# SPORTS LITIGATION ALERT

July 29, 2022 Vol. 19, Iss. 14

## Case Summaries

### Is The Battle Over USFL Intellectual Property Much Ado About Nothing?

**By Gary Chester, Senior Writer**

When last seen in court, the United States Football League was licking its wounds over a meritorious 1986 antitrust case against the NFL that netted it a whopping $1 in damages, trebled to $3, plus $5.5 million in attorney's fees and costs. Failing to obtain the billions it sought from the NFL, the USFL promptly folded after completing just three seasons.

Fast forward to June 3, 2021, when businesses known as The Spring League (TSL) and USFL Enterprises announced the launch of a revamped USFL with eight teams that would play primarily in Birmingham, Alabama, to limit costs. The new USFL is clearly a made-for-TV venture that Fox Sports owns and operates. Fox and NBC covered the league's inaugural ten-week schedule and three postseason games.

Nine months after the initial announcement, nine former USFL team owners and devisees formed a new company called The Real USFL. The purpose of the

## Table of Contents

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

### Case Summaries



### Articles



### News Briefs



Hackney Publications

entity is to hold and enforce the original USFL trademarks. The U.S. District Court for the Central District of California evaluated their trademark claims in Real USFL, LLC v. Fox Sports, Inc., et al., 2022 WL 1134487 (April 14, 2022).

## The Facts

After the original USFL disbanded, the owners elected Steve Ehrhart to chair the USFL Executive Committee to preserve the name and legacy of the league. Ehrhart, the league's executive director, entered into licensing agreements for apparel, books, and films, and in February 2022 assigned all rights to The Real USFL.

Despite not owning the original USFL league and team names and logos, the new USFL used the original league name and team names such as the New Jersey Generals, Birmingham Stallions, and Tampa Bay Bandits. TSL and USFL Enterprises used former USFL players to promote the new USFL to establish a connection with the past.

In preparation for the debut of the new USFL, the league's investors spent tens of millions of dollars on player contracts, stadium leases, apparel deals, and other essential items. The City of Birmingham also invested substantial resources in the new league.

## The Litigation

The Real USFL commenced a legal action to enforce its intellectual property rights on February 28, 2022. The plaintiff filed the operative First Amended Complaint and a motion seeking injunctive relief against the new USFL using its trademarks and logos on March 17, 2022. The Real USFL alleges the defendants, Fox Sports and TSL, are liable for trademark infringement, false advertising, false association, unfair competition, and tortious interference with contract.

U.S. District Judge John F. Walter decided the motion based on the parties' written briefs, without oral argument.

## The Legal Standard

To obtain the extraordinary remedy of a preliminary injunction, the moving party must establish: (1) a likelihood of success on the merits; (2) that it will likely suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in its favor; and (4) that an injunction serves a public interest.

The court concluded that the Real USFL is likely to prevail on its trademark infringement claim because it has a protectable ownership interest in the trademarks and the defendants' use of the marks is likely to cause customer confusion.

The defendants argued that the original USFL had abandoned its trademarks, that a third party registered the trademarks with the U.S. Patent and Trademark Office in 2011, and that the marks were assigned to TSL on April 9, 2021. The plaintiff conceded that the original USFL trademarks lapsed in 1986 when the league ceased operations, but that the plaintiff started to use the marks again in 2006 when Ehrhart contracted with an apparel company to produce nostalgic USFL clothing.

The court found that The Real USFL would likely prevail on the merits. This was based on California Cedar Products Co. v. Pine Mountain Corp., 724 F. 2d 827, 830 (9th Cir. 1984), which held that the "first party to use an abandoned trademark in a commercially meaningful way after its abandonment, is entitled to exclusive ownership and use of that trademark."

Having satisfied the first prong, could The Real USFL meet the additional requirements for a preliminary injunction?

## The Court Denies the Injunction

Although the plaintiff could establish a likelihood of success on the merits, the court ruled that it was unable to meet the three remaining requirements. The Real USFL contended that use of the marks by the defendants would impair its ability to preserve the USFL's legacy and reputation and cause irreparable harm. But

the court recognized that The Real USFL's use of the marks since the demise of the league was minimal.

"For the past four decades" the court wrote, "Plaintiff's members use of the Marks and efforts on behalf of the USFL were virtually nonexistent. In fact, Defendants have undoubtedly generated more goodwill for the USFL since announcing the launch of the New League eight months ago than Plaintiff's members have accomplished in the past forty years."

After determining that denying the injunction would not cause irreparable harm, the court considered the balance of equities. The court observed that The Real USFL is not seeking to use the marks to promote a competing football league, but the defendants have made substantial investments in intellectual property rights and contracts to start the new USFL. The court found that the equities favor the defendants, stating: "An injunction would effectively stop all of the New League's activities while Defendants rebranded both the league and the teams, jeopardizing Defendants' investments and threatening the existence of the New League itself."

Finally, the court considered whether granting an injunction would serve a public interest. Judge Walter found that the risk of public confusion was limited to a few small apparel sales, as opposed to the new league's players, business partners and others suffering substantial losses if the court issued an injunction.

### Laches was a Factor

Although the court did not specifically apply the equitable concept of unjust delay, or laches, The Real USFL's delay in filing the lawsuit was a factor in the ruling.

Had the plaintiff filed suit before the defendants entered into contracts and took on other obligations, the court stated, the analysis of public interest factors might have favored the plaintiff. The court wrote: "Because of the delay, however, there is an unacceptable level of economic harm, and this factor weighs strongly against granting Plaintiff's Motion."

### The Takeaway

Do the USFL's intellectual property rights have any substantial value? Here are some facts:

Telecasts of the new USFL's regular season games averaged 715,000 viewers, according to the Sports Business Journal.

The USFL championship game between the Philadelphia Stars and the Birmingham Stallions averaged a 0.9 rating and 1.52 million viewers on Fox, placing it 46th out of the 63 primetime shows on the four major networks, according to sportsmediawatch.com.

The new league plans to conduct its second season in 2023, but the lawsuit presents an overhang to its investors because Judge Walter found that The Real USFL possesses intellectual property rights and is likely to prevail, based on Ehrhart's revival of USFL trademarks in 2006. Either an injunction or substantial damages for infringement would strike at the heart of the defendants' business plan.

This appears to be a case where a licensing agreement may be the best outcome for all parties. Fees would likely be modest, as the value of the marks would

seemingly pale in comparison to NFL and NCAA trade names and logos.

Lastly, the lack of success of prior spring football leagues such as the XFL and the original USFL makes it interesting to see if the new USFL outlasts this litigation.

Return to Table of Contents

## The Litigation Surrounding Dunkin' Donuts Park Goes into Extra-Innings; Connecticut Supreme Court Remands Case for a New Trial

**By Robert J Romano, JD, LLM, St. John's University – Rome Campus, Senior Writer**

Dunkin' Donuts Park, the home of the minor league baseball team the Hartford Yard Goats, was again named the best Double-A Ballpark in America by Ballpark Digest in 2021, previously winning the award in 2017 and 2018.[1] However, the legal battle between the city of Hartford and Centerplan Construction Co., one of the original developers of the park, has been anything but award winning.

By way of background, in early 2015 the city of Hartford, then under the leadership of Mayor Pedro Segarra, hired Connecticut based Centerplan and DoNo Hartford LLC, both of which were controlled by developer Robert Landino, to build the 6,120-seat ballpark. The building of this stadium was to be a key part of the planned economic revitalization of the city. Within a year, however, the project was millions over budget and months behind schedule. The developers got a small extension, but by the spring of 2016, it was evident that the park would not be completed in time for the beginning of the upcoming baseball season.[2] In June of 2016, the city, frustrated with the lack of progress, terminated the contract with Centerplan, with a new contractor being hired by Arch Insurance, the company holding the performance bond for the project.

Arch Insurance subsequently filed suit against Centerplan, which prompted Centerplan to file suit against the city of Hartford, setting up a legal battle that continued through the 2019 baseball season. The jury, after a multi-week trial, found Centerplan liable for the cost overruns and delays, and awarded the city of Hartford $335,000 in damages. Centerplan, not satisfied with these findings, petitioned to have the jury's verdict set aside, while also filing an appeal wherein it raised the following issues:

- Did the trial court err in deciding as a matter of law that, under the parties' agreements, the city did not breach its agreements with the plaintiffs by terminating Centerplan without affording it an opportunity to cure?
- Did the trial court err in refusing to instruct the jury that, if it found that there was concurrent delay by virtue of the city's acts or omissions, Centerplan would be entitled to an extension of time and DoNo could not be in default?
- Did the trial court err by directing the jury to award liquidated damages to the city without allowing it to consider offsetting the benefit conferred by the plaintiffs on the city?
- Did the trial court err in discharging the lis pendens filed by DoNo and its counterclaim defendant affiliates, the leaseholders, on the parcels surrounding the ballpark?[3]

Fast-forward to May 2022, the Connecticut Supreme Court, in a unanimous 5-0 decision, overturned the trial court's ruling and remanded the case for a new trial. The Supreme Court found that "because the trial court did not properly construe the agreements and did not present this issue to the jury, the parties, particularly Centerplan, were prevented from developing the record regarding, and the jury was prevented from deciding, not only whether proper notice and an opportunity to cure were provided, but also whether honoring the termination requirements would be futile or whether Centerplan's breach was incurable."[4]

The Supreme Court noting that in cases like these, "whether a contract has been breached is a question of fact . . . and that courts lack the authority to make

1 https://www.nbcconnecticut.com/news/sports/dunkin-donuts-park-in-hartford-named-best-double-a-ballpark-for-third-time/2504974/

2 Landino maintained that the project was behind schedule because of multiple last-minute design changes ordered by the city of Hartford.

3 Centerplan Constr. Co., LLC v. City of Hartford SC 20526

4 Id.

findings of facts or draw conclusions from primary facts found."[5] The Court went on to state that "in the present case, the trial court determined, before trial and as a matter of law, that the city could not have breached its contract with Centerplan . . ."[6] But, as the Supreme Court patently stated, "we cannot make these determinations as a matter of law."[7] Therefore, because these questions must be determined by the jury, the Supreme Court had no option but to remand for a new trial.

Interestingly, however, in April of 2021, after years of costly litigation, city of Hartford officials said that they "stood by their decision to fire Centerplan"[8] and that they "did exactly the right thing to protect the taxpayers of Hartford from an irresponsible contractor."[9] The question remains, however, who is protecting the taxpayers of Hartford from irresponsible politicians?

Return to Table of Contents

## Ski Resort Successful in Defense against a Party Injured during Transportation by Ski Patrolman

**By Kwangho Park, Assistant Professor at Viterbo University**

In Heavenly Valley Ski Resort, plaintiff Teresa Martine (Martine) injured her knee while skiing, and a ski patrolman Gustav Horn (Horn) helped her down the mountain. However, the rescue toboggan in which she was riding lost control, and Martine sustained a head injury. She ended up accusing Heavenly Valley Limited Partnership (Heavenly) of negligence and damages which caused her additional head injury.

Heavenly moved for summary judgment, and the trial court granted the motion based on Heavenly's argument that Martine had no evidence for the following arguments: (1) Horn had been negligent in the transportation of Martine; (2) his negligence caused an incident which resulted in Martine's additional injuries. Furthermore, the doctrine of primary assumption of risk barred Martine's complaint. Accordingly, the trial court entered judgment and Martine appealed. However, the trial court dismissed Martine's arguments on appeal. Later, Martine made a new motion, but again it was denied by the Court of Appeal of the State of California, Third Appellate District. The case was closed on September 26th, 2018.

The incident happened on the Powder Bowl slope at Heavenly Mountain Resort on March 23, 2009. Because of Martine's kneecap injury, she requested ski patrol assistance. After Horn arrived at the scene, he provided proper first-aid to Martine by applying a quick splint to her wounded left leg. He then loaded her onto a rescue toboggan (i.e., a rescue sled). He placed her ski equipment next to her in the toboggan, on her non-injured side, and began to transport her to the bottom of the mountain. During the transportation, the toboggan rolled over, and Martine's head was consequently injured. Heavenly contends that "the rollover by external force (i.e., snowboarders emerged from the woods and obstructed the way of the sled) caused some of Martine's equipment in the toboggan to hit her head." However, Martine asserts that the sled tumbled due to Horn's negligent and out of control transportation, causing the toboggan to hit a tree, which resulted in her head injury.

