended treatment including a steroid injection and limited Plaintiff to lifting no more than ten pounds. He filed for and began receiving temporary total disability benefits in September 2018. His doctor continued to write him out of work through December 2018.

In March 2019, Donley underwent lumbar surgery. He reached maximum medical improvement in July 2019, and his doctor assessed him with a 10 percent permanent partial impairment and recommended a 70-pound lifting restriction. This restriction precludes Donley from working as a NASCAR tire carrier, as the position now requires the carrying of two 65-pound tires at a time.

When Donley began working as a real estate broker in August 2019 the employer subsequently ceased paying disability benefits. On October 3, 2019, Donley filed an application for reinstatement of compensation with the Commission. His case was heard by a Special Deputy Commissioner, who determined that Donley had failed to show his loss in earnings was related to his admittedly compensable work injury. He also sought an award of disability compensation, which was likewise denied. The Full Commission entered its opinion and award on May 18, 2021, denying his claim for disability compensation and affirming the denial of Donley's application to reinstate disability payments. The plaintiff appeals.

In the appeal, Donley challenged the Commission's finding that he "had not provided credible evidence that he is incapable of earning the same wages as a result of his injury."

The appeals court noted in its analysis that "to prove compensable disability an injured employee must present evidence showing three essential elements: (1) he is incapable after his injury of earning the same wages he had earned before the injury in the same employment; (2) he is incapable of earning the same wages he

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had earned before his injury in any other employment; and (3) the incapacity to earn was caused by the workplace injury. Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee can meet this burden by a variety of methods:

> *(1) the production of medical evidence that he is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.*

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)

Donley introduced evidence that his earnings as a real estate broker were less than what he earned as a NASCAR tire carrier. However, the Commission found that Donley failed to prove that his reduced earning capacity was caused by his workplace injury.

The Commission found that Donley "has not provided credible evidence that he is incapable of earning the same wages he had earned prior to the injury in the same or in any other employment as a result of the work-related injury." Donley argues that this finding is not supported by competent evidence and conflicts with the Commission's other, unchallenged findings of fact. "We disagree," held the appeals court. "The evidence and the Commission's other findings of facts are consistent with this finding and support the Commission's conclusion that Donley's injury was not the cause of his reduced earnings.

"The Commission found that NASCAR imposed a new rule that forced the employer to cut its team of tire carriers in half, terminating four employees and doubling the physical demand of the remaining employees' jobs. The employer evaluated its carriers in November 2017, December 2017, January 2018, and leading up to the February Daytona race. Donley was not placed under a work restriction during the team's evaluation of the carriers and was in the bottom half of the team before his injury occurred. The Commission noted that 'tire carriers are getting bigger,' and that one of the employer's current tire carriers is a former NFL linebacker. Donley was not selected to work any NASCAR races in 2018, though he did work as a pit crew member in lower-tier races. The employer continued to employ Donley for two months following his injury, during which Donley participated in practices and workouts, and terminated him and three other tire carriers when the new rule was imposed. Donley was not under a work restriction at the time of his termination. Once the new rule went into effect, the total number of available tire carrier positions within NASCAR was reduced, and the job that Donley was terminated from effectively no longer existed as the new definition of tire carrier required that two tires be carried at a time.

Ultimately, the Commission's unchallenged findings of fact show that Donley was not a competitive candidate for the tire carrier position in light of the new rule promulgated by NASCAR, even before his injury and work restrictions, and support its conclusion that 'Donley failed to show that his reduced earnings were *because of* the work-related injury.'

"Donley argues that the fact that he got a new job as a real estate agent, earning less than he did as a tire carrier, shifts the burden to Employer to show that he could have obtained a job paying the same as his prior earnings. But getting another job does not shift the burden to Employer regarding the third Hilliard prong, causation: Donley still bears the burden of showing 'but for the work-related injury . . . [the plaintiff] would not have . . . suffered wage loss.' Medlin v. Weaver Cooke Constr., LLC, 229 N.C. App. 393, 396, 748 S.E.2d 343, 346 (2013) (quoting Fletcher v. Dana Corp., 119 N.C. App. 491, 497, 459 S.E.2d 31, 35 (1995)).

"We acknowledge that Plaintiff's termination prior to being assigned work restrictions does not necessarily preclude a finding that his reduced earnings were caused by his work-related injury. In Britt, the plaintiff was injured at work after being notified that he would be laid off at the end of that month. 185 N.C. App. at 679, 648 S.E.2d at 919. Although his injury may not have caused his termination and immediate wage loss, we held that this did not preclude a finding of disability 'if, because of Plaintiff's injury, he was incapable of obtaining a job in the competitive labor market.' Id.

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at 683, 648 S.E.2d at 921. Unlike in Britt, however, the Commission found in this case that Plaintiff's reduced wages were not caused by his injury, but by his pre-injury relatively inferior ability as a tire carrier, the reduction in available positions, and the increased requirements of those positions. As this finding was supported by competent evidence, we are bound by it." Chaisson, 195 N.C. App. at 470, 673 S.E.2d at 156.

Matthew Donley v. Chip Ganassi Racing, et al.; Ct. App. N.C.; No. COA 21-447; 5/17/22

Attorneys of Record: Campbell & Associates, by Bradley H. Smith, for Plaintiff-Appellant. Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Ryan W. Keevan, for Defendants-Appellees.

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Sixth Circuit Decision Potentially Expands Title IX Liability for K-12 School Districts

By Kate Vivian Davis, of Bricker & Eckler

A panel of the U.S. Court of Appeals for the Sixth Circuit in Cincinnati issued an opinion on May 19, 2022 that arguably expands the scope of liability K-12 school districts may face with respect to Title IX claims of sexual harassment. At a minimum, the case is a reminder that when school districts are put on notice of sexual harassment, they must act.

The case – Doe, on behalf of Doe #2, the Metropolitan Government of Nashville and Davidson County, Tennessee dba Metropolitan Nashville Public Schools, 2022 Westlaw 157 3848 (May 19, 2022) – combined two cases of students who claimed the district was deliberately indifferent and violated their rights under Title IX by permitting sexual harassment to occur against them.

The Background Facts

Jane Doe was a freshman when four male upperclassmen subjected her to "unwelcome sexual activity" in the stairwell at her school. Unbeknownst to Jane Doe, a video of the incident was later made public.

Similarly, in a different school in the same district, freshman Sally Doe was led to the bathroom by a male student, who pressured her into performing a sexual act. The male student recorded a video of the incident without her knowledge, which was later distributed to other students in the district.

The Legal Analysis of "Before" and "After" Title IX Claims

In this case, the plaintiffs alleged two theories of liability under Title IX, known as "before" and "after" Title IX claims – liability for the district's conduct before the students were harassed, and liability for the district's conduct after they were harassed. Let's briefly review the decisions the court relied on to analyze these claims.

In Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), the Supreme Court held that a school district could be liable under Title IX for subjecting "students to discrimination where [a school] is deliberately indifferent to known acts of student on student sexual harassment and the harasser is under the school's disciplinary authority." Sound familiar? This is the standard adopted by the U.S. Department of Education as part of the most recent Title IX regulations. See 34 CFR §106.44.

The court also referenced a previous Sixth Circuit decision – Kollaritsch v. Michigan State University, 944 F. 3d 613 (6th Circuit 2019) – which limited certain Title IX claims based on student-on-student sexual harassment. In Kollaritsch, four female students at Michigan State University were sexually assaulted by male students and reported the assaults to administrative authorities. They alleged the administration's subsequent response was inadequate. In its decision, the court held the plaintiffs must show "that the school had actual knowledge of some actionable sexual harassment, and that the school's deliberate indifference to it resulted in further actionable harassment of the student victim." Id. at 620. Because, in Kollaritsch, the students were assaulted once, the court concluded that they could not show the school's conduct or lack thereof caused the students to suffer harassment. The court also observed that further harassment must be inflicted against the same victim. Id.

Thus, in asserting their "before" and "after" claims, Jane and Sally Doe argued that the District had a widespread problem of sexual harassment in its schools, pointing to numerous instances of sexual misconduct and other examples of the dissemination of sexual videos of minor students without their consent.

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Sixth Circuit: The Students' "Before" Claims Could Proceed

Here, the district court had applied Kollaritsch and concluded that the students' "before" claims were precluded because there was no evidence that the district was on notice of this harassment. However, the Sixth Circuit disagreed, finding evidence of over 950 instances of sexual harassment in the district preceding the incidents involving Jane and Sally Doe. The Sixth Circuit pointed out that when Jane and Sally Doe reported their harassment, the Title IX Coordinator was not involved, and the previous cases of harassment were handled at the building level.

