SPORTS LITIGATION ALERT

January 27, 2023 Vol. 20, Iss. 2

Cases

Is It Confusing that the N.Y. Jets and Giants Play in New Jersey? A Federal Magistrate Weighs In

By Gary Chester, Senior Writer

When the New York Giants crossed the Hudson River to play in the New Jersey Meadowlands in 1976 and the New York Jets followed eight years later, neither team opted to place "New Jersey" in its official name. This created conflicting feelings among New Jerseyans who were delighted to host two NFL teams, but regarded their continuing identification with New York as "offsides."

Fans on the New Jersey side of the Hudson did not file a legal action to force a name change; they bought season tickets instead.

Decades later, an effort to compel the Jets and Giants to change their names came from an unlikely

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source: New York football fans. In January 2022, some New Yorkers filed a class action lawsuit against both teams, the NFL, and the entity that owns and operates MetLife Stadium in East Rutherford, New Jersey. The complaint in U.S. District Court for the Southern District of New York demanded that the Jets and Giants remove all references to New York from their names, logos, and advertising, and pay billions in damages for consumer fraud.

In Suero v. NFL, 2022 U.S. Dist. LEXIS 228206 (December 16, 2022), the court considered the plaintiffs' claims in a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Facts

The plaintiffs are residents of New York City who alleged they were deceived into believing that the Jets and Giants played their home games in New York and/or were inconvenienced in traveling to New Jersey to attend a game.

The amended complaint set forth "Ten Lies," including that the Jets and Giants are New York teams and that their home stadium, MetLife Stadium, sets the standard for venue excellence and is under 20 minutes from New York City. The tenth lie "is the MetLife logo, which consists of the words 'MetLife Stadium' beneath the New York Skyline," which the plaintiffs alleged misrepresents that the stadium is located in New York City. The plaintiffs argue that but for the misrepresentation that MetLife Stadium is located in New York, the plaintiffs assert they would not have purchased tickets.

The Allegations

The amended complaint set forth four causes of action: (1) false advertising in violation of New York General Business Law (GBL) Section 350-a; (2) deceptive practices in violation of GBL Section 349; (3) common law fraudulent misrepresentation; and (4) negligence, premised on a violation of a New Jersey law prohibiting vendors from requiring credit-only payments for goods or services. The plaintiffs sought $2 billion in compensatory and $4 billion in punitive damages, plus attorneys' fees and costs.

U.S. Magistrate Judge Barbara Moses considered the parties' arguments and presented a written recommendation to the presiding judge, Alvin Hellerstein.

The Arguments

The plaintiffs argued that while other NFL teams play outside the city for which they are named, the Jets and Giants are the only teams that play in an entirely different state. They cited various laws restricting product labels, including a Vermont statute regulating the use of "Vermont maple" and they likened the Jets and Giants to "corn syrup being falsely labeled Vermont Maple Syrup."

As to the New Jersey no credit-only law, the plaintiffs called an audible and dismissed their own claim when they discovered there was an applicable statutory exemption.

The defendants countered that the plaintiffs did not respond in any meaningful way to their legal arguments.

The Decision

Turnovers will kill a team's chances in the course of a big game, and so it seems the plaintiffs fumbled at least three times in their litigation. First, the court found that the amended complaint did not set forth the citizenship of any of the defendants. Since the plaintiffs did not show that the parties are domiciled in different states, the magistrate held that the court did not have subject matter jurisdiction under 28 U.S.C. Section 1332(a)(1). (The court noted that the Jets, the Giants, and the NFL are all domiciled in New York.)

Second, the defendants argued that the plaintiffs dropped the ball by failing to allege in the amended complaint that the NFL was responsible for promoting any of the so-called Ten Lies. The plaintiffs failed to

address the issue in their opposing brief, thereby abandoning their claims against the NFL.

The third fumble noted by the magistrate was the plaintiffs' failure to state a claim under the GBL. Section 349 prohibits advertising that is "misleading in any respect." A complaint for false advertising or deceptive acts must allege that the challenged transaction was consumer-oriented, involved materially misleading practices, and caused injury.