Martine sued Heavenly in March 2011 and alleged that the "ski patrol negligently failed to maintain control of the sled, causing it to slide down the mountain and into a tree," leading to her second injury. On November 21, 2012, Heavenly moved for summary judgment to dismiss the plaintiff's complaint by using the doctrine of primary assumption of risk and stating a lack of evidence related to Martine's injuries. Martine opposed the summary judgment and argued that (1) the transportation of injured skiers by a ski patrolman cannot be applied to the doctrine of primary assumption of risk; and (2) the transportation of injured skiers by a ski patrolman "engaged in a common carrier activity charged with the duty of utmost care" cannot be applied to the doctrine of primary assumption of risk. After the trial court's decision granting Heavenly's motion, Martine's arguments on appeal are that: "(1) there is evidence on the motion to support the plaintiff's claim that the ski patrolman, Horn was negligent; (2) the plaintiff's action is not barred by the doctrine

5 Coppola Construction Co. v. Hoffman Enterprises Ltd. Partnership, supra, 157 Conn. App. 171.

6 Centerplan Constr.

7 Centerplan Constr., See, e.g., Cruz v. Visual Perceptions, LLC, 311 Conn. 106.

8 https://www.hartfordbusiness.com/article/quietly-dunkin-donuts-park-construction-lawsuit-moves-to-state-supreme-court

9 Id.

of primary assumption of risk; (3) the trial court erred in not allowing the plaintiff to amend her complaint to allege negligence and damages arising from a second injury the plaintiff incurred the same day while being taken off the mountain; and (4) the trial court erred in not granting her motion for a new trial." The court of appeal accepted her arguments and approved a new trial.

Regarding the first argument of Martine, the court of appeal concludes that the doctrine of the primary assumption of risk becomes a defense against Martine's claim for Heavenly's negligence in causing Martine's injuries. For Martine's second argument, which is related to the doctrine of the primary assumption of risk, the trial court used various appellate court decisions: Lackner v. North, 135 Cal. App. 4th 1188, 1202 (2006); Kane v. National Ski Patrol System, Inc. 88 Cal. App. 4th 204, 214 (2001). The previous decisions that the trial court used have the same point that the activity of skiing includes certain inherent risks. Based on these cases, the trial court found that Martine voluntarily participated in the activity of skiing and voluntarily received first-aid treatment and transportation services knowing that Martine and Horn were at risk of collision with other snowboarders or skiers while they descended the mountain.

Additionally, Martine argued that since Horn acted as a common carrier during the transportation of the injured plaintiff, the primary assumption of risk cannot apply. According to Squaw Valley Ski Corp v. Superior Court, 2 Cal. App. 4th 1499, 1506 (1992), a common carrier is "everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages" and should "do all that human care, vigilance, and foresight reasonably can do under the circumstances" (Squaw Valley v. Superior Court at p. 1507) to avoid injuries. To decide if Heavenly is a common carrier, there are three conditions for a court to consider: whether (1) the defendant has a place of business for transportation; (2) the defendant uses advertisements of their service toward the public; (3) the defendant collects the charges for their service. These conditions, however, are not related to the transportation controlled by Horn because a ski patroller's transportation is discretionary in nature, and there is not any compensation for the transportation of an injured party to the bottom of the mountain, unlike the ski lifts. Also, on the basis of Regents of the University California v. Superior Court, 4 Cal. 5th 607 (2018) (Regents v. SC), Martine argues that "Heavenly was liable because either it acted as a common carrier by providing the ski patrol service or it had a special relationship with Martine like a common carrier has with its passengers," but the Regents v. SC case does not concern the duty of common carriers and is not related to the assumption of risk. For these reasons, the court of appeal concluded that the trial court appropriately ruled that Martine's claim for negligence is barred by the doctrine of primary assumption of risk, and because of that, the court need not address Martine's argument that "the trial court erred in excluding evidence intended to show that Martine's rescuer's conduct was merely negligent under either principle of ordinary negligence or application of the law of common carriers."

Thirdly, Martine argues that "the trial court erred in not allowing her to amend her complaint to allege negligence and damages arising from a second injury she incurred the same day while being taken off the mountain." However, the court of appeal notes that Martine had never filed a motion to amend the complaint, which is that she sustained an additional injury when she was dropped while being loaded onto the tram. However, the original allegations of the complaint are related only the incident on the ski run. For these reasons, the court of appeal rejects Martine's attempt to expand her allegations beyond her previous complaint.

In terms of the last argument on appeals, Martine argues "the trial court erred in denying Martine's new trial motion." Her arguments for a new trial indicates "(1) those waived because they were not raised in the trial court and (2) those forfeited because Martine has failed to provide cogent facts and legal analysis demonstrating trial court error." However, the court of appeal does not consider Martine's irregular claims because she had the obligation in the trial court to "raise any issue or infirmity that might subject the ensuing judgment to attack…" (Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn, 163 Cal. App. 4th 550, 564 (2008)). Accordingly, Heavenly was awarded its costs on appeal.

**Teresa Martine v. Heavenly Valley Limited Partnership (C076998), Filed 09/04/18.**

Return to Table of Contents

## Appeals Court: Basketball-Playing Plaintiff Assumed the Risk of Injury

A New York state appeals court has affirmed the ruling of a trial court, which found that a plaintiff assumed the risk of injury when he slipped on an indoor court while playing basketball. Central to the ruling was the fact that the plaintiff had played more than 50 times on the court prior to suffering the injury.

Plaintiff Michael Lungen was injured while playing basketball when he slipped on condensation that had accumulated on the floor of an indoor gymnasium. The plaintiff thereafter commenced the instant action to recover damages for personal injuries against the defendants Harbors Haverstraw Homeowners Association, Inc., and FirstService Residential Midatlantic, LLC (hereinafter together the defendants), among others. He alleged that the accident was caused by the defendants' negligence, inter alia, in maintaining the gymnasium.

Following discovery, the defendants moved for summary judgment in on the grounds that the plaintiff assumed the risk of his injuries. In an order dated January 14, 2020, the Supreme Court granted the defendants' motion.

The plaintiff moved for leave to reargue his opposition to the defendants' motion for summary judgment. In an order dated March 9, 2020, the court, upon reargument, adhered to the original determination in the January 14, 2020 order granting the defendants' motion, leading to the plaintiff's appeal.

The appeals court noted that the doctrine of primary assumption of risk provides that "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." (Asprou v Hellenic Orthodox Community of Astoria, 185 AD3d 641, 642, 127 N.Y.S.3d 584, quoting Morgan v State of New York, 90 NY2d 471, 484, 685 N.E.2d 202, 662 N.Y.S.2d 421; see Custodi v Town of Amherst, 20 NY3d 83, 88, 980 N.E.2d 933, 957 N.Y.S.2d 268). "Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation" (Mamati v City of N.Y. Parks & Recreation, 123 AD3d 671, 672, 997 N.Y.S.2d 731). "The primary assumption of risk doctrine also encompasses risks involving less than optimal conditions" (Bukowski v Clarkson Univ., 19 NY3d 353, 356, 971 N.E.2d 849, 948 N.Y.S.2d 568; see Sykes v County of Erie, 94 NY2d 912, 913, 728 N.E.2d 973, 707 N.Y.S.2d 374).

"Assumption of risk is not an absolute defense but a measure of the defendant's duty of care" (Maharaj v City of New York, 200 AD3d 769, 769, 157 N.Y.S.3d 534, quoting Asprou v Hellenic Orthodox Community of Astoria, 185 AD3d at 642). The doctrine "does not exculpate a landowner from liability for ordinary negligence in maintaining a premises" (Sykes v County of Erie, 94 NY2d at 913; see O'Brien v Asphalt Green, Inc., 193 AD3d 1061, 1063, 147 N.Y.S.3d 114). "Participants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport" (M.P. v Mineola Union Free Sch. Dist., 166 AD3d 953, 954, 88 N.Y.S.3d 479; see Custodi v Town of Amherst, 20 NY3d at 88). However, "[i]f the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its [*4] duty of care by making the conditions as safe as they appear to be" (Brown v City of New York, 69 AD3d 893, 893, 895 N.Y.S.2d 442; see Bukowski v Clarkson Univ., 19 NY3d at 357; Berrin v Incorporated Vil. of Babylon, 186 AD3d 1598, 1599, 129 N.Y.S.3d 841). "It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (Maddox v City of New York, 66 NY2d 270, 278, 487 N.E.2d 553, 496 N.Y.S.2d 726).

The appeals court held that the defendants established, prima facie, that the plaintiff "was aware of and had assumed the risk that the floor of the basketball court would be slippery from condensation that had formed due to humid conditions in the gymnasium. The defendants' submissions, including the plaintiff's own deposition testimony, demonstrated that the plaintiff had played basketball in the gymnasium on more than 50 occasions prior to the day of the accident, knew that the gymnasium air was 'humid' and had dry-mopped the gymnasium floor while playing basketball in the past when it was 'getting wet' from '[c]ondensation,' and nevertheless continued playing basketball in the gymnasium on multiple occasions up until the date of the accident despite his awareness of this condition.

Under these circumstances, the plaintiff assumed the risk of injury inherent in playing basketball on an indoor court which he knew to become slippery due to humid conditions in the gymnasium (see id. at 278; Levinson v Incorporated Vil. of Bayville, 250 AD2d 819, 820, 673 N.Y.S.2d 469; Capello v Village of Suffern, 232 AD2d 599, 599-600, 648 N.Y.S.2d 699).

"In opposition to the defendants' prima facie showing, the plaintiff failed to raise a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923). Accordingly, upon reargument, the Supreme Court properly adhered to the determination in the January 14, 2020 order granting the defendants' motion for summary judgment dismissing the complaint insofar as asserted against them."

Michael Lungen v. Harbors Haverstraw Homeowners Association, Inc., et al.; Supreme Court of New York, Appellate Division, Second Department; 2020-00545, 2020-03093, (Index No. 31175/18); 6/8/22

**Attorneys of Record: Neimark & Neimark LLP, New City, NY (Ira H. Lapp of counsel), for appellant.**

**Barry McTiernan & Moore LLC, White Plains, NY (Laurel A. Wedinger and David Schultz of counsel), for respondents.**

Return to Table of Contents

## N.Y. Appeals Court Delivers Partial Victory to Minor League Baseball Clubs in Contract Dispute

An appeals court in New York State has affirmed, in part, a trial court's decision to deny the motion of two major league baseball teams, which sought to dismiss a claim brought by minor league baseball team owners for breach of contract and tortious interference with contractual negotiations.

The plaintiff in the case was Nostalgic Partners, LLC, the owner of the Staten Island Yankees minor league baseball team, which was formerly affiliated with the New York Yankees major league baseball club. Nostalgic purchased the Staten Island Yankees from Staten Island Minor League Holdings LLC in 2011. Plaintiff Tri-City ValleyCats, Inc. is the owner of the Troy, New York-based Tri-City ValleyCats minor league baseball team, which was formerly affiliated with the Houston Astros major league baseball club.

These actions arise from the end of those affiliations as part of Major League Baseball's **controversial restructuring of its minor league system**.

At the time of the lawsuit, the plaintiffs claimed that the defendants' "false promises and unlawful conduct have caused the SI Yankees significant harm, in that they have destroyed the SI Yankees' business model and doomed the SI Yankees to oblivion."

In its review, the appeals court wrote that the trial court "correctly determined that Nostalgic's complaint states a cause of action for breach of contract based on the 2011 Letter Agreement Amendment.

"We disagree with the Yankees' contention that it merely covenanted in the 2011 Letter Agreement Amendment to have in effect with Nostalgic a standard Player Development Contract (PDC) 'as referred to in Major League Rule 56 of the Professional Baseball Agreement,' which expired by its terms on September 30, 2020, along with the Professional Baseball Agreement.