The Sixth Circuit distinguished Kollaritsch and explained that the unwelcome conduct here was a result of the district's indifference to the problem of pervasive sexual misconduct in its schools. The court adopted the Ninth Circuit test for Title IX "before" claims, which provides: "A student must show: 1) the school maintained a policy of deliberate indifference to reports of sexual misconduct, 2) which created a heightened risk of sexual harassment that was known or obvious, 3) in a context subject to the school's control and 4) as a result the plaintiff suffered harassment that was 'so severe, pervasive and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school.'" Citing Karasek v. Regents of the University of California, 956 F. 3d 1093 (9th Circuit 2020).

The court concluded that when a student shows that the school's deliberate indifference to a pattern of student-on-student sexual misconduct leads to sexual misconduct against the student, then Kollaritsch's requirements for causation have been satisfied. The court wrote, "put differently, in a successful before claim, a school's deliberate indifference to known past acts of sexual misconduct must have caused the misconduct that the student currently alleges."

Sixth Circuit: The Students' "After" Claims Could Proceed

With respect to the students' "after" Title IX claims, the court first focused on Sally Doe. The court explained that, when Sally Doe's mother met with the administration about what her daughter had experienced, the principal responded that the matter was "out of [his] hands" and told the mother to contact the police. The court noted that the principal did not recall informing the head of the school about this meeting, did not refer Sally Doe to the Title IX Coordinator or any other administrator, and did not provide Sally Doe or her mother with information about any steps that the school would take to address the consequences of the incident. The court wrote that the District took no additional action other than assisting Sally Doe's parents with arranging to homeschool. Thus, the court held that a reasonable jury could conclude that, rather than taking steps to remedy the sexual harassment, the District opted to avoid the problem, resulting in Sally Doe being forced to choose between homeschooling or enduring further misconduct. Therefore, the case was remanded to the district court.

The court also remanded Jane Doe's "after" claim to the district court, holding that Kollaritsch did not apply. The court explained that the "same victim" requirement from Kollaritsch – which involved a university – did not apply in the K-12 context because K-12 schools have more authority and control over the students than at the university level.

Takeaways for K-12 Districts

The most important takeaway for K-12 districts from the court's decision is its explanation that K-12 districts may be held to a different standard than universities for liability under Title IX – largely due to the fact that they have more control over the discipline and day-to-day activities of their students compared to institutions of higher education. The court also emphasized how the District's processes failed the students in question in this case, viewing as problematic the District administration's choice to handle the issues at the building level rather than reporting them to the district's Title IX Coordinator.

This case serves as a cautionary reminder to train administrators in K-12 buildings at all levels to ensure that they understand the importance of reporting claims of sexual harassment to the Title IX Coordinator so that the District can act.

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Articles

Title IX at 50: The Work Continues

By Ellen J. Staurowsky, Ed.D., Senior Writer & Professor, Sports Media, Roy H. Park School of Communication, Ithaca College, staurows@ithaca.edu

In a recent keynote address to the National Collegiate Athletic Association (NCAA) Inclusion Forum, legend and icon Billie Jean King reflected on the state of Title IX and women's sport. Speaking about the nature of progress, the tenuous security of the rights that Americans have, and the need to be ever vigilant in protecting those rights, she drew upon the words of Coretta Scott King noting that "Struggle is a never-ending process. Freedom is never really won, you earn it and win it in every generation".

Fifty years have gone by since Title IX of the Education Amendments Act of 1972 was passed. Recent reports conducted in anticipation of Title IX's 50th anniversary on June 23, 2022 by the Women's Sports Foundation (Staurowsky et al., 2022), the University of Maryland's Shirley Povich Center for Sports Journalism and Howard Center for Investigative Journalism (Newhouse 2022a, 2022b), USA Today (Staff, 2022), and the NCAA (Wilson, pending) all reach the same conclusion. The struggle for girl and women athletes to be treated equally under Title IX is thus far a never-ending process. Each generation of girls and women in school sports have had to challenge school authorities to earn and win the freedom to compete unencumbered by gender discrimination. While Title IX has served as a catalyst to promote progress for girls and women in terms of athletic opportunities, access to athletic scholarships, and attendant operating budget allocations to support participation (recruiting, coach salaries as examples), there is much more work to be done to achieve gender equality within athletic departments sponsored by federally funded schools at the post-secondary and college level.

When Girl & Women Athletes Win Their Title IX Rights, the Nation Wins

Over the past 50 years, Title IX has had a profound effect on the opportunities for girls and women to participate in athletics. In 1972, the year of Title IX's passage, 7% of high school varsity athletes were girls (294,015). By 2018-2019, the most recent reporting year, 3,402,733 girls (43%) were competing on varsity high school teams. According to NCAA statistics, women's participation in college athletics rose from 15% in 1972 to 44% during the 2020-2021 academic year.

The removal of barriers to participation for girl and women athletes strengthens the nation's overall sport system, yielding benefits in terms of long-term health consequences (Staurowsky et al., 2020) as well as setting the stage for athletic excellence on the world stage. As a case in point, if the women of Team USA had competed in the 2020 Tokyo Olympics as their own country, their total medal count of 66 would have placed them third behind the Russian Olympic Committee and China (Planos, 2021).

Shortfalls in Athletic Participation Opportunities, Athletic Scholarships, and Resources

Under Title IX regulations, specifically the three-part test, athletic participation opportunities for girls and women athletes should be proportional to enrollment (if 50% of undergraduates are women; 50% of existing athletic opportunities should be available to women). If athletic opportunities are not offered proportionally, a school needs to demonstrate that it has a record of adding sports systematically and on a regular basis or athletic programs offered to girls and women fully and effectively satisfy existing needs and interests. Using information reported by colleges and universities in accordance with the Equity in Athletics Disclosure Act for the 2019-2020 academic year, Staurowsky et al (2022) found the following:

- At 2,074 two-and four-year post-secondary institutions that reported data, women athletes had access to 43% of athletic opportunities offered by

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their institutions. When compared to the representation of women undergraduates at those institutions, who made up 54.5% of overall enrollment, women athletes were disproportionately underrepresented in athletics. In order to close that nearly 12 percentage point gap, an additional 81,389 athletic opportunities would need to be added.

- Among NCAA institutions across all divisions 86% offered higher rates of athletic opportunities to men athletes disproportionate to their enrollment. For the 2019-20 academic year, that gap favoring men athletes represented 58,913 missed opportunities for women athletes.
- Only 94 of the 1,089 NCAA (8.6%) schools reporting met the proportionality standard for participation under the three-part test, offering men and women athletic opportunities proportional to enrollment. Fifty-five (55) institutions or 5% of institutions provided athletic opportunities to women athletes at rates beyond their representation in the student body.
- Only 18.8% of NCAA Division I institutions (66 of 350); 5.7% of NCAA Division II institutions (18 of 312); and 3% of NCAA Division III institutions (14 of 427) offered athletic opportunities to female athletes proportional to their enrollment.

At the high school level, data from the 2018-2019 academic year reported by the National Federation of State High School Associations (NFHS) revealed that girl athletes receive disproportionately fewer athletic opportunities compared to boy athletes. While girls made up 51% of high school enrollment that year, only 43% of athletic opportunities were allocated to girl athletes. Addressing that gap would require adding approximately a million athletic opportunities for girls (Staurowsky et al., 2022).

While compliance is determined on a case-by-case basis and EADA data offer insights but not definitive measures of compliance, the growth of girls and women's sport over the span of the last five decades makes it more difficult for school administrators to persuasively explain why there are shortfalls in athletic opportunities. Arguments that schools cannot afford to offer athletic opportunities proportional to enrollment run aground because numerous courts have determined lack of funding is not an excuse to justify a failure to address gender discrimination.

Beyond shortfalls in athletic participation opportunities, inequities in the allocations of athletic scholarships and budget allocations are sweeping. EADA reports for 2019-2020 revealed that

- men athletes received $252 million more in athletic scholarships than women athletes received. If athletic departments offered athletic opportunities to women athletes proportional to enrollment, they would have had to award an additional $750 million in athletic scholarship assistance
- of the $241,400,778 spent on recruiting athletic talent to compete at the college level (in both two-year and four-year institutions). Of that total, only 30% was spent on recruiting women athletes ($75,290,142).
- on average, coaches of women's teams received a much smaller percentage of salary compared to coaches of men's teams, ranging from 19% in NCAA Football Bowl Subdivision (FBS, formerly known as Division I-A) to 49% in NJCAA Division I (Staurowsky et al., 2022).

Uneven Enforcement & Lack of Title IX Knowledge

In a recent interview with ESPN, U.S. Department of Education Secretary Miquel Cardona was asked about the challenges associated with enforcement, among them being the fact that the federal government has never proactively initiated a lawsuit against a school. He commented that the focus of his administration was on building a culture of compliance that includes students, families, educators, and administrators because it was unrealistic, with the limited resources available to the Office of Civil Rights (the office charged with Title IX oversight) and a limited number of investigators, to handle the full expanse of enforcement needs across all agencies and schools that Title IX covers (Murphy, 2022).