While the plaintiffs alleged that the defendants' use of New York in their names or in the MetLife stadium logo was confusing, they did not raise any facts tending to show that the conduct was likely to confuse reasonable consumers. It is insufficient to claim that a plaintiff was misled. A complaint must allege facts showing that "a significant portion of the general consuming public…acting reasonably in the circumstances" could be similarly misled. (This is often achieved in trademark cases through consumer surveys.)

To support its recommendation to dismiss the action, the magistrate noted that there is nothing remarkable about professional sports teams moving to the suburbs while retaining the name of the city where it formerly played. The court also noted that the MetLife Stadium website indicated that the facility is located in New Jersey.

Further, the amended complaint did not allege that the plaintiffs suffered any material harm from the alleged deception.

Finally, the court found that the plaintiffs' reliance on National Football League Properties, Inc. v. New Jersey Giants, 637 F. Supp. 507 (D.N.J. 1986), was misplaced. There, the Giants brought a trademark claim against a company that called itself New Jersey Giants, Inc., and sold unlicensed apparel bearing the mark "New Jersey GIANTS" in direct competition with the team's sales of licensed NFL merchandise bearing the New York Giants marks.

The New York Giants routed the New Jersey Giants when the court found that "NEW YORK GIANTS" and related marks were "valid," "nationally recognized," or "might conceivably be misunderstood by some few consumers."

In contrast, the New York plaintiffs here suffered a shutout. Magistrate Moses did not find that any of the Ten Lies were likely to mislead reasonable consumers and she recommended a dismissal of all claims.

The Epilogue

The litigation was halted for a review from Judge Hellerstein, as the magistrate's recommendation to grant the motion to dismiss did not constitute a binding decision. Finally, the plaintiffs punted before the court issued a final ruling when they agreed to a stipulation of dismissal of all claims with prejudice and without payment of any legal fees or court costs.

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Rontez Miles Sues the NFL and is Tossed from Court

By Jeff Birren, Senior Writer

Introduction

Rontez Miles played safety for the New York Jets. "Miles has an eye condition 'known as alopecia areata' that he claims causes him to experience ocular photosensitivity and photophobia and limits his ability to see well in sunlight or artificial light" (Miles v. The National Football League et al, USDC New Jersey, 2:19-cv-18327-JXN-JSA (11-21-22), all quotes are from the opinion). For several seasons Miles "used a protective shield…while practicing or playing." In 2017, an "NFL equipment judge demanded that he remove the protective shield…or he would not be permitted to play." He subsequently suffered a "severe and significant injury that included a "broken orbital bone in his right eye." His NFL career subsequently ended during the 2019 season.

Two years later, Miles sued the NFL in New Jersey State Court, alleging claims under the Americans with Disabilities Act ("ADA") and the New Jersey Law Against Discrimination ("LAD") because the NFL would not let him wear his protective shield. The NFL removed the case to the U.S. District Court in New Jersey, and recently that court dismissed the former Jets player's lawsuit.

Background

Miles played college football at Pennsylvania Western University. Following the 2012 college season, he signed with the Jets as an undrafted free agent. As an NFL player, Miles was a member of the National Football League Players' Association ("NFLPA") that has a Collective Bargaining Agreement ("CBA") with the NFL. Miles was released in August 2013 and spent much of the 2013 season on the team's practice squad. In 2014, he was promoted to the active squad. However, in Week 17 of that season, he was injured and placed on the Reserve Injured list. Miles began the 2018 season on the active squad. Unfortunately, he had a torn meniscus and was again placed on the Reserve Injured list. Miles returned to the active roster later that November. In 2019, he was on the active roster until November 19, when, due to neck and hip injuries, he was placed on the Reserve Injured list. His NFL career ended shortly thereafter.

The Initial Lawsuit

Miles sued the NFL and five Doe defendants in New Jersey Superior Court in 2019 (Miles v. National Football League & Does 1-5, Superior Court of New Jersey, Morris County, MRS L 1770-19 (8-19-2019)). The complaint had three allegations charging the NFL with violations of LAD and ADA for failing to make necessary accommodations for his eye problems that led to an injury that ended his NFL career.