"Rather, the Yankees in fact covenanted to provide Nostalgic with a standard PDC 'as referred to in Major League Rule 56 of the Professional Baseball Agreement or the rule that is its successor, replacement or equivalent.' Nothing in that language requires the successor, replacement, or equivalent rule to be associated with the Professional Baseball Agreement. In addition, neither the nature of Player Development Licenses, which the Yankees acknowledge replaced PDCs, nor affiliations between major and minor league teams under the new minor league structure, are sufficiently developed on this record to conclude that Player Development Licenses are not a successor, replacement, or equivalent to PDCs under former Major League Rule 56. Whether there is a conflict between the Yankees' covenant in the 2011 Letter Agreement Amendment and the Major League Rules cited by the Yankees, and the effect (if any) of any such conflict, are matters that cannot be resolved on this motion."

The appeals court added that "contrary to the Yankees' further contention, section 7(b) of the 2007 Letter Agreement, which provided that it 'shall terminate upon the occurrence of . . . failure of [Staten Island Minor League Holdings] to have a PDC in effect' with the Yankees, was not carried over into the 2011 Letter Agreement Amendment. The 2011 Letter Agreement Amendment specifically amended certain provisions

of the 2007 Letter Agreement and incorporated others, and section 7(b) was not among them. Even if section 7(b) were among the provisions incorporated into the 2011 Letter Agreement Amendment, the Yankees' alleged breach of their obligation to maintain in effect a PDC with Nostalgic under the Major League Rules or equivalent, cannot cause that obligation to terminate on the basis that Nostalgic does not have a PDC in effect (see Riverbay Corp. v Thyssenkrupp N. El. Corp., 116 AD3d 487, 488, 984 N.Y.S.2d 14 [1st Dept 2014])."

Turning to the ValleyCats' action, the appeals court noted that the elements of tortious interference are a valid contract between plaintiff and another, the defendant's knowledge of the contract and intentional procurement of its breach without justification, and damages resulting therefrom (Oddo Asset Mgt. v Barclays Bank PLC, 19 NY3d 584, 594, 973 N.E.2d 735, 950 N.Y.S.2d 325 [2012]).

The ValleyCats' alleged that the Astro defendants procured a breach of, inter alia, section 19.03 of the NAA, which provides:

"Any club, party, to or identified with this Agreement, which shall enter into any negotiation to become a member of or in any way cooperate with any organization of professional baseball clubs whose existence will in any manner conflict with the letter and spirit of this Agreement, or the interests of any of the clubs operating under it, shall thereby automatically forfeit all rights and privileges conferred by this Agreement, including membership in any league party to this Agreement, and all right to hold and/or reserve players' contracts."

The appeals court wrote that this "provision plainly prohibits any team that is a party to the NAA from negotiating to become a member of a competing organization. The Astro defendants do not dispute that teams that entered into Player Development Licenses violated section 19.03. The Astro defendants' contention that the provision is merely a forfeiture provision that does not give rise to an actionable breach conflates breach with remedy. That the remedy under the provision is expulsion from the NAA rather than a claim for breach of contract, does not make a violation of the provision any less of a breach (see Two Rivs. Entities, LLC v. Sandoval, 192 AD3d 528, 529, 146 N.Y.S.3d 1 [1st Dept 2021]).

Contrary to the Astro defendants' further contention that they could not have procured a breach of the provision because they had no power to require the teams they invited to participate in a restructured minor league system to accept, "'persuasion to breach alone, as by an offer of better terms,' is sufficient to constitute procurement of a breach of contract (Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 194, 406 N.E.2d 445, 428 N.Y.S.2d 628 [1980]).

"The ValleyCats' remaining claims for tortious interference with contract are based on the Astro defendants refusing to enter into new affiliations with the ValleyCats or the National Association after expiration of the Professional Baseball Agreement and the ValleyCats' PDC. However, by merely exercising their right not to enter into agreements with the ValleyCats or the National Association after the PBA and ValleyCats' PDC expired, the Astro defendants did not procure breaches of the ValleyCats' various contracts (see WFB Telecom. v NYNEX Corp., 188 AD2d 257, 258, 590 N.Y.S.2d 460 [1st Dept 1992], lv denied 81 NY2d 709 [1993]; Morse v Ted Cadillac, 146 AD2d 756, 757, 537 N.Y.S.2d 239 [2d Dept 1989], appeal dismissed 74 NY2d 700 [1989]). Moreover, their actions were neither unjustified (see WFB Telecom., 188 AD2d at 258; see generally Torrenzano Group, LLC v Burnham, 26 AD3d 242, 243, 810 N.Y.S.2d 42 [1st Dept 2006]), nor an intentional interference (see Alvord & Swift v Muller Constr. Co., 46 NY2d 276, 281, 385 N.E.2d 1238, 413 N.Y.S.2d 309 [1978]; Bellino Schwartz Padob Adv. v Solaris Mktg. Group, 222 AD2d 313, 313-314, 635 N.Y.S.2d 587 [1st Dept 1995])."

**Nostalgic Partners, LLC v. New York Yankees Partnership et al.; Sup. Ct. N.Y., App. Div., First Dept.; Index No. 656724/20, 650308/21, Appeal No. 15867-15868, Case No. 2021-03933, 2021-03831; 5/3/22**

**Attorneys of Record: Boies Schiller Flexner LLP, New York (Thomas H. Sosnowski of counsel), for New York Yankees Partnership, appellant.**

**Sullivan & Cromwell LLP, New York (Benjamin R. Walker of counsel), for Houston Astros LLC and the Office of the Commissioner of Baseball, appellants.**

**Berg & Androphy, New York (Michael M. Fay of counsel), for Nostalgic Partners, LLC, respondent.Weil Gotschal & Manges LLP, New York (Gregory Silbert of counsel), for Tri-City ValleyCats, Inc., respondent.**

Return to Table of Contents

# Articles

## Examining Railing Safety for Sport/ Concert Venues

**By Drs. Gil Fried, Salih Kocak, and Aneurin Grant-University of West Florida**

Imagine going to the ballpark to watch your favorite team or attending a concert at a large arena to dance to your favorite band. Most fans would not think twice about their safety when they are in the nosebleed seat. The view from high up can be great. Even with a few beers in your system, you feel safe. Nothing can go wrong up there.

The reality is significantly different. There have been too many examples of people being seriously injured or dying when falling over a railing, falling down ramps, jumping onto handrails and falling off, and other similar injuries venue designers, builders, and operators need to consider. Even if a venue meets the minimum building code requirements, is that enough or appropriate with the knowledge we have concerning how a building is used and how people might need to be protected from their own possible actions or the actions of others?

This article examines some of the more serious injury/death examples over the past twenty years. Various building codes will be discussed. Then, specific guidance is given to those who are designing, building, and operating stadiums and arenas to help create as safe an environment as possible.

### History of Railing Dangers

Often, the only thing between fans in the upper deck and the action below is a railing, steel tubing sometimes at 26 inches high. A fan can stand up to cheer, similar to everyone else, the excitement and jostling by others can cause the person to lose their balance. The next thing everyone knows the fan has fallen over the railing seriously injuring herself.

From 1969 to 2011, there were 22 fall-related fatalities at major league ballparks, according to the "Death at the Ballpark" blog compiled by authors David Weeks and Robert Gorman, who published a book by the same name in 2012. Those numbers include all types of fatalities, including suicides and fans who were intoxicated or engaged in risky behavior.

Three deaths over the past 15 years were reported in an ESPN story. One death at Coors Field in Denver happened in May 2011, one at Turner Field in Atlanta in May 2008, and one at Shea Stadium in New York in April 2008. Each of these cases entailed men falling while trying to slide down a staircase or escalator railings. Shockingly enough (note the sarcasm) alcohol was often a factor in these types of incidents.

On the first day, the Texas Rangers' stadium (called "The Ballpark in Arlington" until the Rangers moved to Globe Life Park in Arlington in 2019) was opened in 1994, Hollye Minter fell backward over a 30-inch railing while posing for a picture. Hollye Minter fell approximately 35' onto an empty row of chairs below. Minter suffered two fractured vertebrae, two broken ribs, six broken teeth, and other injuries. Shortly after Minter's fall, the Rangers raised the railings in the section where she fell to 46 inches.

One of the most publicized railing death cases happened the following year in the same ballpark, in Arlington. On July 7, 2011, thirty-nine-year-old Shannon Stone fell to his death over a 33-inch rail. The Rangers determined after that incident that their existing rail heights were inadequate, so they raised the railing height to 46 inches all over the park in preparation for the next season at a cost of $1.1 million.

There have been more injuries and deaths since the Stone tragedy. In 2014, a toddler was hospitalized after tumbling over a railing at the American Airlines Center in Dallas during a performance by the Ringling Brothers Barnum and Bailey Circus.

In 2016, a man was injured after falling over a railing at Oracle Arena following a 2016 NBA Finals game between the Golden State Warriors and the Cleveland Cavaliers. According to the police, the fan was involved in an altercation with another person before the fall.

In 2021 there were several major incidents with the most publicized incident being a mother and toddler who died when they fell over a railing in a picnic bench area at Petco Park in San Diego. Prior to the fall, the

mother had a close call while jumping on a picnic table bench, with her young son, near the ledge of an upper concourse. For some reason, the mother and child started jumping on the table a second time, and that is when they fell to their deaths.

Bleacher and grandstand injuries are not unique. The United States Consumer Products Safety Commission (CPSC) issued Guidelines for Retrofitting Bleachers in 2000. The guide highlighted that there was an annual average of 19,100 bleacher-associated injuries treated in emergency rooms (ER). Data from 1999 alone showed 22,100 bleacher-associated injuries treated in hospitals. Approximately 6,100 of these injuries were a result of the person falling from, or through, bleachers, onto the surface below. One recommendation from the CPSC was that the top surface of a bleacher's guardrail should be at least 42 inches above the leading edge of the footboard, seatboard, or aisle, whichever is adjacent to the guardrail. The CPSC's 42-inch rail height recommendation was intended to prevent inadvertent falls over the railings by all but the tallest 1% of adults. It further reflected a consensus from different organizations that advocated for a 42-inch-high guardrail such as:

- 2000 National Fire Protection Association (NFPA) 101 Life Safety Code
- 2000 International Building Code (IBC) of the International Code Council (ICC)
- 1999 National Building Code (NBC) of the Building Officials and Code Administrators (BOCA)
- 1997 Uniform Building Code (UBC) of the International Conference of Building Officials (ICBO)
- 1997 Standard Building Code (SBC) of the Southern Building Code Congress International (SBCCI).

Besides falling over or in between railing, railings can collapse. One such example happened at a Major League Soccer match at RFK Stadium in Washington, DC. Amid the post victory championship celebration, about 50 fans were injured when railings on the stadium's north side collapsed. A similar incident happened in 2022, when a section of railing gave way as Philadelphia Eagles quarterback Jalen Hurts was leaving the field. Luckily no fans were seriously injured in the designated ADA seating area when fans pressed against the railing to contact the quarterback.

These various incidents raise the prospect of liability as injured fans can sue claiming the railing was ineffective or insufficient. Besides possible notice concerning the railing, every college and professional sports team knows that fans reach for foul balls, stand up to go to the concession stand, cheer their team, yell at the other team, stand as a result of prompts during the game, get up to do the "wave," stand for the national anthem, stand for the 7th inning stretch, and now are constantly being distracted by mascots or Wi-Fi obsessed behavior. Further, it is well known that fans come in all different conditions, with possible medical, psychological, or other conditions or they might be having fun or are intoxicated which could impact their balance and decision making. This begs the questions: why are the requirements for guardrails not more stringent? Should guardrails be higher at ballparks and concert venues where fans regularly engage in "atypical" behaviors and movements? Should guardrails be stronger to accommodate the weight of multiple fans leaning over at the same time? These questions move railing issues from liability issues to focusing on building codes and construction strategies.

### Why 26-inches?

The 26-inch minimum height for front-row railings dates to 1929 when it was included in the National Fire Protection Association Building Exits Code. The guide set building safety standards for numerous building types and was a one size fits all approach. The code was not developed specifically for sport or entertainment venues. The code was developed specifically in response to fire hazards rather than spectator crowd issues. The code was created in response to the Triangle Shirtwaist Factory fire which killed 146 people during a 1911 fire in New York City. Over the years, the code has grown to cover numerous issues and concerns associated with a wide range of venues.