Responding to that approach, long-time Title IX litigator, Arthur Bryant, observed It would be great to build the culture, but he's kidding himself if he thinks that's what's going to do it. Does the police officer by the side of the road as people are going by at 100 miles per hour say, 'I'm trying to build a culture where people

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will stop speeding'? No. You pull over people violating the law and you hold them accountable. ...The way you build the culture of compliance is you enforce the law" (as quoted in Murphy, 2022).

In theory, local Title IX athletics enforcement is to be overseen by a Title IX coordinator appointed by each institution, which is a federal requirement. For decades, schools either ignored that mandate, appointed someone in name only, or were unaware of their obligation. While there has been more attention and resources directed toward Title IX coordinator positions on college and university campuses since 2011, those resources have largely been directed toward addressing the critical issue of sexual harassment and assault. And Title IX coordinator roles are expansive, including monitoring Title IX compliance, creating policies and procedures for reporting, conducting investigations and reviews, and educating campus constituencies.

How prepared Title IX coordinators are to fulfill their obligations in overseeing athletics is up for question. According to Nowicki (2018), a survey of Title IX trainers revealed that those serving in Title IX coordinator roles in high school settings had little familiarity with how Title IX applied to athletics. In a study of people charged with Title IX compliance in Power Five athletic departments (n=90), 60% indicated that taking on the role was a default assignment because they were a woman administrator. Of those serving in a Title IX athletics compliance role, only a third had specific training prior to taking on the responsibility (Staurowsky & Rhoads, 2020).

Thus, there are significant hurdles to building the kind of compliance culture that Secretary Cardona talks about. Ideally, it makes sense to conceive of a fully functioning Title IX compliance infrastructure that is locally based because the more proactive schools are in fulfilling their compliance obligations under Title IX and the more accessible avenues are in terms of identifying problems and hearing complaints, the quicker gender discrimination can be addressed. Compelling as that is in theory, in practice, the lack of consistent enforcement has resulted in the very constituencies that should be empowered to hold school administrators accountable (athletes, parents, coaches, and even athletics administrators) evidence low levels of understanding or even knowledge about the law (Staurowsky et al., 2022).

In a poll conducted by Ipsos for The Shirley Povich Center for Sports Journalism and the Howard Center for Investigative Journalism at the University of Maryland in 2022, "nearly three-quarters of secondary school students and nearly 60% of parents said they know 'nothing at all' about the landmark civil rights law meant to ensure gender equity in education, including athletics" (Newhouse, 2022).

Further, as Staurowsky and Rhoads (2020) reported, there is little investment or effort in educating athletes and coaches about Title IX. Among Power Five compliance officers, 51% indicated that funding support for Title IX education efforts was fair to poor; 45% indicated that funding support to attend trainings was fair to poor; 49% indicated that workload allocations to do the job was fair to poor; and 49% reported that Title IX resources were not available to athletes on the athletics website. When it comes to educating athletes and coaches about how to read an EADA report, only 2-3% of Title IX athletics coordinators offered such education.

The Future

When Billie Jean King was asked at the 2022 NCAA Inclusion Forum about what steps should be taken to address the shortfalls that exist in Title IX athletics compliance moving forward, she commented that schools would be better served to willingly comply with the law rather than resisting it. She also said that "Presidents need to search their souls". Both Cardona and King are speaking to the need for educational leaders to step up and use the power of their positions to establish a compliance culture around Title IX in athletics that is proactive rather than reactive.

What 50 years of Title IX athletics history suggests, however, it is that it will take much more than just that. Among the recommendations that the Women's Sports Foundation is offering in this 50th anniversary year are the following:

- that the U.S. Department of Education Office for Civil Rights (OCR) be fully funded to strengthen their Title IX enforcement efforts
- that the OCR initiate compliance reviews across larger sets of institutions and provide greater technical assistance with emerging questions and issues

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- that Federal policymakers pursue passage of the Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act of 2021 (H.R. 4097 & S.2186). This bill recognizes the need to provide more resources, training, and technical assistance to schools to ensure compliance with Title IX.
- The U.S. Department of Education should develop a federal reporting system that requires schools to publicly disclose a) which part of Title IX's three-part test for athletic participation they are using to comply; and, if appropriate, collect b) information regarding their history and continuing practice of program expansion and/or c) the methods used to fully and effectively meet the needs and interests of qualified women athletes.
- The U.S. Congress and the U.S. Department of Education should adjust the Equity in Athletics Disclosure Act (EADA) and its regulations so that the annual data it requests on its form fully encompass the practices of athletics departments in order to comprehensively assess gender equity practices, including the reporting of information about an institution's athletics-related capital as well as operating expenses.
- The U.S. Department of Education should establish an external audit system to promote public confidence in and full accuracy of EADA reports.
- The U.S. Department of Education should require critical institutional representatives (e.g., Title IX compliance offers, Directors of Athletics, etc.) to participate in annual Title IX training to ensure that those charged with implementing it within their institutions are fully knowledgeable of policy requirements and their role(s) in implementation.
- The Office for Civil Rights should create a one-stop website for school personnel, families, and students to understand and apply Title IX athletics standards in an easy-to-digest manner (adapted from Fair Play for Girls in Sport, Legal Aid at Work (K. Turner, 2021).

For a full list of recommendations, see the full WSF report (Staurowsky et al., 2022). . **https://www.womenssportsfoundation.org/articles_and_report/50-years-of-title-ix-were-not-done-yet/**

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If It Doesn't Move, Kick It... How U.S. Soccer Is Playing Smart Off The Ball

By Angela C. de Céspedes & Heather E. Kemp, Saul Ewing Arnstein & Lehr LLP

On Wednesday, May 18, 2022, the U.S. Soccer Federation (U.S. Soccer) announced collective bargaining agreements that achieved equal pay for the Women's and Men's National Teams. The United States women's national soccer team (WNT) represents the United States in international women's soccer. Not only did the WNT kick the ball – they collectively scored an unprecedented header in the form

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of a CBA with far reaching implications for soccer, women, and all sports globally.

To ignore these female athletes, their achievements, and the ripple effect it will have, is to disregard that there are more soccer fans worldwide than any other sport – 3.5 billion, compared to 500 million for baseball, 450 million for golf, and 400 million each for basketball and American football (the four of which make up Nos. 7, 8, and tied for 9 on the list of the top ten). In fact, even if you throw in tennis' 1 billion fans worldwide for good measure, you still only get to a collective 2.75 billion, compared with that of soccer's 3.5 billion.

While the statistics above may be shocking to some sports fans, they must surely be known to those making decisions as to the allocation and investment of funds in leagues, teams, athlete salaries, prize money, endorsements, licensing, memorabilia and appearance fees. Curious then that the 100 highest-paid athletes in the world, which include players from 10 sports and 24 countries, as reported by Sportico for 2022 include: 36 NBA players, 25 NFL players, 12 MLB players, 12 European Soccer players, 4 Fighters, 4 Golfers, 3 Tennis Players, 1 F1 Driver, and 1 Cricket player (Cricket enjoys 2.5 Billion fans worldwide holding the No. 2 spot). Of the 100 top earning athletes only 2 are women – tennis players Naomi Osaka (No. 20) and Serena Williams (No. 52). Even more curious then are results of a recent survey conducted by Altman Solon which revealed that nearly 50 percent of women in the UK, US and Germany are monthly sports viewers, a figure that rises to nearly 70 percent in Latin America and Asia. In terms of viewership of women's sports men make up 50 percent of the women's sport fanbase. An analysis of social media popularity with a higher than average engagement by female athletes, the rise of NIL income for women at the college level and beyond, and female representation in video games (about 50% of gamers are women), make the figures above even more puzzling and the achievement of the women of US Soccer all the more meaningful.

The WNT is the most decorated women's soccer team in history and holds the record for the most watched soccer game in United States history. The team has won four Women's World Cup titles (1991, 1999, 2015, and 2019), four Olympic gold medals (1996, 2004, 2008, and 2012), and eight CONCACAF Gold Cups. The team is governed by United States Soccer Federation and competes in CONCACAF (the Confederation of North, Central American, and Caribbean Association Football). The WNT's 2019 stadium home jersey remains the No. 1-selling soccer jersey, men's or women's, ever sold on Nike's website in any one season. It's impossible to ignore their talent, hard work and success both on and off the soccer field.