The NFL removed the case to federal court. The notice of removal included a declaration by Lawrence Ferazani, NFL Management Council General Counsel, containing a copy of the CBA. In a footnote, the Court stated that Miles' amended complaint "expressly refers to the CBA and the CBA is integral to Plaintiff's allegations that the NFL 'waived' provisions of requirements in the CBA."

In Federal Court

On October 16, 2019, the NFL filed a motion to dismiss the complaint, "contending that Plaintiff's claims" were preempted by federal labor law "because the allegations are inextricably intertwined with the CBA and incorporated Official Playing Rules." Miles filed his opposition on December 4, 2019. The NFL filed its reply brief on December 20, 2019.

The Clock is Reset

Prior to oral argument, Miles filed an amended complaint on June 23, 2020. It had six causes of action, including the LAD and ADA claims. The third claim was for negligence, followed by a claim that the NFL waived any provision in the CBA when it previously allowed Miles to play with the protective shield. The fifth claim was that his claims did "not depend on an interpretation of the CBA." Finally, the sixth claim was against 'Does 1-5' and 'Does 1-6' for the "stated LAD and ADA" claims.

The NFL filed another motion to dismiss in August 2020. Miles filed his opposition in September, and the NFL replied in October. In April 2021, the parties were ordered to participate in mediation, which failed. By August of 2021, Miles filed a supplemental opposition, and the NFL replied.

The Court's Analysis

The Court stated the legal standard on a motion to dismiss "places a considerable burden on the defendant seeking dismissal." A court must first state the elements of each claim, then state which allegations "are mere conclusory and therefore not be given an assumption of truth" and finally, "ascertain" whether the remaining allegations "plausibly give rise to a right of relief." The Court began with counts one, two, and six of the amended complaint.

In count one, Miles alleged that he was discriminated against because of his disability. In count two, he alleged that the NFL "failed to provide a reasonable accommodation for his disability in order to perform the duties of his employment." In count six, he alleged that the 'Doe' defendants "aided and abetted the NFL in violating" those claims. The NFL argued that those claims "cannot be resolved without interpreting the CBA and the incorporated Official Playing Rules."

Federal labor law "mandate[s] resort to federal rules of law in order to ensure uniform interpretation" of CBAs and to "promote the peaceable, consistent resolution of labor-management disputes," citing Lingle v. Norge Div. of Magic Chef, Inc, 486 U.S. 399, (1988). These disputes "must be resolved by reference to federal law." If a claim depends "upon the meaning" of a CBA term, "the application of state law…is preempted by federal labor law" per Lingle. Such claims are preempted "because the Court must address the legal effect" of the CBA's "bargained Player Contract and interpret the CBA to determine whether there is a legally recognizable employment relationship between" Miles and the NFL. It would further need "to analyze the CBA" and "Official Playing Rules to determine whether the NFL had a legitimate, non-discriminatory reason for its alleged refusal to permit Plaintiff to wear the shield."

The NFL cited a New Jersey Supreme Court decision wherein a "plaintiff who was legally blind in his right eye" claimed that the New Jersey Transit Rail Operations "violated the LAD by requiring him to wear protective eyeglasses, which he claimed further hindered his eyesight." That plaintiff's claim was preempted by federal law because the claim "hinged on interpreting the CBA provision."

Miles argued that his claims did not require an interpretation of the CBA. The Court disagreed. The Court determined that his contract was with the Jets, and "is in accordance with a CBA between the NFL and the NFLPA."

Yet, to "adjudicate the discrimination claim, the Court must address" whether Miles had an employment relationship with the NFL. Furthermore, the Court would "have to interpret the CBA to determine whether the NFL had obligations under the CBA or incorporated documents to make certain accommodations" for Miles. Thus, the LAD and ADA claims "substantially depend on whether the NFL's action were aligned with the CBA and are therefore preempted."

The Court also found that with respect to the "vaguely asserted" ADA claims asserted in counts two and six, Miles conceded that he "did not file a charge of discrimination with the EEOC, which is a mandatory prerequisite to suit under the ADA." Therefore, his ADA claims "must be dismissed for failure to exhaust his administrative remedies." Therefore, the Court dismissed counts one, two and six with prejudice.