It is assumed that the original code developers likely set the standard at a height where railings would not impede someone's view, and that it was designed mainly for theaters and symphony halls – rather than ballparks and arenas. While 26 inches meets what the code requires, some feel that height

is too low, especially attorneys representing injured individuals.

Even with some anecdotal information and opinions, MLB stadiums' average railing heights around 2010 were closer to 26 inches. The ESPN show "Outside the Lines" contacted officials with all 30 Major League Baseball ballparks in 2011 to examine the heights of their front-row railings at these stadiums. Only 10 teams responded with actual measurements and the measurements ranged from 26 to 36 inches. As previously mentioned, the 26-inch height is the minimum allowed by the IBC and some local building codes.

In the Texas Ranger stadium fall involving Mr. Stone, he measured 6 feet, 3 inches tall, and fell over a 33-inch railing. The railing came up to just below Stone's belt buckle. A 42-inch railing would have rested just above Stone's hips. For most people, a 42-inch railing would reach around one's stomach and would be even higher for shorter people.

## The Science of Railing Height

One of the methods to help make the calculation more appropriate is through science. In terms of railing height, that analysis can focus on two key elements. One is the center of gravity, and the other is how people interact with the railing and other venue elements.

The center of gravity represents when and how someone might fall over a railing. Taller people have a higher center of gravity which means that a low railing is more dangerous for a tall person compared with a shorter person whose center of gravity is closer to the 26-inch railing height. Thus, a shorter person is less likely to fall over a 26-inch railing. As stated by Richard Brauer in Safety and Health for Engineers 3rd Edition (2016): "Therefore, if 99% of the population is less than 6 ft 6 in. tall, a 42 in. high top rail will prevent rotation over the rail for all but very few people. Using this estimating method, a 45 in. railing would protect people who are 7 feet tall (p. 128).

According to the International Building Code (IBC 2021), which is used as the basis of most State Building Codes nationwide, guardrail requirements are dependent on the building's occupancy. Since this article is focused on sport and concert venues, the requirements for guardrails are dependent on several types of Assembly occupancy, as follows:

- Group A-1 – Theaters
- Group A-3 – Exhibition halls
- Group A-4 – Arenas
- Group A-5 – Bleachers, grandstands, and stadiums

The IBC states that guardrail systems are required "along open-sided walking surfaces, including mezzanines, equipment platforms, aisles, stairs, ramps, and landings that are located more than 30 inches (762 mm) measured vertically to the floor or grade below at any point within 36 inches 914 mm) horizontally to the edge of the open side." (IBC 2021). Further, "required guards shall not be less than 42 inches (1067 mm) high. (IBC 2021).

However, the IBC provides exceptions to the 42" minimum height requirements for "sightline-constrained guard heights", and reads as follows:

Unless subject to the requirements of Section 1030.17.4, a fascia or railing system in accordance with the guard requirements of Section 1015 and having a minimum height of 26 inches (660 mm) shall be provided where the floor or foot-board elevation is more than 30 inches (762 mm) above the floor or grade below and the fascia or railing would otherwise interfere with the sightlines of immediately adjacent seating.

The 26-inch railing height exemption is unique to the United States. The Sports Ground Safety Authority (SGSA), based in the United Kingdom, publishes the Guide to Safety at Sports Grounds, which is informally referred to as the Green Guide. The standard requires a minimum guard height of 31.5" (800 mm) for sightline-constrained guard heights.

The IBC also discuss how much weight/pressure railings need to withstand to keep people safe, i.e. a "linear load of 50 pounds per linear foot (plf) (0.73kN/m), and a concentrated load of 200 pounds (0.89 kN) (IBC 2021). As with all Building Codes, these are minimum standards.

Provided that the structural requirements for linear and concentrated loads are met, engineers have a fair amount of discretion as to the ultimate design, including the specified materials, size of components, and

the manner in which the guardrail is anchored to the structure. In the interests of maintenance and durability, steel and concrete are obvious choices.

## The All-Important Top Rail

The usefulness of the guardrails to prevent falling over is directly related to the height of the top rail. The height of guardrails is based on the center of gravity of human beings. Gravity can simply be defined as the downward force that the earth exerts while the center of gravity of the body is the location where the mass of a body is concentrated. The center of gravity of humans is typically located in front of the sacrum which is situated between the two hipbones of the pelvis. According to this explanation, the center of gravity of a body (CGB) is a hypothetical point and it is approximately 3 inches above someone's mid-height. When this is applied to the 99th percentile of population height in the United States based on data provided by the National Center for Health Statistics (2016), a person who is 6.5 feet (78 inches) tall will have CGB at 3 inches above the mid-height which is (78/2) +3 = 42 inches, equal to the height of the top rail in the guardrails. This implies that people shorter than 6.5 ft tall will have CGB below the guardrail and possibly would rotate under the top rail, whereas people taller than that will rotate over the top rail by falling against the rail and probably tumbling. Figure 1 demonstrates a 6.5 feet tall person behind 42 inches tall guardrail.

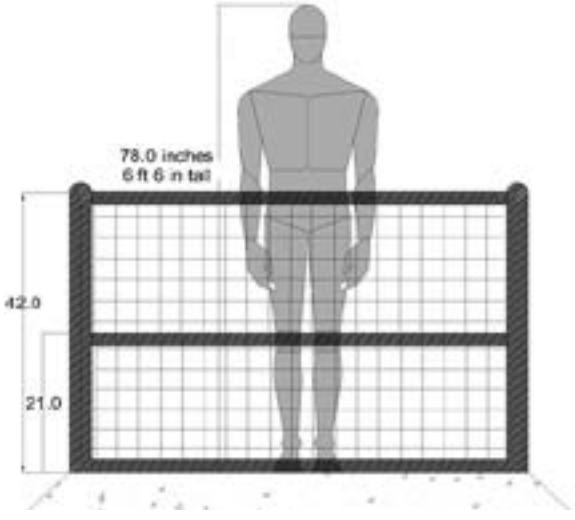


**Figure 1: Drawing of a 6.5 feet tall person behind 42 inches tall guardrail**

According to National Health Statistics Reports (2018), the average height of American men and women over 20 years old between the years 1999 to 2016 was 5 feet 9 inches (69 inches). Based on the second quartile height data of the US population, the approximate height of the guardrails should not be less than 36 inches. Both of these cases are scaled and visualized in Figure 2 compared to a 6.5 feet tall person. It is obvious that neither of the cases is safe from falling over them. If the CGB concept is applied to 26-inch guardrails, it yields that it can only protect people of approximately 3.83 feet tall, which would be considered a statistical outlier according to U.S Census Bureau, Statistical Abstract of the United States (2011).

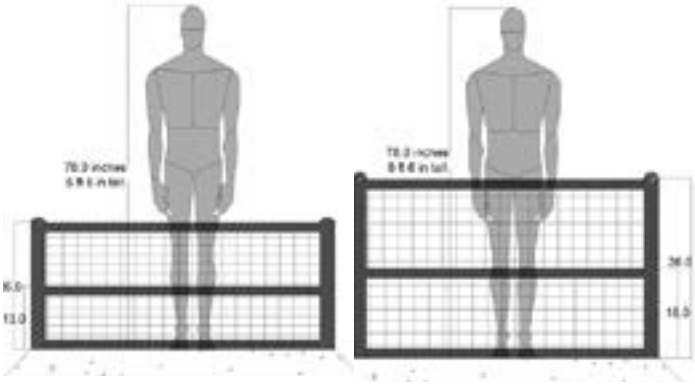

**Figure 2: Drawings of 36 inches and 26 inches height guardrails with 6.5 feet person behind.**

Thus, architects and engineers of sports and concert venues are often given the extremely challenging, and sometimes contradictory design directive of maximizing the number of spectators, optimizing the spectator views, and managing the safety of the whole experience. Upper levels and decks in stadiums are often viewed as a necessary design solution, as they seem to reconcile maximizing the number of spectators, while still maintaining some level of proximity to the action. Larger arenas are often built with tiered seating, and multiple levels, well above the 30" elevation difference specified in the IBC. Hence, guardrails are an integral part of stadium and arena design.

## Railing Materials and Guardrail Design Considerations

Because fans can use and abuse rails, it is important to build them from the very beginning to withstand the

wear and tear of inappropriate but expected fan behavior. Railing systems can be fabricated using steel, anodized aluminum, cable/wire, glass, concrete, iron, brass, copper, chrome, wood, composite materials, and even PVC and vinyl. Regardless of the type of material used and certain benefits they provide, the primary purpose of most railing is safety.

In a broader classification, there are two primary railing types, which are handrails and guardrails. While handrails are constructed to be grasped and provide a reliable handhold as people travel along their length, guardrails are designed to protect human beings from a wide range of dangers, such as falling over an elevated surface.

Guardrails can be technically described as the barriers having vertical supports spaced at a certain distance, horizontal parts, namely bottom/toe board, mid-rail, and top rail, and infills between these parts. Even though there are many different types and plans of guardrails, Figure 3 demonstrates an example of a standard guardrail plan.

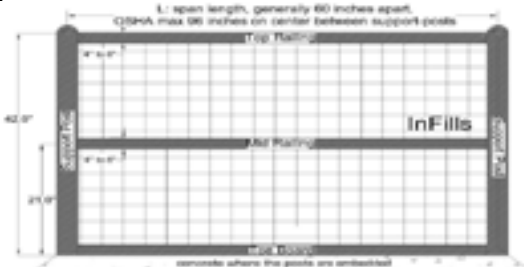


**Figure 3: Standard guardrail example**

Guardrails mainly consist of 4 main components, which are:

- **Support posts**—vertical load-bearing flexural elements
- **Horizontal rails**—bottom/toe board, mid and top rails
- **Infill/baluster**—material filling the space between support posts and horizontal rails
- **Connections**—embedded/anchored into concrete, bolted/welded into steel frames, or screwed/bolted into wood members

The complete design of guardrail systems includes the design of every single guardrail component properly against loading (structural), height, spacing, and deflection requirements to meet applicable code requirements. Each guardrail system is designed to resist a certain load at a specific height and uniform post spacing without showing excessive deformations. This means that all the component parts of the railing system need to function properly together in order to protect fans from the pressure they can exert on the rails when many fans are leaning against the rail.

Both IBC and most of the local codes refer to the American Society of Civil Engineers (ASCE) Minimum Design Loads and Associated Criteria for Buildings and Other Structures- ASCE7 section 4.5.1 for the load requirements on the guards, which states that the guards shall be designed to resist a linear load of 50 pounds per linear foot (plf) applied horizontally to the top rail or a single concentrated load of 200 lb. applied in any direction at any point on the top rail and to transfer the load through the supports to produce the maximum load impact on the element being considered (ASCE, 2016). These loads are representing either the force applied by a tightly gathered group of people leaning on a railing system in case of uniform loading or a single person pressing against or an object pushing the rail in case of concentrated loading. Figure 4 illustrates the scenarios and loading conditions for both concentrated and uniformly distributed load conditions. It is important to note that the most critical loading happens when the top rail is loaded horizontally, which results in the maximum bending moment on the posts.

Structural design of guardrails does not only include the design of guardrail members for the strength requirements, but it also covers their serviceability requirements. In order to satisfy the serviceability requirements, guardrail members should not deflect or deform excessively under the applied loads. This means that if twenty people are leaning against the rail, as an example, the rail would not move or change shape. There will always be deflection, but it just should be within the limits.