As a result of the WNT's efforts, for the first time in history soccer players on the men's and women's teams will receive the same appearance fees and bonuses for international matches. For the World Cup, the most-watched sporting event in the world with 1 billion viewers (the Super Bowl in second place with 100 million viewers), FIFA's bonus pool for the upcoming 2022 men's World Cup in Qatar will be $440 Million, while the prize money for the women's World Cup in Australia in 2023 will be $60 Million. The negotiated CBAs circumvent FIFA and provide the US women's and men's teams with an equal share of the prize money won—a provision which is the first of its kind in professional sports and will hopefully equalize investment, not just tournament prize money.

Never Give Up On The Play

The WNT first filed a complaint with the Equal Employment Opportunity Commission (EEOC) in 2016, demanding equal pay for the same work as the Men's National team. By 2017, the team had reorganized their players association, fired their union executive, and took control of CBA negotiations, and they secured a new CBA with improvements in both working conditions and pay. Two years later, the players took their fight a step further by withdrawing their EEOC complaint and filing suit against U.S. Soccer in the Central District of California under Equal Pay Act and Title VII claims.

In April of 2020, the Central District of California granted partial summary judgment to U.S. Soccer, dismissing the central elements of the WNT complaint. The court found that each team had negotiated its own CBA with differences in guaranteed and meritorious pay. Further, the court found that the WNT had a higher total compensation between 2015 and 2019 as a result of the men's team failing to qualify for the 2018 World Cup and the women's team winning the 2019 World

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Cup. Meaning, the WNT's lopsided success contributed to the failure of their push for equal pay.

While the WNT filed for appeal, U.S. Soccer, now led by Cindy Parlow Cone, sought to find common ground and cool the growing negative media coverage. In November of 2020, U.S. Soccer and the players association reached a new agreement for equal working conditions that provided more equitable staffing, travel, accommodations, and match venues. In early 2022, U.S. Soccer reached a settlement for the 2019 suit, which gave the WNT $24 million, mostly in back pay to players on the women's team, and included an agreement to reorganize both the men's and women's CBAs to equalize pay.

Winning Requires Teamwork

By early 2022, both team's CBAs were expired, encouraging all sides to come to a collective table and nail down an agreement for the benefit of U.S. Soccer as a whole – another first. Finally, on May 18, 2022, U.S. Soccer announced a new deal that achieved equal pay for the men's and women's teams.

The newly minted CBAs provide an equal pay rate for the teams through 2028. Each player receives $8,000 for a friendly match and bonus pay for a tie or win (nothing additional for a loss). For official competitions, each player receives $10,000 plus bonus pay. This scale is equal across both teams. The model is pay-for-performance, which is a change for the women's team only. The prior women's team CBA provided a yearly salary for national team players and dramatically lower performance-based pay.

For World Cup competitions, which provide millions of dollars in prizes based on placement, both teams will pool their bonuses and split the earnings. For the 2022 and 2023 World Cups, U.S. Soccer will take 10% of the sum of both team's earnings, with the remainder split evenly between the two teams. For the 2026 and 2027 World Cups, U.S. Soccer will take 20%, and again, the remainder will be split evenly between the two teams.

For non-World Cup tournaments, if both the men's and women's team play in the same tournament (for example, the Gold Cup), the prize money is pooled, U.S. Soccer retains 30%, and the remainder is split evenly between the two teams. If only one team plays in a non-World Cup Tournament, U.S. Soccer retains 30% and the competing team receives the remainder. In addition to the pay structure agreement, the CBAs provide an equal revenue-sharing structure for broadcasts, apparel, and sponsorships. U.S. Soccer also agreed to pay players the same dollar amount for each U.S. Soccer ticket sold, including a 10% bonus for any sell-out matches. Venues, accommodations, travel, and staff are to be equitable. The CBAs also created 401(k) s for all players and free childcare for both teams.

Eye On The Ball

The fight for equal pay in sports is far from novel, but its achievement is rare. This imbalance is typical across most comparable sports such as the NBA and WNBA, the professional tennis circuit, and the PGA and LPGA Tours.

The most unusual aspect of the equal pay structure is the pooling and sharing of tournament prize money. The arrangement assures that both teams make the same total compensation from the world's most popular athletic tournament. This change may open more opportunities for similar structures in other sports or tournaments across the country and globally.

Although unique circumstances may have created the conditions that led to U.S. soccer's equal pay deal, its achievement alone may spur other leagues to address the pay gap with an eye toward advancing sport as a whole regardless of gender. One of the replicable successes of the WNT during their six-year campaign was their ability to garner significant public support. Players used their popularity to engage on social media, make victory speeches, book television appearances, and write articles that focus on the gender pay gap in sports. In fact, a frequent chant by fans during WNT games in the years leading up to the CBAs was "Equal Pay." The players' persistence over years, mounting public pressure, and the eventual support of and recognition by the men's team and controlling organization, U.S. Soccer, allowed the WNT to strike with conviction.

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The NFL's Houston Texans to be Named as Co-Defendant in the Watson Civil Sexual Assault Lawsuits – What It Means

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

Cleveland Browns and former Houston Texans Quarterback Deshaun Watson is currently not playing offense this off-season, but is defending himself against 24 civil lawsuits and counting wherein the various plaintiffs allege that he engaged in 'coercive and lewd sexual behavior'[1] when contracted to provide him with therapeutic massages.

Specifically, it is alleged that over a 17-month period spanning from the fall of 2019 through March 2021, Watson received massages from approximately sixty-six different female therapists, twenty-two of whom claim that during their session he engaged in sexual misconduct by exposing himself, coercing them to touch him in a sexual manner, touching them with his penis, or by shifting his body in a way that would force the therapist to touch his private areas. In the two other matters, the women claim that Watson's conduct rose to the level of a sexual assault, with one plaintiff alleging that Watson pressured her to perform oral sex, while the other claimed that he grabbed both her buttocks and vagina.[2]

Now, in an interesting development, the NFL's Houston Texans are about to become a co-defendant in the Watson civil litigation matter. Tony Buzbee, a Houston based personal injury attorney representing the women involved in the cases against Watson, announced that he will now include the franchise as a defendant after learning from both the Houston Police Department and a *New York Times* report that the team's management played an integral role in contributing to Watson's alleged loathsome and lewd behavior.

"What has become clear is that the Houston Texans organization and their contracting 'massage therapy company' facilitated Deshaun Watson's conduct. In many of these cases, the Texans provided the opportunity for this conduct to occur," Buzbee stated. "We believe the Texans organization was well aware of Watson's issues, but failed to act. They knew or certainly should have known."[3]

As reported by the *Times*, Watson's conduct was enabled, knowingly or not, by the Texans when members of the organization scheduled massage appointments on his behalf, provided him with hotel rooms at the Houstonian for the message sessions to take place, and, most interestingly from a legal perspective, by drafting a nondisclosure agreement (NDA) for him after one of the alleged victims threatened to expose his behavior.[4]

It is assumed that counsel for the 24 plaintiffs is relying on the legal concept of *'Respondeat Superior'* as a way to include the Texans as a defendant in the lawsuit. Respondeat superior, when translated means

1 https://www.nytimes.com/article/deshaun-watson-sexual-assault-lawsuit.html

2 Id.

3 https://abc13.com/deshaun-watson-houston-texans-sued-massage-therapists-nondisclosure-agreement/11939517/

4 https://www.nytimes.com/article/deshaun-watson-sexual-assault-lawsuit.html

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'let the superior make answer', is a legal doctrine holding an employer liable for an employee's wrongful acts committed within the scope of employment.[5] Therefore, an employer, in this case the Houston Texans, could possibly be liable for the acts or omissions of its employee, Watson, if his actions were within the course and scope of employment.[6]

In order to prevail on a respondeat superior claim, the injured plaintiffs must prove that at the time of the conduct, the employer's worker (1) falls within the legal definition of "employee" and (2) the employee was acting in the course and scope of his or her employment.[7] A worker is legally considered an employee in the state of Texas when his or her employer has "the overall right to control the progress, details, and methods of operations of the work."[8] In addition, an employee acts within the course and scope of his or her employment when performing tasks generally assigned to him or her in furtherance of the employer's business (a) with the employer's authority and (b) for the employer's benefit.[9]

The question of whether or not Watson was an employee of the Houston Texans is easily answered by the fact that the young quarterback signed a four-year, $177.5 million contract extension before the 2020 season with the Texans organization to keep him with the Houston team at least through the 2025 season.[10]

The second question – whether Watson's, as described, 'coercive and lewd sexual behavior' can be considered acts or omissions within the *course and scope* of his employment with the Texans may be somewhat more difficult, but not impossible to prove. Were the 'tasks' in furtherance of the employer's business? Arguably yes – a hale and hearty, physically healthy quarterback is indeed beneficial to the Texans' business of winning football games. Were his acts under the authority of the Texans and for its benefit? The fact that, according to the New York Times, those associated with the organization helped in providing Watson with access to the messages and that the Texans, specifically its director of security, Brent Naccara, provided him with the NDA which he began taking to appointments for the therapists to sign, may be enough to prove to a trier of fact that such acts were within the 'employer's authority and for its benefit'. In fact, Watson testified at a deposition that he began taking the NDAs to massages that same week that Naccara provided it to him, giving one to a 'woman in Manvel, who signed it, and another to a woman who said in her lawsuit that she ended the session after he suggested a sexual act. Watson told her she had to sign in order for him to pay, so she did.'[11]

As fans it will be interesting to watch as this civil case plays out over the next several months, if not years. But in the interim, although two state of Texas grand juries **declined to pursue criminal charges** against Watson for his conduct associated with the twenty-four plaintiffs, and the Cleveland Browns thought it was prudent to trade for Watson and sign him to a guaranteed $230 million dollar contract, isn't it time for the NFL and Commissioner Roger Goodell to step up their investigate and decide whether or not Watson's 'coercive and lewd sexual behavior' is in violation of the League's Personal Conduct Policy?