For count three, however, the question was whether this claim was "sufficiently independent" of the CBA "to withstand the pre-emptive force" of federal law. Miles argued that the NFL "owed him a duty of care 'to help him avoid injury while playing football' and that was breached when it 'prohibited him from utilizing protective equipment.'" The NFL countered that any such duty "can only be ascertained by interpreting provisions in the CBA and the Official Playing rules, which carefully allocate responsibilities for player safety and medical care among the NFL, the NFLPA, the Clubs, the Club physicians and the players." The Court agreed.

A New Jersey Supreme Court case stated that the elements of a negligence claim are a duty of care owed by the defendant to the plaintiff, a breach of that duty, a consequent injury proximately caused by that breach, and damages. Federal cases cited within this Court's opinion held that when the resolution of such a claim is substantially dependent on an analysis of the terms of a CBA, the claim must either be treated as a federal law claim or dismissed. Miles' amended complaint stated that he had been a professional football player employed by the Jets. The NFLPA is the "exclusive bargaining representative of all NFL players" and that

Miles' employment with the Jets "was in accordance" with the CBA. The CBA "governs the respective rights and responsibilities of the NFL, the Clubs, the NFLPA, and the players with respect to, among other subjects, player health and safety, player attire and equipment, and the remedies and benefits available to players in the event of an injury sustained while performing services under an NFL Player Contract." Moreover, the "CBA requires NFL players and Clubs to follow the rules promulgated by the NFL concerning the operation of the game."

Consequently, "the Court would have to interpret the CBA and Official Playing Rules and related documents" to "determine whether the NFL owed Plaintiff a duty of care as alleged in his Amended Complaint." The Court would then have to determine whether the NFL "acted in accordance" with those provisions, or if it had waived any provisions of the CBA. If the Court finds that "Plaintiff's negligence claim is inextricably intertwined with and substantially dependent upon an analysis" of the CBA it was thus preempted. This finding was consistent with "numerous courts" who had earlier come to the same conclusion in other NFL cases. Therefore, the Court once again dismissed the negligence claim "with prejudice."

In count four, Miles claimed that the NFL had waived any relevant provisions of the CBA, playing rules, or related documents. In count five, he asserted that his claims did not require interpretation of the CBA or other related documents. The Court wrote, "To the contrary, Plaintiff's claim that the NFL waived provisions in the CBA furthermore demonstrates that the CBA governs Plaintiff's claims." Miles could not "plead around preemption by alleging that his claims do not require interpretation of the CBA." The Court again concluded that counts four and five "do not support any legally cognizable cause of action and are dismissed with prejudice." In a footnote, the Court stated that this opinion "shall not be construed to preclude Plaintiff from resolving his grievances in accordance with the CBA."

Conclusion

Not only were Miles' NFL claims dismissed with prejudice, a few months later in September 2022, Miles was also accused of sexually assaulting a woman in front of her child, which added to his legal struggles. Ironically, the amended complaint gave the Court grounds for similarly dismissing these claims with prejudice. This was so apparent to the Court that it dispensed with oral argument. Hurt and anger are not substitutes for careful legal analysis. The Court's footnote about grievance procedures may sound good, but the time for Miles to file a grievance on any of his claims has since expired.

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Title IX Lawsuit Continues Between San Diego State University and Its Former and Current Female Athletes

By Lauren Rosh

On November 1, 2022, the United States District Court for the Southern District of California granted in part and denied in part a request for judicial notice and also granted in part and denied in part a motion to dismiss by the Board of Trustees of the California State University and San Diego State University (SDSU), collectively the defendants.

The case is a class action lawsuit against San Diego State University brought by former and current women athletes at the University regarding alleged Title IX violations related to the allocation of athletics scholarship funds, treatment and benefits, as well as retaliation.