The discussion so far might seem complicated and outside the purview of most venue executives. However, a stadium/arena manager needs to know railing height, condition, attachment points, and related variables to make sure the railing system can do its job-protect fans. Stadium/arena managers should have a rough idea and visually monitor railing components. If there appears anything unusual, such as rust or

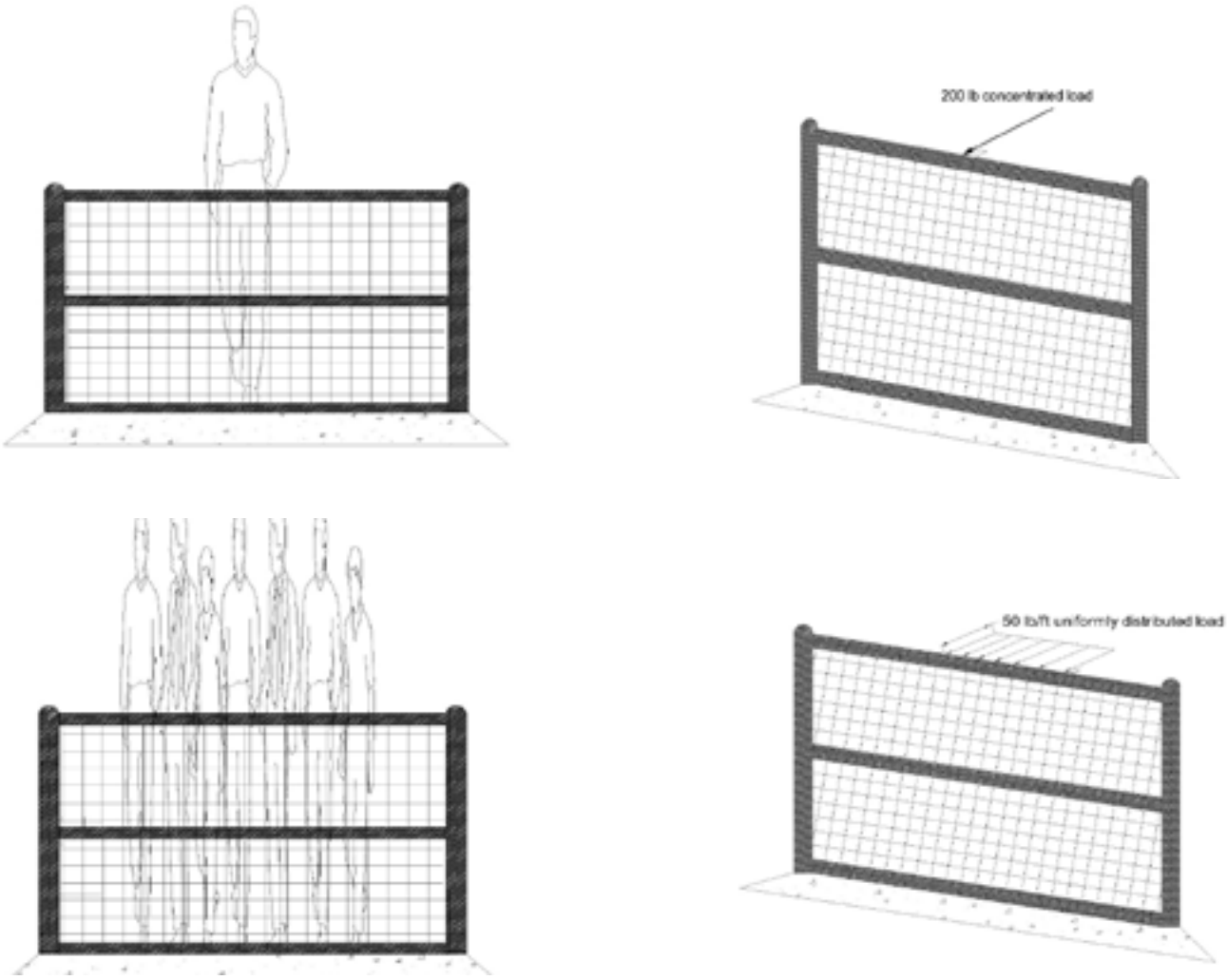


**Figure 4: Concentrated and uniformly distributed loading cases**

crumbling cement, professionals should be contacted to ensure the railing system is not compromised.

## Risk Management Strategies

If there is an issue with the railing height or railing integrity at various sport/entertainment venues, then there needs to be possible solutions to consider. With input from local code officials, design professionals, and industry representatives, the International Code Council updates the International Building Code, and reviews any proposed design changes on a 3-year cycle. Through this process, the IBC could mandate stricter requirements for guardrails. This would entail a concentrated educational campaign to educate those working with the IBC about the serious injuries and deaths and that the 26-inch line of sight exception should be changed. The American Society of Theater Consultants (ASTC) suggested in 2016 that there are fundamental differences between the behaviors of sporting event audiences, and those of the theatre, such that they should have separate Building Code requirements.

Another option is for architects and builders to work with teams or venue owners to examine the proposed/existing design and develop designs that will hopefully make venues safer. In the United Kingdom, the Sports Ground Safety Authority relies on the collective and collaborative knowledge of engineers and architects, police, emergency planners and facilities maintenance professionals (SGSA 2021), advocates a railing height of 31.5” (800mm) for sight constrained guards. Further accommodations could be made by modifying the pitch of stairs, or tiered seating installations in public venues, such that the seating areas are further removed from elevation drops where guard

areas become necessary. This can be accomplished by adding horizontal walking surface between the seating and the guardrails or providing an access aisle behind the first row of seating.

Other suggestions include: a risk management strategy to help make lower railing safer through using glass or clear plastic above the railing height to help preserve the sight line, but also to provide some added protection or utilizing safety netting. Netting is utilized at TopGolf venues to protect fans from injury after falling over an elevated driving platform. While there is no rail, there are nets used to protect people from falling.

There is no one correct solution but having a hard target railing height based on science and how people interact with the venue will be a significant step forward. On the other hand, while changes might be considered, it is important to identify strategies to help make railings less dangerous. Venues could provide additional warnings to fans sitting near the front rows and those directly underneath railing sections that there are potential risks. Railings can be painted a distinct color so they stand out. Signs can be posted discouraging people from dancing, selfies, leaning over, and other possibly dangerous behavior near the railing. This is especially important when many people can congregate near or against railing and such a mass of bodies can cause railing or its anchoring system to fail under pressure.

*Dr. Gil Fried is a sport management professor and Chair of the Administration & Law Department. Drs. Kocak and Grant are both Construction Management professors in the Administration & Law Department at the University of West Florida.*

Return to Table of Contents

## NIL and the Importance of Monitoring Your Licensing Agreements

**By Jared P. Vasiliauskas or Michael V. Viverito, of Power & Cronin, Ltd.**

*Disclaimer: This Article is intended to provide an overview of Trademark considerations within NIL Agreements and is not intended to be legal advice or to create an attorney-client relationship between the reader and the author.*

Almost one year after the introduction of the NCAA's Interim Name, Image and Likeness ("NIL") Policy on June 30, 2021, college athletes across the country continue to derive financial benefit from use of their name, image or likeness. As of July 6, 2022, it was estimated that a total of $917 million had been spent in NIL deals.[10] While the upside of the NIL Policy has been felt almost immediately after its passing by college athletes, so too has the downside for those representing them. The current NIL regulatory landscape is a patchwork of state laws, offering little-to-no uniformity across the country. While the hope is that there will be uniform legislation from state-to-state, it is extremely important that individuals representing college athletes research and understand the rules and regulations for the state in which they are operating.

Popular among both professional athletes and collegiate athletes navigating the NIL landscape is filing to obtain trademark protection over a specific phrase or mark. This is done through the United States Patent and Trademark Office. While it is strongly recommended you consult an experienced trademark attorney to assist in the application process, the system currently in place allows virtually anybody to follow the steps and file a trademark application. Due to the fees for filing for and obtaining a trademark, as well as the considerable period of time it takes to receive approval, the utmost caution should be taken by novice users to ensure compliance with federal law. When done correctly, filing for and maintaining a trademark for your

10 Associated Press, NIL Spending estimates surpass $900 million; deals in 2022-2023 could easily top a billion (Jul. 6, 2022), https://www.courant.com/sports/college/hc-sp-college-sports-nil-20220706-20220706-jfaolzlahvg4fkluh5eyqqsbau-story.html.

client is just one of the ways collegiate athletes can benefit from the use of their name, image or likeness.

The United States differs from many foreign countries in that trademark rights generally belong to the first user of the mark, rather than the first to file. However, the Lanham Act provides that filing an application to register a mark constitutes "constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration against."[11] It should be noted that these trademark priority rights afforded to the first application are subject to certain limitations and cannot be asserted against another person "whose mark has not been abandoned and who, prior to filing

- has used the mark;
- has filed an application to register the mark which is pending or has resulted in registration of the mark; or
- has filed a foreign application to register the mark on the basis of which he or she has acquired a right of priority, and timely files an application under section 1126(d) of this title to register the mark which is pending or has resulted in registration of the mark."[12]

Trademark applications filed in the United States can be filed on the basis of actual use in commerce under Section 1(a) of the Lanham Act, or on bona fide intention to use the mark in commerce under Section 1(b). [13] For those applying on the "intent to use" basis, trademark registration will not occur unless the mark is actually used in commerce within a specified period of time: (i) before the application is approved for publication, (ii) within six months of the Notice of Allowance issue date, or (iii) within the extension of time obtained after the Notice of Allowance issue date.[14]

Prior to applying for a trademark, it is imperative that you first search the United States Patent and Trademark Office website Trademark Electronic Search System to see if any phrase or mark has previously been registered or applied for that would create a likelihood of confusion. Likelihood of confusion creates grounds on which a trademark attorney can refuse to register the mark indicated in your application due to conflict with a similar trademark that's registered for goods or services related to yours.[15] This is because if both trademarks were used in commerce at the same time, it would likely confuse consumers, who may not be able to determine the source of the goods or services.[16] This is in place to protect consumers. For there to be a conflict, it is not required that the marks and the goods/services be exactly the same. The marks only need be similar and the goods and/or services related such that average consumers would mistakenly believe they come from the same source.[17]

Likelihood of confusion is not the only grounds on which a trademark examining attorney can refuse to register your mark. A mark that merely describes an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods or services will be refused registration.[18] If the primary significance of the mark is a generally known geographic location, if purchasers would be likely to think that the goods or service originate in the geographic place identified in the mark, and if the mark identifies the geographic origin of the goods or services, then the examining attorney will refuse your mark based on the mark being primarily geographically descriptive.[19] Generally speaking, the examining attorney will refuse registration of a mark if it is merely a decorative feature, or part of the "dress" of the goods.[20] Such use is merely ornamental and does not serve the trademark function of identifying or distinguishing the mark from others. While there are certainly other grounds on which an examining attorney may refuse to register your mark, these are the most prominent.

Having your trademark approved brings with it the responsibility to maintain your approval status and keep the mark "live". There are specific

11 15 U.S.C. § 1057(c) (2022).

12 Id.

13 See generally, 5 U.S.C. § 1051 (2022).

14 https://www.uspto.gov/trademarks/apply/intent-use-itu-applications (Jul. 13, 2022).

15 https://www.uspto.gov/trademarks/basics/why-search-similar-trademarks (Jul. 13, 2022).

16 Id.

17 https://www.uspto.gov/trademarks/additional-guidance-and-resources/possible-grounds-refusal-mark (Jul. 13, 2022).

18 Id.

19 Id.

20 Id.

maintenance documents that must be produced when required. Failure to file the required documents at the specified time will result in cancellation and/or expiration or your mark, and require a new application to be filed. Please note that the United States Patent and Trademark Office does not police the use of registered marks. That responsibility remains with the owner of the mark. If you believe there is an unauthorized use of your mark, or if there is another mark infringing on yours, it is up to you to proceed with legal action to stop a party from violating your ownership rights. Please consult with an experienced trademark litigation attorney to discuss the full spectrum of protection afforded to your mark prior to engaging in litigation with an infringer. This is especially important for licensable assets, such as trademarks. College athletes have the opportunity to own their own marks and license them out as they see fit. While the ability to license a trademark presents many opportunities for a college athlete to grow their portfolio, there is also the increased chance for unauthorized use. Therefore, carefully monitor your licensing agreements to ensure that your client's marks are being used as agreed.