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Marlins General Counsel Ashwin Krishnan Turns an Opportunity into a Career

Ashwin Krishnan, Vice President and General Counsel of the Miami Marlins. is an accomplished executive in the sports industry with more than a decade of extensive legal and business.

But it didn't always used to be that way.

As Krishnan tells it, he just another law student pining for a career in the sports industry when the proverbial golden opportunity came along – a summer internship with the Boston Celtics. Krishnan practically lived at the office that summer, which mad an impression – a good one .

5 Black's Law Dictionary (10th ed.).

6 *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 128-29, 139 (Tex. 2018).

7 *Painter*, 561 S.W.3d at 128-29, 131.

8 *Painter*, 561 S.W.3d at 128-29, 138.

9 *Painter*, 561 S.W.3d at 128-29, 138-139.

10 https://www.sportingnews.com/us/nfl/news/deshaun-watson-contract-cleveland-browns-void/tmetgsmn2pzulvhl9hfk518s#:~:text=Watson%20had%20signed%20a%20four,set%20to%20begin%20in%202022.

11 https://www.nytimes.com/2022/06/07/sports/football/deshaun-watson.html

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Years later, Krishnan, sitting outside a Miami Beach restaurant, discussed his epic journey.

Question: ***When did you know you wanted to pursue a career in sports law?***

Answer: It really started in law school. I had always been a huge sports fan. I knew early on that my athletic abilities would not lead to a career playing sports.

When I got to law school, I kind of fell into this sports law field. I saw there was a sports law class on campus taught by Peter Carfagna. There was also a very nascent sports law society at the time, which I became involved with. It really opened my eyes to all the legal jobs in this field, which I didn't really appreciate. Understanding that there's lawyers that work at teams, leagues, unions, agencies, sponsors, apparel companies, media rights companies, and on and on. There's this whole universe of sports lawyers

So, a light bulb went off in my head, where I said, wait a minute, "I'm really passionate about the sports field. I'm checking ESPN a hundred times a day. There's also a room for lawyers in this field. I'm passionate about being a lawyer. Maybe there's a way I can combine the two. So, I decided that I'm going to do everything I can to, to get involved in the field, whether that meant attending conferences, writing articles, speaking on panels. Etc.

Q: ***What was your big break in sports law?***

A: My biggest break was getting an internship with the Boston Celtics as a 2L in law school. Professor Carfagna had developed a relationship with Mike Zarren, who's the general counsel there at the Celtics. Together, they created an internship program, which was just a great opportunity for a student to kind of shadow and learn on the job. Professor Carfagna had recommended a group of students for Mike to interview for a spot in his program. I was very fortunate that Mike and I connected. He selected me to be an intern in that program.

I really dove in and really embraced every opportunity. And, in fact, I would say I almost focused more on that internship, than any of my other coursework. In fact, I would bring my other textbooks to the Celtics offices and just sit there and study because I was so enthralled and enamored with being part of this team sports environment.

That was the threshold moment for me, where I said, "This is what I want to do. Let me figure out how to get into this field."

Q: ***What, what do you like most about the job?***

A: Two things. First, I love the people. I love the fact that we're an organization, we're a team. We have so many different disciplines and specialties. From creative people to technical people to baseball people to operations people to finance people. You name it, we've got them. However, we're all United, we're all working towards one goal. I love working with so many different types of people.

The other thing I really love about it is just the uniqueness of the issues that we deal with every day. Every day I go, not knowing exactly what I'm going to be dealing with. I love the fact that every day I get challenged to think about new problems, new issues. I don't know what's coming at me, but I have to kind of figure it out. Its problem solve, or use my judgment, my intuition, and try to figure new issues out every day. I just don't know which part of the business is going be popping up that day. And I compare it kind of like a little bit to whackamole where yeah, different issues pop up and you just have to kind of put on different hats and take care of them and try to keep everything under control.

Q: ***Sounds like you really have to be kind of a multitasker. You can't focus on one area?***

A: Absolutely. When people always ask me what the biggest challenges are with my job, I say it's the time management prioritization, because we've got so many different business units that are activating and doing things. And everybody thinks their issue is the most important and needs to be solved right away. I'm not necessarily communicating with everyone else, nor do they see my to-do list. So, for me, it's always a challenge to kind of communicate to everybody and and let them know how my priorities are driven by what's most important to the organization. For example, here are the five issues that I've been hit with. Which one do I tackle first? How long is each one going to take? How do I communicate to each person? So, every day is an exercise in prioritization and time management.

Q: ***How much do you interact with GCs in other sports?***

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A: A fair amount. Our roles are fairly unique in terms of the issues we deal with from fans, vendors, ticketing, etc. We may deal with privacy laws. Or it might be IP issues that are very unique to the sports world. Living in Florida, we also have our own set of laws and everything else we need to kind of comply with and deal with. I'm very close with the legal folks, at the Dolphins, Heat, and Panthers. I can quickly call them and say, "Hey, we're facing this issue. What are you guys doing about it? Or what are your thoughts on this? Or have you explored this or? Or hey, this is a new thing that is coming, have you guys thought about it yet?

And we can have those kinds of collaborative discussions because, while we are all trying to get fans to come to our buildings, on a legal front, we're all trying to solve the same issues. And nobody wants to see anybody else go down the wrong road, where they set bad precedent for all of us, or just suffer negative consequences. I'm very grateful for that because that's usually one of the first networks that I tap into and say, "Hey guys, what are you doing about this?"

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LEAD1 Association Examines the Risks of Legalized Sports Wagering on College Campuses

The U.S. is the only country in the world with substantial legalized sports betting on college campuses.

LEAD1 Association (LEAD1) President and CEO Tom McMillen recentyly interviewed Martin Lycka, Senior Vice President for American Regulatory Affairs & Responsible Gambling at Entain, a leading global sports betting, gaming, and interactive entertainment group, which operates in the U.S. through BetMGM, jointly owned with MGM Resorts International. The subject: legalized sports betting on college campuses.

In the U.S. today, betting on college sports is legal in more than 30 states and growing rapidly. As such, the U.S. is the only country in the world with substantial legalized sports betting on college campuses. With such activity, comes increased significant potential liabilities for colleges and universities. Other recent changes in college sports such as the NCAA relaxing its NIL rules, also underscore some of the new ways that sports betting may exist on college campuses. For these reasons, McMillen wanted to chat with Lycka to discuss some of these potential risks. Here are some of the important takeaways from the podcast episode:

1. ***There are new risks associated with the intersection between NIL and legalized sports betting.*** While most state NIL laws and institutional policies on NIL prohibit college athlete NIL deals with sports betting entities, some states and institutions allow for this. According to Lycka, because of the communal nature of college campuses, information that may be relevant to betting could spread "like wildfire." College students may even unwittingly share information, like seeing an injured player walk around campus, and text that information to their friends. In addition, "fringe players," may be tempted to share inside information related to their team if they are attracting significantly fewer NIL opportunities than their star teammates.
2. ***The pervasiveness of sports betting advertisements could also lead to risks.*** The NCAA Division I Interpretations Committee recently provided guidance that schools and conferences can sign deals with data companies that sell that information to sportsbooks. The Mid Atlantic Conference recently announced such an agreement with Genius Sports, and athletics departments, such as LSU and Maryland, both recently agreed to partnerships with sportsbooks. More and more college sports entities will likely follow suit. Accordingly, if sports betting becomes more of an accepted normality, the possibility for a scandal(s) may increase. There are also concerns that in-play betting, or prop bets, could lead to irresponsible betting.
3. ***Lycka believes that certain safeguards can mitigate these risks, including:*** (1) providing education on college campuses about responsible betting and explaining how betting works (which could reduce some of the temptations to bet and/or get involved in illicit betting activities); (2) constantly monitoring games through sophisticated sports integrity teams who can red

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flag suspicious behavior, and (3) enforcing rules that prohibit minors from betting.