Factual Background, Initial Complaint, Motion to Dismiss

In 2020, SDSU cut its women's rowing team. As a result, some players came together to bring back their team. However, as Arthur Bryant, one of the attorneys with Bailey Glasser representing the athletes, said that with lawsuits sparked by teams being cut, the perspective is often not to just bring back the team, but rather to ensure the team is brought back to an environment in which its members are treated well.

The named plaintiffs in the case are either former members of the SDSU now-eliminated women's rowing team or current members or former members of SDSU's women's track and field team. Their names are Madison Fisk, Raquel Castro, Greta Viss, Clare Botterill, Maya Brosch, Helen Bauer, Carina Clark,

Natalie Figueroa, Erica Grotegeer, Kaitlin Heri, Olivia Petrine, Aisha Watt, Kamryn Whitworth, Sara Absten, Eleanor Davies, Alexa Dietz and Larisa Sulcs.

The plaintiffs filed the initial complaint on February 7, 2022, asserting a claim regarding the denial of equal allocation of athletic financial aid.

According to the District Court's opinion, when determining whether there is an equitable allocation of athletic financial aid, compliance is examined by "a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs."

The opinion further explains that this is measured by "dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results."

Here, the plaintiffs alleged that "none of them 'received all of the athletic financial aid for which they were eligible at SDSU.'" Under 45 CFR 86.37, "to the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

Therefore, if 55% of the athletes are women, then the school must allocate 55% of the scholarship funds to athletes who are women.

According to the initial complaint, during the 2019-20 academic year, pursuant to information SDSU submitted to the federal government under the Equity in Athletics Disclosure Act, the university gave women varsity athletes $690,000 less in aid and men varsity athletes $690,000 more in aid, which the plaintiffs argue they were supposed to receive if the defendants had complied under the provisions laid out by 45 CFR 86.37.

Additionally, the complaint goes on to allege that during the 2020-21 academic year, according to the information SDSU submitted to the federal government under the Equity in Athletics Disclosure Act, the university granted women athletes $570,000 less and men athletes $570,000 more than each should have received if the school complied with the applicable law. The complaint alleges that this disproportionate allocation is still currently happening as well.

On April 8, 2022, the defendants filed a motion to dismiss, and the plaintiffs amended their complaint, filing it on April 21, 2022. The plaintiffs also added the other two claims for denial of equal treatment and benefits under Title IX as well as alleged retaliation.

When the Office of Civil Rights considers whether there are equal opportunities presented to members of women's and men's teams, it considers, among other facts: (1) whether the selection of sports and levels of competition effectively accommodating the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; (10) publicity.

Here, as laid out in the first amended class action complaint filed on November 29, 2022, the plaintiffs make several allegations including (1) that women on certain teams, such as track and field, have had to reuse equipment while the men, on teams such as football, do not; (2) that men's teams are given priority for scheduling practice and weight room training; and (3) that SDSU provides men's teams catered meals while traveling, but the women's teams have to provide their own sack lunches when traveling.

The third claim the plaintiffs asserted against SDSU is retaliation. As described by the district court's opinion, actionable sex discrimination includes retaliation "against a person because he complains of sex discrimination."

After the plaintiffs filed the initial complaint for this case on February 7, 2022, according to the first amended class action complaint a meeting that was previously unscheduled was called for on February 16 with the women's varsity track and field team. The plaintiffs allege in the amended complaint that on the call, at the beginning of the meeting, SDSU said that it was "disappointed and unhappy" with the women who brought the lawsuit against the school as it was a distraction.

The first amended complaint continues by stating that the five members of the women's track and field team who were on the February 16 call and named plaintiffs were "adversely affected, disturbed and

upset, and harmed in their ability to pursue Title IX claims on behalf of themselves and the other female student-athletes at SDSU."

Shortly after, on May 5, the defendants filed a motion to dismiss seeking to dismiss the first amended complaint on the grounds that the plaintiffs did not have standing for their Title IX claims for the first and second counts alleging unequal allocation of scholarship and unequal treatment and benefits, respectively.

The motion to dismiss also stated that the complaint failed to state a claim for relief for all three counts, the third count being alleged retaliation because they did not plead sufficient facts to support the claim.