*The Power & Cronin, Ltd., Sports Law team is experienced in counseling athletes and their representatives on the complexities of the name, image and likeness landscape, particularly with trademark application and enforcement. If you have any questions about the trademark application process, or about name, image and likeness in general, please contact attorneys Jared P. Vasiliauskas or Michael V. Viverito.*

Return to Table of Contents

## Minnesota Mother must pay coach $50,000 for Defamation in Dispute Over Daughter's Playing Time

**By John T. Wendt**

As reported previously in Sports Litigation Alert, Woodbury (Minnesota) High School Basketball Coach Nathan McGuire sued a parent for defamation, which arose from a disagreement over playing time.[21] McGuire had coached Julie Bowlin's daughter when the daughter was in seventh grade at the Academy of Holy Angels. Bowlin's daughter followed McGuire when he went to coach at Woodbury. However, Bowlin became upset because McGuire wouldn't guarantee her daughter varsity playing time.[22] Bowlin and other parents complained to administrators about the coach's conduct and players' playing time and roles on the team.[23] Bowlin and another parent even filed maltreatment-of-minors reports against McGuire with the Minnesota Department of Education. The maltreatment reports were found to be without merit.[24]

But the school did place McGuire on administrative leave and ultimately decided not to renew his coaching contract. And yet Bowlin continued to attack McGuire and admitted that when McGuire was suspended from coaching on January 8, 2014, she sent him a text that said, "Too bad you didn't coach tonight."[25] She also admitted that in August of 2014 she falsely "told another parent that McGuire could lose his teaching job because he 'was recently put in jail' for his treatment of girls' basketball players."[26]

McGuire sued Bowlin and others for defamation and civil conspiracy. Finding that McGuire was a public official and following New York Times v. Sullivan and similar cases, the District Court granted the defendants' motion for summary judgment finding that McGuire was a public official and that there was no evidence that Bowlin or the other defendants knowingly or recklessly made a false report. The Court of Appeals in an unpublished opinion affirmed the District Court's decision.[27] However, the Minnesota Supreme Court reversed and remanded the case finding that, "Although McGuire was employed by the school district, his

21 John Wendt, *Minnesota High School Basketball Coach Sues Parents for Defamation — McGuire v. Bowlin*, (2020), https://sportslitigationalert.com/minnesota-high-school-basketball-coach-sues-parents-for-defamation-mcguire-v-bowlin/ (last visited Jul 17, 2022).

22 Rochelle Olson, *Former Woodbury High girls' basketball coach wins defamation lawsuit against parent*, (2022), https://www.startribune.com/former-woodbury-high-girls-basketball-coach-wins-defamation-lawsuit-against-parent/600189609/ (last visited Jul 12, 2022).

23 McGuire v. Bowlin, A18-0167, Minn. Ct. App., (Unpublished Opinion), (2018), https://www.casemine.com/judgement/us/5c0a497b342cca45a84e0ead (last visited Jul 17, 2022).

24 McGuire v. Bowlin, 932 N.W.2d 819 (2019).

25 Olson, *supra* note 2.

26 *Id.*

27 McGuire v. Bowlin, A18-0167, Minn. Ct. App., (Unpublished Opinion), *supra* note 3.

coaching duties are ancillary to core functions of government; put simply, basketball is not fundamental to democracy."[28]

Last week and nearly nine years after this all started, a settlement was reached between the parties. Bowlin agreed to pay $50,000 to settle the coach's defamation lawsuit. She also admitted she made numerous false accusations against McGuire.[29] The settlement included a three page "To Whom It May Concern" letter where she admitted her role in McGuire's "wrongful termination." Bowlin admitted that "she wrongly told the Woodbury High School Athletic Club Boosters in November 2013 that McGuire had been 'terminated' from Holy Angels and that parents had brought complaints against him."[30] Bowlin also acknowledged that she falsely accused McGuire "of bullying, pushing, harassment, manipulation, aggression and inappropriate touching at Woodbury and Holy Angels."[31]

But the damage has already been done. McGuire said that despite a successful coaching career he has applied for approximately 50 coaching jobs but had heard back from only five. He also said that a coach at another school in the district wanted to hire McGuire as an assistant, but the district refused. As McGuire said, "I was told I could never coach in the district again… This lady that was in my district for two months basically destroyed everything."[32]

Donald Chance Mark Jr., McGuire's attorney said that Bowlin is using a life insurance policy to pay McGuire a total of $50,000 with a series of $300 payments and "if she fails to pay on time or otherwise violates the settlement agreement, that judgment becomes $350,000."[33] One of the reasons why the case has dragged on was because Bowlin is in her third bankruptcy proceeding. Mark noted that the court found that Bowlin's statements were made "with malice."[34] This is important because under Section 523(a)(6) of the Bankruptcy Code debts based on liability "for willful and malicious injury by the debtor to another entity or to property of another entity" are specifically excluded from the scope of the bankruptcy discharge.[35]

In conclusion McGuire said, "It's been hard for me to swallow, being a member of this district for 23 years and having one person torpedo everything…Hopefully, this will prevent other coaches from [experiencing] similar situations."[36] Yet, McGuire also seems to be optimistic, "We're hoping with this letter, with this settlement…that maybe I can work again with the youth in the district that I teach."[37]

*John T. Wendt is Professor Emeritus, Ethics and Business Law, University of St. Thomas. He also serves on the Court of Arbitration for Sport (Lausanne).*

Return to Table of Contents

## The Case of Skillz Platform, Inc. v. AviaGames Inc.

**By Katelyn Schuh, GW Law 2L**

On April 5, 2021, AviaGames Inc. filed a motion to dismiss Skillz Platform Inc.'s initial complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for patent infringement based on a lack of patent eligible subject matter under 35 U.S.C. §101 for two asserted patents.

A motion to dismiss for failure to state a claim upon which relief can be granted "tests the legal sufficiency of a claim." The two patents at issue are U.S Patent Nos. 9,649.564 (the 564 Patent) and U.S. Patent Nos. 9,479,602 (the 602 Patent). The Court denied the motion in relation to the 564 Patent and granted the motion without leave to amend as to the 602 Patent.

By way of background, Skillz maintains a mobile gaming platform which enables third-party game developers to make games available on its platform through a free Software Development Kit. In other

28 McGuire v. Bowlin, *supra* note 4.

29 Josh Verges, *Player's mom to pay $50,000 to settle Woodbury HS basketball coach's defamation lawsuit – Twin Cities*, (2022), https://www.twincities.com/2022/07/12/players-mom-to-pay-50000-to-settle-woodbury-hs-basketball-coachs-defamation-lawsuit/ (last visited Jul 12, 2022).

30 Olson, *supra* note 2.

31 *Id.*

32 Verges, *supra* note 9.

33 *Id.*

34 Olson, *supra* note 2.

35 United States Bankruptcy Code, *Section 523–Exceptions to discharge–2020 United States Bankruptcy Code*, United States Bankruptcy Code (2020), https://usbankruptcycode.org/chapter-5-creditors-the-debtor-and-the-estate/subchapter-ii-debtors-duties-and-benefits/section-523-exceptions-to-discharge/ (last visited Jul 18, 2022).

36 Olson, *supra* note 2.

37 Verges, *supra* note 9.

words, Skillz connects players worldwide by hosting fee-based competitive esports games on its platform.

This matter all started in April 2021 when Skills filed its suit, contending that "AviaGames maintains a competing mobile gaming platform, which AviaGames developed using Skillz's intellectual property that it gleaned while developing games for Skillz's platform." Skillz owns the 564 Patent, which relates to ensuring that competitors in a mobile online gaming tournament play over client devices communicating along remote servers, which have common gameplay within a tournament that varies randomly between different tournaments. The main crux of the innovation of the 564 Patent is that it generates pseudo-random numbers, causing gameplay to differentiate between tournaments, but not between games within the same tournament.

The parties disagreed as to whether or not the patents were patent eligible under §101. AviaGames argued that the patents were directed to abstract ideas, lacking in a non-abstract improvement to computer technology, and thus lacked an inventive concept. However, Skillz contended that AviaGames overgeneralized the claims of the patents, ignored their specific implementation details, and raised factual issues about the conventionality of various technologies that cannot be resolved at the 12(b)(6) stage.

In Alice Corp. Pty. Ltd. v. CLS Bank Intern, the Supreme Court laid out a two-part framework for assessing the validity of patent claims under §101. Under Step One, a court must determine whether the claims at issue are directed to a patent ineligible concept. The second step is a "search for an 'inventive concept' – an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself.'"

In regard to the 564 Patent, the parties disputed whether the claims were directed to an abstract idea under Alice Step One. AviaGames argued that the recitation of pseudo-random number generation was an improper attempt to patent a mathematical algorithm, while Skillz argued the claims were directed to specific implementations using pseudo-random number seeds to standardize gameplay in an electronic skills-based game. The Court found that AviaGames failed to show the claims of the 564 Patent were directed to abstract ideas at the pleading stage. The court concluded that AviaGames failed to show that the 564 claims were directed to patent ineligible abstract ideas at Alice step one, therefore they did not need to conduct an analysis under Alice step two. The Court denied the motion to dismiss in regard to the 564 Patent.

In regard to the 602 Patent, the Court assessed the eligibility in three parts – Claim 1 (representative of claims 2, 6-7, 9-11, 15-18, 20, and 24), Dependent Claims 8 and 17, and Dependent Claims 3-5, 12-14, and 21-23. For Claim 1, the Court agreed with AviaGames that the 602 Patent was directed to an abstract idea, thus the Court proceeded to Alice Step Two. Step Two considers whether the claims contained an inventive step that transformed the un-patentable abstract idea into patentable subject matter. The Court held that Skillz failed to show what about the ordered combination of the 602 Claims was an inventive concept, and found that the claim was directed to abstract ideas without an inventive concept to transform the un-patentable abstract ideas into patent-eligible subject matter. The court held that Claim 1, and the claims it represented, was patent ineligible subject matter.

Claims 3-5, 12-14, and 21-23 pertain to taking a video recording of a user's screen during gameplay and broadcasting it to other client devices in a specific gaming event. The parties disputed whether the claims were patent-eligible subject matter. The Court agreed with AviaGames and held that the Broadcasting Claims were patent ineligible as they were implemented on generic hardware. In regard to Claims 8 and 17, the Court found that Skillz failed to show the claims were directed to an improvement in computer functionality under Alice Step One, or that they contained an inventive concept under Alice Step Two, thus they were also directed to patent ineligible subject matter. The court dismissed Skillz's infringement claim based on the 602 Patent without leave to amend.

This case is being closely watched by industry experts because what started out as a business relationship seems to have ended in a series of lawsuits, costing both parties money and perhaps, their reputations.

Return to Table of Contents

## Stein v. Activision Blizzard: One Complaint in a Storm of Shareholder Lawsuits

**By Courtney Seams, GW Law 2022 Graduate**

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

Recently, Microsoft announced plans to acquire Activision Blizzard (AB) in a merger. Microsoft will acquire AB for $95 per share in an all-cash transaction for a total of $68.7 billion in a deal that was unanimously approved by AB's board of directors. AB owns games such as Call of Duty, Overwatch, Warcraft, and Candy Crush and has a total of 400 million monthly active players. The merger will not be complete until 2023 and will make Microsoft the third largest gaming company.

Since the merger was announced, multiple shareholders have filed lawsuits against AB seeking injunctive relief to stop the merger unless more information regarding the merger is provided to the shareholders. One of these lawsuits was brought by Shiva Stein, an AB shareholder, who alleged that AB and its board members violated Sections 14(a) and 20(a) of the Securities Exchange Act (SEA). Stein is a unique plaintiff in that she has previously filed 124 securities lawsuits over the course of two years, half of which were dismissed voluntarily.

In this lawsuit, Stein alleged that the company failed to release material information that was relied upon to create the misleading proxy statement given to shareholders, which encouraged them to vote in favor of the merger. Stein alleged that the company failed to release internal financial records that were relied upon by the Board and the financial advisors involved in approving the deal. Stein alleges that the failure to release this financial information to shareholders is in violation of the SEA Section 14(a) and makes the proxy statement misleading to shareholders who had yet to vote on the merger at the time. The proxy statement was misleading, according to Stein, because shareholders did not have all of the information necessary to make a fully-informed decision regarding the merger. Further, Stein alleged that the board was in violation of Section 20(a) of the SEA because they had the power to control and were directly involved in the making of the misleading proxy statement.