More in the podcast episode can be found on sports wagering implications for college sports, including on esports betting.

The LEAD1 Angle can be found on the following platforms:

- **Apple Podcasts HERE**
- **Spotify HERE**
- **LEAD1 Association Website (Episode 21 Page) HERE**
- **LEAD1 Association Website (Episode Archive) HERE**

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Another Lawsuit Filed Involving Loot Boxes, This One Against Take-Two Interactive Software Inc.

By Carmen Palumbo, GW Law 2L

(Editor's Note: The following appears in Esports and the Law, a periodical produced by Hackney Publications.)

Take-Two Interactive Software Inc., the parent company of 2K sports, is facing a class-action lawsuit over the sale of loot boxes in its high-grossing game NBA 2. An Illinois minor and her guardian filed the suit on January 11, 2022, seeking $5 million dollars in relief citing, "Defendant's unfair, deceptive, and unlawful practices, including illegal gambling practices, deceive, mislead, and harm consumers."[12]

The plaintiff is not alone in feeling deceived by the hidden microtransactions embedded in the game. Earlier this year California parents filed two separate lawsuits against Apple and Google for their role in promoting the use of loot boxes[13]. The parents asserted that loot boxes were a form of illegal gambling, and that Apple and Google should be held responsible for the part they played in promoting the sale to children. Apple was sued for working with app developers to publish games containing loot boxes in their app store. Apple's role was driven by an incentive paid on a percentage of all in-game transactions. Google was sued for strategically marketing games containing loot boxes. They too were paid based on a percentage of all in-game transactions. The lawsuits ended in favor of both Apple and Google after the courts concluded that: "Loot Box prizes are not things of value under California gambling laws, and absent any case law holding to the contrary, the Court concludes that Loot Boxes are not illegal slot machines under California law."[14]

The California parents, like the Illinois parents' herein have similar goals in mind, to protect their children and pocketbooks from excessive in-game microtransactions. In this recent matter, the NBA 2K game costs $59.99, as a with endless microtransactions that allow the gamer to make additional in-game currency purchases which unlocks players, upgrades a player's skill level, and allows access to unique clothing. Although players have a chance to earn this in-game currency as they master the game, achieving this skill level is difficult and time consuming. Thus, most players resort to using cash to access these special offerings. One such offer is the popular loot box. Loot boxes are mystery boxes of random clothing and skills[15]. The odds that an individual receives a "good" loot box are hidden, making the appeal or lure to buy the box, again and again, even more enticing[16].

Purchases of loot boxes are made through a credit card the player attaches upon installation of the game. This connection allows for purchases of in-game

12 Cecilia D'Anastasio, Take-Two Faces Lawsuit Over Controversial 'Loot Boxes' in NBA 2K Bloomberg.com, https://www.bloomberg.com/news/articles/2022-03-03/take-two-faces-lawsuit-over-controversial-loot-boxes-in-nba-2k (last visited May 31, 2022).

13 Recent rulings suggest defendant wins in loot box cases are common, appeals all pending, Wilson SonsiniGoodrich & Rosati Professional Corporation Home Page–Palo Alto, Silicon Valley, San Francisco, New York, Seattle, San Diego, Washington, D.C., Shanghai, Hong Kong, Brussels – Recent Rulings Suggest Defendant Wins in Loot Box Cases Are Common, Appeals All Pending, https://www.wsgr.com/en/insights/recent-rulings-suggest-defendant-wins-in-loot-box-cases-are-common-appeals all-pending.html#6 (last visited Jun 4, 2022).

14 *Coffee v. Google LLC*, No. 20-cv-03901-BLF, 2022 U.S. Dist. LEXIS 4791, at *40-41 (N.D. Cal. Jan. 10, 2022).

15 Loot boxes linked to problem gambling in new research, BBC News (2021), https://www.bbc.com/news/technology-56614281 (last visited May 31, 2022).

16 Loot boxes linked to problem gambling in new research, BBC News (2021), https://www.bbc.com/news/technology-56614281 (last visited May 31, 2022).

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currency with just a few clicks. The suit asserts that this effortless process leaves minors, "psychologically distant" from the real-life implications of the purchase[17]. Furthermore, the purchases are non-refundable, arguably leaving the actions of minors, caught up in the game, irreversible. The suit argues that these unmonitored, in-game purchases leave the parent or owner of the credit card liable for hefty bills and negatively impact the disposition of the minor. Furthermore, the claim raises a comparison between the appeal of a loot box purchase, such as luck and reward and its similarities to gambling. In sum, the possibility of getting rare or lucrative game materials becomes a contest of its own, tempting minors to buy more loot boxes without a consideration for the real-life cost. Proving that NBA 2K stands to benefit from the deceit and temptation of minors is the crux of the case.

There are two common arguments gaming companies put forth in favor of loot boxes. First, they 'enhance' game play. They allow someone who is not as skilled as other players or who lacks the time required to master the game, to acquire them through purchases. Second, it's a revenue source for game developers. According to many reports loot boxes will account for over 20 billion dollars in sales by 2025[18].

Although these defenses have protected the game publishers, to date, Belgium has decided to take the lead on this matter and protect their youth. In 2018, they ruled that loot boxes were analogous to gambling and would be banned from all games[19]. Following suit, the Netherlands ruled the same and forced all gaming manufacturers to remove all mechanics (like loot boxes) from the games. As for the U.S., in 2019, Senator Josh Hawley proposed a bill banning the sale of loot boxes to minors stating, "Social media and video games prey on user addiction, siphoning our kids' attention from the real world and extracting profits from fostering compulsive habits"[20]. Furthermore, "...when kids play games designed for adults, they should be walled off from compulsive microtransactions. Game developers who knowingly exploit children should face legal consequences".[21] Although this bill seemed to gain traction with both sides of congress and parents across the country, it has not passed the introductory stage. If the class action is won by the Illinois parent, it could pave the way for legislation against similar mechanisms in games to finally move forward.

17 Cecilia D'Anastasio, Take-Two Faces Lawsuit Over Controversial 'Loot Boxes' in NBA 2K Bloomberg.com, https://www.bloomberg.com/news/articles/2022-03-03/take-two-faces-lawsuit-over-controversial-loot-boxes-in-nba-2k (last visited May 31, 2022).

18 Matt Gardner, The gaming industry's Loot Box problem is about to get worse Forbes (2021), https://www.forbes.com/sites/mattgardner1/2021/03/11/the-gaming-industrys-loot-box-problem-is-going-to-get-worse/?sh=68aa5ff94425 (last visited May 31, 2022).

19 Cecilia D'Anastasio, Take-Two Faces Lawsuit Over Controversial 'Loot Boxes' in NBA 2K Bloomberg.com, https://www.bloomberg.com/news/articles/2022-03-03/take-two-faces-lawsuit-over-controversial-loot-boxes-in-nba-2k (last visited May 31, 2022).

20 Senator Hawley to introduce legislation banning manipulative video game features aimed at children, Senator Josh Hawley (2019), https://www.hawley.senate.gov/senator-hawley-introduce-legislation-banning-manipulative-video-game-features-aimed-children#:~:text=Senator%20Josh%20Hawley%2C%20a%20fierce,by%20the%20video%20game%20industry. (last visited May 31, 2022).

21 Senator Hawley to introduce legislation banning manipulative video game features aimed at children, Senator Josh Hawley (2019), https://www.hawley.senate.gov/senator-hawley-introduce-legislation-banning-manipulative-video-game-features-aimed-children#:~:text=Senator%20Josh%20Hawley%2C%20a%20fierce,by%20the%20video%20game%20industry. (last visited May 31, 2022).

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Sports Lawyer Moira O'Connor Discusses Her Experience as Director of Operations at Soldier Field

It wasn't long after we reached out to Moira O'Connor, then Director of Operations at Soldier Field, that she switched jobs.

Thomas has a legal background, which is why we sought her out for an interview feature about her experience with sports facilities.

Fortunately for her, that same legal background opened the door to an attorney at law at Taft Stettinius & Hollister LLP, a law firm out of the Midwest. After nine years on the facilities side, the opportunity to practice law with more regularity was too good to pass up.

Nevertheless, we were still interested in what she had learned, given her unique perspective. What follows is her interview.

Question: What were your job responsibilities as Director of Operations at Soldier Field?