This past April, 98 percent of AB shareholders voted in favor of the merger. In May, following this shareholder approval, Stein voluntarily dismissed the case, however other shareholder suits regarding the merger and its lack of financial transparency are ongoing. Other plaintiffs are concerned that there is a conflict of interest for the board who may be receiving financial benefits from the transaction – specifically financial gains from the board members' option to exchange all company equity awards for merger consideration.

Microsoft and Activision Blizzard are still moving forward with the merger and have stated that they disagree with the claims in the shareholder lawsuits that have been brought so far. It will be interesting to see how these suits play out over the next year as the merger comes to a close.

Return to Table of Contents

## Professional Athletes Have Unique Needs When • It Comes to Financial Planning

**By Jacob Turner**

As a professional athlete, your financial situation is far from normal. Professional sports provide planning opportunities that when implemented correctly set a path for success. Your signing bonus, contract structure, players association royalties, off-field income, roster placement, benefits package, and uneven cash flow all provide financial and tax opportunities when positioned properly.

Players find themselves in peak earning years from 18 to 35. There is no build-up period. The general population builds net worth and begins to understand finances as they climb the corporate ladder. You are on a rocket ship with limited fuel. Any financial mistakes are extrapolated ten-fold due to your age and earning ability. In conjunction, your career will last anywhere from 1-20 years. When you combine a shortened earnings window with the top 1% income thresholds it creates an enormous opportunity.

Professional sports are a business that has no emotions. The best players play, and the game quickly

weeds out those who do not perform at the highest level day in and day out. This level of expertise demands all your time, energy, and focus. As such, finances tend to take a back seat to your career.

While it is easy to feel that you are saving enough when minimum salaries for every major sports league are in the mid to high six figures. The time is now to plan. Setting clear expectations early on allows you to truly optimize your situation. To maximize your investment strategy and your savings rate while minimizing your tax burden requires more than a feeling. Optimizing for these items allows for you to capture the 8th wonder of the world, compounding. The financial system is geared toward the average. It is not geared towards a twenty-year-old making seven figures. Generic financial planning tools, thoughts, and ideas are table stakes, and your approach needs more. Whether you sign the big free-agent contract, grind it out year to year, or never quite reach your athletic goals, achieving financial success is fully in your control. We aim to provide clarity for athletes and their specific needs.

## 5 Ideas to Understand

### *1. What can you afford?*

Answering this question helps set you up for success in your financial life. On the surface, it seems quite simple. There are countless articles, studies, and opinions that help people make savvy buying decisions ranging from the mundane to dream houses. Unfortunately for athletes, it is a different ballgame. Basing spending habits off an athlete's salary is a recipe for disaster.

According to data gathering firm Statista, the average salaries for the four major sports leagues range from $2,690,000 million for the NHL up to $8,320,000 for the NBA. Most professional teams only pay players during the season which only magnifies the per check number for athletes. The average player is earning six figures per paycheck. This sum allows you to buy nearly anything. Want to buy a new car, great. Want to put a down payment on a house, approved. Want to buy a Rolex, no problem. These large checks create a false sense of security for players. To compound the issue, these checks are usually year to year with no guarantee of future income.

So how do we decide what an athlete can afford? The key here is distinguishing between needs and wants. You need a car. You do not need a Ferrari. You need a place to sleep. You do not need a 6,000 square foot house. You need shoes. You do not need Gucci loafers. This is not to say that you should not reward your success with things that bring you joy. This is to illustrate the difference between a one-time purchase and a lifestyle. A one-time purchase is just that, one time. A lifestyle is a sustainable way of living that can continue. Building a budget based on your needs provides an excellent starting point for athletes.

### *2. What is investing and how do you do it best?*

Investing at its most basic level is the use of capital with the belief that it will generate a return. For this paper, we will focus on financial capital. Financial capital is the dollars that are left after you pay your taxes, write your agent a check, take care of the people around you, and reward yourself. This is the money that is "leftover". A good rule of thumb is to take whatever your contract is and slice it in half. You will send 50% out the door and keep 50%. Understanding this idea sooner rather than later avoids many common mistakes. Now, you have your 50% and you are ready to decide how it gets invested. There are two camps at opposite ends of the spectrum in terms of the public markets or what most refer to as the stock market. There is "active" investing. This is the idea that you can outperform the market by correctly choosing stocks or timing your investments. You are sure to come across an advisor proclaiming his track record in selecting certain stocks or funds that have generated outsized returns. On the opposite side is "passive" investing. This is a belief that the stock market is highly efficient. So, rather than trying to find the needle in the haystack, they buy the entire haystack. We are not going to get too far into the details of either strategy. Instead, we want you to consider the "cost" of being wrong. A passive investor who is wrong generates market returns instead of something greater. While an "active" investor who is wrong jeopardizes their ability to reach their goals. In addition, believing that your advisor can beat the odds and is the "smartest guy in the room" requires two things. First, you must ignore the overwhelming amount of evidence to the contrary. Second, you must consider the above consequences if he is not the "smartest guy in the room".

As a professional athlete, you have an opportunity to save a significant amount of money. Your goal should be to invest in a sustainable way that allows

you to meet all your goals, both current and future. The numbers show that an approach based on the evidence and not opinion provides the best odds of success. This strategic approach requires careful portfolio construction, regular attention, and most of all discipline. All things that are in your control. One thing it does not require is finding the "smartest guy in the room" or jeopardizing your goals. Perhaps the greatest value an advisor can add is keeping you disciplined.

### *3. What is your offensive strategy?*

The largest driver of investment returns is determined by your asset allocation. Asset allocation is the percentage you distribute to "offensive" assets (stocks) versus "defensive" assets (bonds). The larger percentage allocated to offense provides a higher expected rate of return.

Determining your asset allocation requires a deep understanding of your unique situation. While most financial tools have parameters that help you find this number based on age and other factors these need not apply. Remember, your situation is uncommon.

Professional athletes have narrow earning windows, uneven cash flows, uncertain job prospects, and 60 plus years to live after playing. These factors should be accounted for when determining how much risk to take. Some questions players should consider when determining this are: What guarantees are in my contract? How much risk do I need to take? How much income do I need currently? How much income will I need in 1,3, and 5 years? How much liquidity do I need? What are my expectations after my career? Do I have the desire and skills to move into another career post-playing? This is a sampling of questions that you should consider when making this decision.

Putting a strategic plan in place mitigates the desire to constantly tweak. It allows you to tune out the noise and stay disciplined. As your career progress and circumstances change it is important to revisit these questions.

### *4. What is your defensive strategy?*

As a professional athlete, you have been blessed with an incredible opportunity to create wealth for yourself and your family. The goal should be to create a plan to build and protect this wealth. When athletes think of wealth managers, they tend to equate that to investments and growing wealth. While these factors are important, it is also important to have a defensive strategy in place. Defensive includes everything that your team puts in place to protect the wealth you have accumulated. You are a public figure. Everyone can google your name and find out how much you have made in your career. This level of notoriety requires a defensive strategy unique to you. Here are a few items that should be a part of your defensive game plan.

**Learning the Art of "NO".** You will receive requests to invest, give, and help friends and family. You must be prepared to say "NO" often. Using your financial team as the point person and referring all requests to them allows you to avoid unnecessary conflict.

**Property and Casualty Insurance.** While everyone needs these coverages for their primary homes and cars. Athletes live a transient lifestyle that often means moving upwards of 3 or more times during a season. With each move comes another short-term rental. An overlooked item for players is renters' insurance. This provides coverage in the case of the unexpected happens at one of these properties.

**Umbrella Insurance**. Umbrella coverage is an overarching form of coverage that protects things not covered by more specific policies. As a high-profile public figure having proper umbrella coverage is one of the most important defensive strategies to implement.

**Life Insurance.** Depending on the coverage provided based on your roster status and your situation there might be a need for added coverage. Life insurance should be viewed as solving a need and be grouped into your defensive bucket.

**Estate Planning.** As your career, life, and family grow there becomes an increased need for proper estate planning. A basic suite of services all athletes should have are trust, will, medical directive, and financial directive. These provide protection and guidance should something unexpected happen.

You have been blessed with an incredible opportunity to create wealth for yourself and your family. The goal should be to create a plan to build and protect this wealth. Implementing these strategies helps players achieve this.

### *5. How do you minimize your taxes?*

Players are provided a distinctive compensation structure that lends itself to strategic tax planning opportunities. These opportunities can provide huge savings when properly implemented. While each athlete's situation is unique here are a few things to consider.

**Invest tax-efficiently**. Depending on the league, access to a 401(k) might not be initially available. As such, most of your investments will be in a taxable account. This means that as your account goes up in value and you look to spend that money there will be taxes due. Investing in a tax-efficient manner allows you to keep more of those investment gains.

**Maximize your signing bonus.** Athletes are unique in that they can receive large up-front signing bonuses. Establishing residency in a state with little or no income tax can provide huge tax savings. This should be done in coordination with a CPA who has experience in establishing residency and multistate taxation.

**Develop a plan.** Creating a comprehensive strategy helps you to maximize your on-field income, off-field income, as well contract bonuses. When planned and executed correctly these years provide unique opportunities due to the uneven nature of athlete incomes. Some strategies to consider are Roth IRA contributions and conversions, SEP IRA contributions, establishing a solo 401(k), and contributing to a Donor Advised Fund as well as other advanced planning strategies.

**Build a team.** A team operates efficiently when all the players are constantly communicating with one another. Your financial team should be operating in the same way. Managing your investments, tax, legal, and estate implications collectively provides players with increased efficiency. This ensures that nothing is falling through the cracks.

### You need a wealth manager. So how do you choose?

Choosing an advisor will be the single most important off the field decision of your career. There are three main boxes that an athlete's advisor should check. Those three criteria are fee-only, fiduciary, and fit.

**Fee-Only.** This means that your advisor receives his compensation by advising you and not selling you products. In this structure, your advisor has no incentive to push a certain product or investment. You want an advisor who partners with you on your career journey. This alignment of priorities creates less conflict of interest.

**Fiduciary.** Being a fiduciary requires that the advisor be legally obligated to act in your best interest, putting your interests ahead of their own.

**Fit.** While this is more subjective, to receive maximum value from this relationship you should consider a few questions. Does this person have a deep understanding of the intricacies that come with being a professional athlete? Do they have expertise in dealing with your accelerated career trajectory? Are they willing to explain investments in terms you understand? What services do they provide? Can they be two steps ahead as your career plays out?

*Jacob Turner is a Partner at* **JL Strategic Wealth.**

Return to Table of Contents

## Ukaegbu Exits His Compliance Career for Deputy AD Spot at Washington State, Shares Thoughts on NCAA Compliance Journey

When Ike Ukaegbu entered the athletic department offices at Washington State University for the first time on June 13 it represented his exit from a fast-rising compliance career to one of athletic department leadership

Ukaegbu spent the past seven years as the Senior Associate Athletics Director for Compliance at Texas Christian University (TCU). While there, he oversaw all areas of TCU's comprehensive athletics compliance operations for the department's 22 sport programs, was the Sport Administrator for the Men's Basketball, Swimming & Diving and Rifle programs, and was also a member of the Athletic Director's Executive Team.

While at TCU, Ukaegbu also served as a member of the department of athletics Diversity, Equity, and Inclusion (DEI) Council. As part of his DEI Council responsibilities, he represented the athletics department in the university's search for a Chief Inclusion Officer. In August 2020, he was selected as the TCU Chancellor's Staff Award recipient, which recognizes a university staff member noted for exemplary service and above and beyond contributions to the welfare of the campus community. Ukaegbu, in collaboration with other athletics department staff members and campus partners, spearheaded the launch of TCU's Name, Image & Likeness program, "Scaled to Succeed."

Prior to TCU, Ukaegbu served one year as an Associate Athletics Director for compliance at Virginia

Commonwealth University. At VCU, he oversaw all areas of compliance for the department's 17 sport programs, was a member of the senior administrative team, and also served as the sport administrator/supervisor for women's soccer.

Ukaegbu spent two years as the Director of Athletic Compliance at Boise State University, while also serving in the compliance offices at Cal State Fullerton (2010-11), American University (2008-10) and Florida Atlantic (2007-08).

Throughout his career, Ukaegbu has served on numerous institutional, conference and national committees and organizations including the NCAA Eligibility Center Division I External Advisory Group, the National Association for Athletics Compliance (NAAC) Thought Leaders Group, and the National Association for Athletics Compliance (NAAC) Convention Committee, in which he chaired the Networking Subcommittee. He also represented the NCAA Division I membership on the NCAA Eligibility Center Vice President Search Committee in the Fall of 2016.

Ukaegbu earned a B.A. in Political Science with a Minor in Pre-Law from the University of Arizona in 2007 and a Master's of Science in Sports Administration from St. Thomas University (Miami, Fla.) in 2008. He and his wife, Katie, have three children, Devin, Rosie, and Spencer.

We caught up Ukaegbu before he began the WSU job and sought his insights.

***Question: How did you get your break in athletics administration?***

**Answer:** After graduating with my Bachelor's Degree in Political Science from the University of Arizona, I pursued a Master's Degree at St. Thomas University in Miami, Florida. At the time, I was fortunate to work as an intern in the compliance office at Florida Atlantic University. That one-year internship prepared me for my first full-time compliance job as the Director of Compliance at American University. I then went on to hold compliance positions at Cal State Fullerton, Boise State, VCU and TCU. About half of my compliance career, was spent at TCU and I was fortunate to also serve as a sport administrator for three sport programs while there, including for the Men's Basketball program.

***Q: What skills do you have to have to be a successful compliance professional?***

**A:** To be a successful compliance professional, you should be knowledgeable about NCAA rules, efficient, empathetic, friendly, and professional. Additionally, it helps to be thick-skinned, a good listener, problem-solver, and communicator.

***Q: What was your greatest accomplishment as a compliance professional?***

**A:** My biggest accomplishment as a compliance professional was building strong and healthy relationships with coaches. I built these relationships by being approachable and visible, providing significant rules education and exhausting all resources and options when attempting to find ethical solutions for coaches. These methods allowed me to build trust with the coaches I served.

***Q: Do you have any regrets about the work you did?***

**A:** I have no regrets about the work I did throughout my 15-year compliance career.

***Q: What will you most when you leave day to day compliance?***

**A:** I will miss helping student-athletes navigate NCAA waivers that significantly impact their lives. Throughout my compliance career, I was fortunate to assist numerous student-athletes overcome many difficult circumstances (e.g., mental health, physical injuries, academic ineligibility, financial circumstances, etc.) by filing NCAA waivers on their behalf. Thankfully, a strong majority of the waivers were approved. Although these waiver experiences were sometimes emotionally taxing on the student-athletes and all other parties involved, the approvals had major impacts on the student-athletes at that moment, for the remainder of their collegiate careers and for some of them, the rest of their lives.

Return to Table of Contents

## NSU Names Sports Lawyer as Deputy AD for Business and Finance/SWA

Northwestern State University has named Sydney Jones its new Deputy Athletic Director for Business and Finance and its Senior Woman Administrator.

Jones comes to NSU from soon-to-be fellow Southland Conference member Texas A&M-Commerce where she spent the past five months as the department's Senior Associate Athletic Director for business services and SWA.

"First and foremost, the leadership and personnel from top to bottom make this a really exciting team to join," Jones said. "With (Director of Athletics) Kevin (Bostian) being in his first couple of months he's forward-thinking and focused on getting tasks across the finish line which is advantageous. I'm excited to join this team and get some of those bigger goals accomplished.

"Northwestern State is an all-hands-on-deck institution. All personnel work hard and are committed to the bigger picture for the overall department. That was really enticing for me."

Jones will serve as the chief financial officer for Northwestern State athletics as well as the department's SWA.

"In a short period of time, Sydney Jones has made her mark as a college athletics administrator," Bostian said. "Throughout the hiring process, she impressed our committee with her presence and command of what we expect. Adding someone with Sydney's skill set and abilities makes our department stronger. Her ability to relate to our student-athletes through her experiences as a college athlete will benefit them during their time here at Northwestern State."

A four-year softball letterwinner at Nevada, Jones brings myriad career experiences to Northwestern State.

Jones was the Director of Procurement and Contracting at the United States Air Force Academy before moving to Texas A&M-Commerce. While at Air Force, Jones had oversight of purchasing, procurement and game guarantees while developing and maintaining key relationships with internal and external shareholders. She also played important roles in improving Air Force's athletic facilities, construction projects, policy analysis and reform.

While at Texas A&M-Commerce, Jones was a key part of the transition team for the Lions' July 1 move to the Southland Conference.

In addition to her time at Texas A&M-Commerce, Jones was the Assistant Director of Athletics for External Operations and Development/SWA at Lincoln Memorial University in Harrogate, Tennessee. While at LMU, Jones was responsible for developing and implementing fundraising initiatives, had oversight of fiscal management and procurement, assisted with compliance and had sport supervisory roles for softball, women's volleyball and beach volleyball. Additionally, Jones was an adjunct professor of sport management classes in the LMU school of business.

Jones also brings experience in the legal realm of minor league baseball with roles involving contract negotiation and interpretation as well as player representation.

As an undergraduate at Nevada, Jones served as a representative on the school's Student-Athlete Advisory Council while earning her degree in political science and economics in 2015. During her time at Nevada, Jones interned with the Nevada State Senate and Political Caucus.

She earned her Juris Doctorate degree from the Thomas Jefferson School of Law, focusing on sport and entertainment law, in 2018. Jones was a Sports Law Fellow, was honored by the World of Sports Law in 2017 and won the Am Jur Award for Sports Law and Analytics in 2018.

Return to Table of Contents

## Sports Lawyer Tim Nevius Joins Overtime as Compliance Chief

Tim Nevius, a former NCAA investigator who then became an advocate for college athletes, has joined the sports media company Overtime Sports as its Vice President of Regulatory Affairs and Athlete Advocacy.

Nevius had previously been outside counsel for Overtime.

He has also been a strong advocate of college athletes, which elaborated on a couple years ago in Sports Litigation Alert, which is included below.

"It's been awesome working with Overtime for the last two years as it created a revolutionary new basketball league," Nevius said in a statement. "It was a natural fit for me to join full-time as we continue to create new and exciting opportunities for athletes and change what's possible in the sports industry."

Previous to his stint at the NCAA, Nevius was an attorney at Winston & Strawn in New York. There, he

helped initiate and lead a federal antitrust lawsuit on behalf of Division I athletes to challenge NCAA. He also advised high school, college, and Olympic athletes and their families on a variety of eligibility issues, including NCAA transfer cases, scholarship reductions, drug appeals, and waiver requests.

The interview, in abbreviated form, follows below.

***Question: Tell us about your practice***

**Answer:** I run the only law firm in the country dedicated exclusively to representing college athletes. I work on eligibility cases of all kinds and fight for solutions on behalf of college athletes, which is critical for them due to the absence of any independent representation in a system that doesn't always put their interests first. I also run a non-profit dedicated to reform (the College Athlete Advocacy Initiative) and work with lawmakers and other advocates to drive policy change for the best interest of the athletes.

***Q: How did you get attracted to this practice area?***

**A:** I was a college baseball player at the University of Dayton and following law school, I wanted to stay involved in sports. I got hired at the NCAA in 2007 and was quickly assigned to some high-profile enforcement cases. After five years as an investigator, my perspective on the business of college sports really started to shift and I became a bit disillusioned by the vast inequities at play. After taking a year to earn an LL.M. at Columbia law, I joined Jeffrey Kessler's practice at Winston & Strawn in New York. Shortly after that, I helped initiate and lead what is now known as the Alston litigation to challenge NCAA compensation rules. At Winston, I took a lot of calls from parents and athletes who sought legal help and I realized there was a high demand for advice related to athlete eligibility matters. So, in 2018, I started my practice and have been working almost nonstop since then.

***Q: How would you grade the NCAA with regards to its creation of a solution to the transfer issue and its subsequent tweaks?***

**A:** Poor. The rules should have changed years ago, and many athletes have suffered consequences as a result of the refusal to change sooner. Just two years ago athletes could be denied a release, which not only prevented their ability to seek an opportunity at a new school, but also prevented them from receiving financial aid at the next school, which was simply unconscionable. Division II still uses that rule, and I had a case last year in which a DII school's refusal to grant a release was one of the more shameful displays I've seen by an athletics department. Now we have the portal, which is an improvement, but preventing athletes in some sports from immediate eligibility is just indefensible and the waiver process has become a bit of a circus. It needs to change right away.

***Q: If you could change one thing about the NCAA, what would it be?***

**A:** The slow and unwieldy bureaucracy that inhibits progress, even when desire exists for change. There are so many competing interests and an unhealthy number of politics that get in the way of timely and meaningful reform. Unfortunately, the consequences of that system usually fall on the athletes. It's also disappointing when the NCAA engages in half-truths as a strategy for defending the crumbling facade of amateurism. Fortunately, most people are finally starting to see through that messaging, which is bad news for the NCAA. Its credibility has plummeted and it's very hard to trust the system to take action on its own, especially for the interests of the athletes. That's why we see the states and congress taking more and more interest. The NCAA only changes when forced to do so, although sometimes they would have the public believe otherwise.

***Q: What is your relationship like with colleges and universities?***

**A:** Very Good. Some universities come to me directly to work with their athletes. Several others have covered my legal fees, which provides representation for the athletes that they might not otherwise be able to afford I've worked closely with athletic departments and compliance directors on various cases and waivers with great success. I always appreciate the collaboration and team effort to reach the best result for the athletes. Most people understand that I'm an advocate for the athletes, first and foremost, and most of them are too. However, there are times when the interests of the University conflict with those of the athletes and we have to work together to find a resolution. Usually, it's very amicable but sometimes can become contentious when the athletes aren't getting a fair shake.

Return to Table of Contents

# News Briefs

## Utah AG Moves to Dismiss Lawsuits Involving Participation of Transgender Athletes in High School Sports

Utah Attorney General Sean D. Reyes has filed a motion to dismiss a lawsuit brought against two school districts, their superintendents, and the Utah High School Activities Association, which seeks to pave the way for the participation of transgender athletes in high school sports competition in the state. The plaintiffs allege the new state law, HB 11, violates the Utah Constitution. From the filing, the state notes that this case confronts the "intersection of an emerging social challenge confronting policymakers worldwide: how to best preserve fair competition and safety in women's sports while also accommodating the interests of transgender persons in social interactions (here, high school sports) that align with their gender identity." The state argued that the plaintiffs do not allege viable claims under the Constitution and that the legislature is best situated and constitutionally vested with the power to balance the competing interests at stake. The state also filed its opposition to Plaintiffs' request for a preliminary injunction that would enjoin the law pending litigation.

Here are the links to the motions:

**Opposition to Preliminary Injunction**
**Motion to Dismiss 1**
**Motion to Dismiss 2**
**Motion to Strike**

## Amid Scandal, WWE Chairman and CEO Vince McMahon Retires, Issues Statement

"As I approach 77 years old, I feel it's time for me to retire as Chairman and CEO of WWE. Throughout the years, it's been a privilege to help WWE bring you joy, inspire you, thrill you, surprise you, and always entertain you. I would like to thank my family for mightily contributing to our success, and I would also like to thank all of our past and present Superstars and employees for their dedication and passion for our brand. Most importantly, I would like to thank our fans for allowing us into your homes every week and being your choice of entertainment. I hold the deepest appreciation and admiration for our generations of fans all over the world who have liked, currently like, and sometimes even love our form of Sports Entertainment.

"Our global audience can take comfort in knowing WWE will continue to entertain you with the same fervor, dedication, and passion as always. I am extremely confident in the continued success of WWE, and I leave our company in the capable hands of an extraordinary group of Superstars, employees, and executives – in particular, both Chairwoman and Co-CEO Stephanie McMahon and Co-CEO Nick Khan. As the majority shareholder, I will continue to support WWE in any way I can. My personal thanks to our community and business partners, shareholders, and Board of Directors for their guidance and support through the years. Then. Now. Forever. Together."

Return to Table of Contents