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Answer: As the Director of Operations at Soldier Field I oversaw: Major events; Capital improvement projects; repair and maintenance; facility services/cleaning services; trades; laborers; building systems; grounds maintenance; and subcontractor contracts. Under our management umbrella at Soldier Field, we also managed specialized sport complexes for the Chicago Park District including (3) indoor ice rinks; indoor and outdoor synthetic turf fields; a gymnastics facility; a youth baseball stadium; and a NCAA/Professional rated Hydraulic indoor track and field facility. I oversaw the operations side of those facilities as well.

Q: How did being a lawyer help you in that role?

A: I did four years of law school at night (graduating from the University of Illinois Chicago School of Law in 2017), while working full time for ASM Global. My first role was manager of one of the ice rinks and then two years as the Director of Operations at Soldier Field. From a practical perspective, time management was the most important part of my schedule. Being able to give 100 percent to work and then go to school after work and do the same wouldn't have been as achievable had I not been able to manage my time correctly.

From a personal perspective, being a younger female in an operations role at an NFL stadium people are quick to discount you and the knowledge you bring into the roll, it provided a level of credibility that I don't think would have been afforded to me if I was not in law school and then subsequently a lawyer.

Most importantly being a lawyer, and even when I was just a law student, it brings a completely different perspective and way of thinking into a stadium operator space. Risk Management and mitigation is always at the forefront of your mind when addressing certain issues. It also was incredibly helpful to have a legal writing background when it came to documentation for the stadium and policy writing- having my law degree played a major role in Soldier Field being able to successfully apply for Safety Act Certification/Designation "in-house", something that was unheard of at the time.

Q: What were the most pressing legal or risk management issues the last few years?

A: Not to state the obvious, but Covid was the biggest risk management/mitigation issue faced the past couple of years. Whether it was writing the protocols for cleaning, stadium entry for staff during quarantine as the stadium still needed to be maintained, to working hand in hand with the team and concessions to plan for a safe stadium re-opening for fans to return. I think any stadium operator at the time can attest that the landscape changed by the day leading up to and during the past couple of seasons regarding protocols. Having my legal background, I was able to not only help write the plans from a legal and operational perspective, but also oversaw the compliance. Having a plan is only as good as its implementation and being able to oversee both sides was directly correlated to my background.

Q: Why did you leave to join a firm?

A: Strangely enough, outside of not working football on Sundays, my day-to-day job with the law firm feels really familiar to me. I do Safety Act applications, minority/women owned business certifications and all of the auditing/compliance that comes with that throughout the country and government relations/strategies. For me I felt if I ever wanted to come back into the sports world or stadium operations world I want to come back and make an impact and really have a seat at whatever table it may be in the future. I felt that at the end of the day, in order to do return I would need to lean more into my legal side and gain that experience to really round out my skill set.

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BAC Sanctions Athlete Vinod Kumar for Two Years for Intentional Misrepresentation

The Board of Appeal of Classification (BAC) has sanctioned India's Para athletics athlete Vinod Kumar to a period of two years' ineligibility for the disciplinary offence of Intentional Misrepresentation.

World Para Athletics commenced disciplinary proceedings with the BAC after Kumar intentionally misrepresented his abilities when he presented for classification at the Tokyo 2020 Paralympic Games. The athlete was observed performing several movements and functions in competition which were not consistent with his performance during the physical and technical aspects of classification.

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Under the World Para Athletics Classification Rules and Regulations, it is a disciplinary offence for an athlete to intentionally misrepresent their skills or abilities and/or the degree or nature of their impairment. It is also a disciplinary offence for any athlete support person to assist, conceal or be complicit in any Intentional Misrepresentation by an athlete.

As a result of the disciplinary offence, the athlete will be ineligible to compete in Para athletics competition until August 2023. The results which the athlete obtained in competition at the Tokyo 2020 Paralympic Games have been disqualified.

Christian Holtz, Managing Director of World Para Sports, said: "Intentional Misrepresentation is a very serious offence and athletes are required to give their best effort when presenting to a classification panel. The classification system is crucial to ensure fair competition and this case shows how committed World Para Athletics is to protect the integrity of the sport."

Each athlete is responsible for being knowledgeable of and complying with all the terms of the World Para Athletics Classification Rules and Regulations and for participating in athlete evaluation in good faith.

The BAC is an independent body that considers, and when appropriate, conducts hearings regarding classification appeals in Para athletics, among other sports. It also has jurisdiction over the resolution of disputes that involve allegations of Intentional Misrepresentation in some sports, including Para athletics.

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New Study Investigates What is the Matter with White Matter in Student Athletes' Traumatic Brain Injuries

By Gina McKlveen

A recent study published by the American Journal of Neuroradiology last month, revealed the ramifications of traumatic brain injuries for college athletes who not only experience sports-related concussions, but repetitive head injuries as well.

The authors of the study, Chung, Chen, Li, Wang, and Lui, titled "Investigating Brain White Matter in Football Players with and without Concussion Using a Biophysical Model from Multishell Diffusion MRI" began with the hypothesis that there may be subtle but significant changes in white matter microstructural damage due to sports-related concussions (SRC) and repetitive head injuries (RHI) exposure that could be detectable with advanced medical diffusion imaging. White matter, simply explained, is brain tissue located deep inside the brain that is composed of nerve fibers, also called axons, which are part of the brain's nerve cells, or neurons. The name "white matter" is derived from the tissues' white color which is caused by a myelin, a layer of the brain that aids in rate of speed for sending signals and electrical impulses quickly between neurons so that the brain can receive and respond to messages.

For these reasons, white matter plays an important part in brain functioning, as it effects internal body communications and the brain's learning ability, which is why any damage or deterioration to this area of the brain can have traumatic, even potentially lifelong, neurological impacts. Based on these growing concerns, especially around the risks posed to young, sometimes still developing minds, like those of student-athletes, associated with sports-related concussions and repetitive head injuries customary in most contact sports, this report investigated the key differences between collegiate football players, specifically, with and without sports induced head injuries.

To begin the research investigation, the authors collected and studied 78 collegiate level athletes, all males around the age of 19 years-old, with 24 being college football players that experienced a sports-related concussion within 48 hours, 26 being college football players that faced repetitive head injuries but lacked a history of any sports-related concussion during the study, and finally 28 being non-contact-sport athletes who played baseball, cross country, and a field event and served as a control group throughout the study. The results of the 24 student-athletes with sports-related concussions were analyzed in more detail, studying the longitudinal recovery trajectories across four different time points. First, student-athletes with sports-related concussions were observed in the 24 to 48 hours after the initial injury. Second was the asymptotic stage, in which student-athletes with sports-related concussions that were observed after passing an initial clearance and return-to-play protocol. Third, student-athletes with sports-related concussions were observed seven

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days post-concussion following unrestricted return-to-play and finally, the fourth time point observation occurred six months after the initial injury. For comparison purposes, the 28 student-athlete non-contact-sport control group and the 26 student-athletes subjected to repetitive head injuries were also observed at the same time intervals that matched the sports-related concussion group. All studies and participants were conducted over the 2016 to 2018 football seasons.

The data collected on the student-athlete participants in the study was obtained using magnetic resonance imaging (MRI) scanner technology and diffusion image processing. After scanning the student-athletes brains and capturing the diffusion images, the authors used Tract-Based Spatial Statistics (TBSS) a sophisticated set of tools used to analyze the voxelwise—or whole-brain—diffusion data to capture the statistics and maps to track the presence white matter metrics. "For TBSS, statistical tests were conducted with 5,000 permutations to identify statistically significant effects among [the] groups." Once the data was collected, "post hoc sub-analyses were performed in an attempt to separate the effects of SRC from RHI. Specifically, the corpus callosum (CC) was studied to understand the temporal evolution of the SRC changes."

One of the most notable results of the data collection of this study was that the TBSS analysis revealed a "diffusely higher" axial kurtosis, meaning the directional measure related to the normal distribution, in athletes that experienced a sports-related concussion compared to the control group at the first time point. Moreover, similar differences in axial kurtosis were found between the control group and the student-athletes that experienced repetitive head impacts. The authors propose that "[These] findings suggest that some of the diffuse measurable microstructural changes observed in the SRC group may related not to [a] sports-related concussion, but to a background of exposure to repeat subconcussive head impacts." In fact, "[s]imilar changes of kurtosis have been reported in nonconcussed young football players with cumulative head impact exposure."

Then, when the authors took a step back and observed the data collected over each of the four different time points established throughout the study, they found that the affected white matter regions of the brains of student-athletes that experienced sports-related concussions in comparison with the non-contact sport control group decreased across the time points, "suggesting partial recovery of microstructural changes during the study period." Yet, what was most interesting to the authors revealed by the data was that "persistent higher [axial kurtosis] in the SRC group was observed compared with the non-contact-sport controls mainly in the [corpus callosum] on [the] 6-month follow up scans, suggesting longer-term persistence of microstructural changes associated with SRC," which means that the damage to the brain from sports-related concussions can have lasting ramifications for student-athletes.

Finally, focusing on the student-athletes with repetitive head injuries, who unlike the student-athletes with sports-related concussions which were taken out of active play, experienced repetitive head injuries over the course of the study, the authors "persistently observed across all time points compared with the non-contact sport controls" increasing and higher axial kurtosis. For emphasis, the authors add, "[w]hile similar findings were present at the initial time point in the SRC group, these were no longer present at later time points after a recuperation period without RHI exposure, suggesting that at least some of the white matter microstructural changes associated with RHI exposure may be reversible early on." In other words, the study found that repeated hits to the head can do increasing damage to white matter in the brain if subjected to those kinds of injuries over an extended length of time without any significant recovery period.

The study did also acknowledge some of its limitations such as the fact that the time points were established by clinical status instead of predefined follow-up intervals, that the small sample size of 78 student athletes may have explained some changes in diffusivity which other studies have shown, or that TBSS methods are sensitive to maximal deviations in diffusion metrics. But the authors of this study ultimately concluded, "[t]here are differences not only in concussed football athletes but also in nonconcussed football athletes compared with non-contact-sport control athletes in terms of microstructure measures. These findings reinforce previous work showing that corpus callosum is specifically implicated in football athletes with SRC and also suggest this to be true for football athletes with RHI." Only further study will be able to

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reveal what is the matter when it comes to repetitive head injuries and the effect of lost white matter over time on student-athletes who have been impacted by these types of injuries and concussions that clearly have significant traumatic neurological repercussions.

The results of this study added to findings published previously from a larger sample population conducted by the National Collegiate Athletic Association-Department of Defense Concussion Assessment, Research and Education (CARE) Consortium study. The work of this study was supported by the National Institutes of Health, the Department of Defense, and the Leon Lowenstein Foundation.

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NCAA-DOD Grand Alliance Conference Provides Updates on Concussion Research

By Justin Whitaker

The fifth annual NCAA-Department of Defense Grand Alliance Concussion Conference, presented virtually April 21, featured concussion experts and researchers sharing preliminary and recently published data.

The conference, titled "A New Era of Scientific Collaboration," was hosted by the NCAA Sport Science Institute and U.S. Department of Defense, in partnership with the Atlantic Coast Conference and the University of North Carolina, Chapel Hill.

Presenters shared updates from the NCAA-DOD Concussion Assessment, Research and Education Consortium, the largest concussion and repetitive head impact study in history, which received a $46.65 million award in October to launch its next phase.

"We're proud of the research gained through the NCAA-DOD Grand Alliance, including the CARE Consortium, the Mind Matters Challenge, and now the long-term CARE-SALTOS Integrated Study," NCAA Chief Medical Officer Brian Hainline said. "Our goal is to continue to learn more about concussion and head impact exposure, which translates into valuable knowledge for the physicians and athletic trainers who are charged with providing care to student-athletes and service academy cadets."

NCAA Chief Medical Officer Dr. Brian Hainline briefly discussed concussions and the CARE Consortium on the latest Social Series. He also addressed the COVID-19 pandemic and mental health resources in a health and safety update for college sports.

North Carolina Chancellor Kevin Guskiewicz, a neuroscientist and concussion researcher, opened the conference with a reflection on the beginnings of the research and the importance of collaboration between NCAA member schools and the Department of Defense.

"This has all occurred through valuable partnerships and multicentered studies involving hundreds of athletic trainers, coaches, physicians, policymakers and student-athletes," Guskiewicz said. "We do this all for the protection of their health and well-being and to improve safety for athletes at all levels of play."

In 1996, Guskiewicz worked with Mike McCrea, professor and vice chair of research in the department of neurosurgery at the Medical College of Wisconsin, on a concussion study that was funded by the NCAA. Guskiewicz shared that he never could have imagined where the scope of research would be today. There are now thousands of study participants and data points to help inform the growing field of sport neuroscience and traumatic brain injury prevention and treatment.

Atlantic Coast Commissioner Jim Phillips echoed the importance of this initiative and the benefits for nearly 500,000 student-athletes across the country and almost 10,000 within the conference.

"It is these extraordinary student-athletes that drive us to continue working together to further ensure their health and safety remains our top priority," Phillips said.

The NCAA-DOD Grand Alliance Concussion Conference was a free-to-attend forum to share emerging information with athletic trainers, team physicians, sports medicine clinicians and athletics health care administrators from NCAA member schools. Stakeholders from military medical facilities and others who oversee and manage sport-related concussion and repetitive head impacts also participated.

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News Briefs

GWU Sports Law Professor Launches EsportsLawShow Podcast

Sports Law Professor (GWU) Ellen Zavian, who is also the Editor-in-Chief of Esports and the Law, has launched Esports Law Show, a podcast that examines legal and business issues in the esports industry. Professor Zavian, who has contributed on the subject to the Washington Post and Forbes, will host a different guest each month as she seeks to shed light on this important topic. To subscribe and receive notifications, visit **https://anchor.fm/ellen-zavian**

Baily & Glasser Hosts 'Title IX 50th Anniversary Primer: Time to Sue?'

Baily & Glasser will host a webinar on Thursday, June 23 (from 2:00-3:00 PM ET) that addresses Title IX of the Education Amendments of 1972. The webinar – on the 50th anniversary of the day that Title IX became law – "will teach students, athletes, parents, alumni, coaches, administrators, college officials, lawyers, the press, and anyone interested what Title IX requires, whether to take action, and why. It will educate and empower current and potential student-athletes – who have the power to enforce Title IX – and hopefully inspire and activate them and everyone else to make sure schools finally provide the gender equity that Title IX requires."

Among the topics set for discussion:

- · Opportunities to participate
- · Athletic financial aid
- · Treatment and benefits
- · Name, image, and likeness (NIL)
- · NCAA and Conferences

The webinar features a panel of lawyers who have successfully represented more female and male student-athletes and potential student-athletes under Title IX than anyone in the country – Arthur Bryant, who tried the very first Title IX athletics case, Cary Joshi, and Lori Bullock. In the last two years alone, these Bailey Glasser partners and their co-counsel have won settlements enforcing Title IX and advancing gender equity for student-athletes and potential athletes at Brown University, Clemson University, the College of William & Mary, the University of North Carolina at Pembroke, East Carolina University, Dartmouth College, Dickinson College, and others. Please click **here** to register for the webinar.

Hogan Lovells Represents Rob Walton in Deal to Acquire NFL's Denver Broncos

The global law firm of Hogan Lovells represented Rob Walton, Carrie Walton Penner and Greg Penner in the purchase and sale agreement announced on June 7 for the Walton-Penner family to acquire the Denver Broncos from the Pat Bowlen Trust. The Hogan Lovells deal team was led by partners Matt Eisler, head of the firm's global sports group, and Russell Hedman, both based in the firm's Denver office. At Hogan Lovells, Eisler and Hedman have executed landmark deals in the sports industry at the firm, including the two highest value transactions in U.S. sports history – namely, this Denver Broncos transaction and the sale of the NBA's Brooklyn Nets in 2019. "Sports Litigation Alert solves that problem, since it publishes every two weeks, featuring five case summaries and eight to 12 articles. This is the main reason the Alert is used in about 75 classrooms any given semester.

Blank Rome Welcomes Sports Law Attorney David Moreno to New York Office

Blank Rome LLP has announced that David A. Moreno, Jr. has joined the firm's New York office as a partner in the Commercial Litigation practice group and as a member of the firm's Sports Law team. Moreno is a seasoned trial attorney whose practice spans commercial litigation, white collar defense, business law, sports law, and reputational management. Prior to joining Blank Rome, David was a partner at Brown Rudnick LLP.

Moreno started his career as an assistant district attorney in the Manhattan District Attorney's office,

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where he was a member of Trial Bureau 50. During this time, he successfully investigated and prosecuted more than 1,200 criminal cases and tried 13 cases to verdict.

Moreno's practice covers numerous areas, including commercial litigation, white collar defense, intellectual property protection, tax, sports law, reputation management, and investment disputes. He advises clients on an array of domestic and international white collar matters, including healthcare fraud, securities fraud, and other financial crimes. He has tried numerous criminal and civil matters to verdict—his significant trial experience as a prosecutor, attention to detail, and business acumen make him a formidable and seasoned trial attorney.

Moreno has also provided counsel to various start-ups and institutional investors on legal and business matters. He has worked closely with companies in response to discrimination based on race and gender, notably advising on diversity, equity, and inclusion ("DE&I") board policies, and remedies relating to dispute resolution, as well as worked closely with company leadership to properly convey the commitment and investments made to address these issues to shareholders and the public.

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