Lastly, the motion to dismiss also sought dismissal on the grounds that the plaintiffs are not entitled to recover monetary damages.

The plaintiffs' response to the motion to dismiss, which they filed in June, went into detail regarding the three counts. For instance, SDSU awarded women athletes less than a proportional amount of financial assistance every year from 2010-11 to 2020-21, that the treatment of women athletes is "far less well" than the men athletes, and that during the February 16 call, SDSU "singled out those who were participating in the lawsuit."

On November 1, the United States District Court for the Southern District of California granted in part and denied in part the defendants' request for judicial notice and also granted in part and denied in part the defendants' motion to dismiss.

According to the November 1 opinion, the plaintiffs had the chance to amend the complaint, which they did on November 29 to avoid abandoning the first and third causes of action.

After the court delivered the opinion and the plaintiffs filed the second amended complaint, the defendant filed another motion to dismiss on December 13, 2022. In that motion, the defendants sought to dismiss the first and third counts of the second amended complaint on three grounds: (1) that the plaintiffs lack standing to pursue a Title IX claim for unequal allocation of athletic financial aid (categorized as Count I) or retaliation (categorized as Count III), (2) plaintiffs fail to state a claim for relief, and (3) to the extent plaintiffs can establish standing on Counts I or III of this amended complaint and state a claim for relief, they are not entitled to recover monetary damages.

Next steps

The plaintiffs' response to the motion to dismiss on the second amended complaint is due on January 26, 2023, and then the defendant will have an opportunity to reply to that response by February 9, 2023.

On February 23, 2023, there will be a hearing on the motion.

Note: The defendants' attorneys did not respond to comment when Hackney Publications reached out likely due to the ongoing nature of this case.

Lauren Rosh is a JD candidate at The George Washington University Law School with an expected graduation date of May 2025. She earned a BA with honors in multiplatform journalism from the University of Maryland, College Park, and has extensive experience covering the intersection of athletics and Title IX.

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Federal Judge Dismisses Antitrust Claim Against FINA

A federal judge from the Northern District of California dismissed a pair of antitrust lawsuits brought against the Fédération Internationale de Natation (FINA), now called "World Aquatics," finding that World Aquatics' governing rules and alleged conduct did not unreasonably restrain trade.

The two lawsuits were filed in 2018, one directly by the International Swimming League (ISL) and another by swimmers Tom Shields (USA), Michael Andrew (USA) and Katinka Hosszu (HUN), with ISL's support. They alleged that World Aquatics leveraged its position as the global governing body for aquatic sports to prevent the creation of a top-tier professional swimming league. ISL had also promised that it would increase prize money by utilizing a more dynamic and broadcast-friendly format.

The defendants were represented by the following Latham & Watkins partner attorneys Chris Yates, Aaron Chiu, and Dan Wall, as well as associates Jack Siddoway, Becky McMahon, Robbie Hemstreet, Christie Greeley, Kevin Wu, and Tim Snyder.

In the court's opinion, Federal Judge Jacqueline Scott Corley acknowledged that "the record is replete with evidence of FINA's concern about competition

from ISL. But, so what? The antitrust laws do not require one competitor to help another compete with it; instead, they prohibit only unreasonable restraints of trade." In fact, the opinion further states, "it is undisputed that top-tier swimmers are not bound by contract to swim only in FINA-sanctioned competitions."

Moreover, Judge Corley writes, "there is no rule (and never was) that allows FINA to penalize a swimmer who participates in a competition that is not affiliated with a member federation, and no evidence that FINA ever did, or even threatened to do so."

World Aquatics President Husain al-Musallam said in a statement that "we are pleased that it brings an end to a period of uncertainty. This is an important decision and also a good decision, not just for World Aquatics, but for the Olympic movement and beyond."

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West Virginia Supreme Court Reverses Circuit Court's Injunction Against Commission's 'Capricious and Arbitrary' Decision

By Shalom Samuels

Can high school athletes turn to the court if they believe that the Commission overseeing their sport has acted in an arbitrary and capricious manner? According to the West Virginia Supreme Court, the answer is no.

In March of 2020, L.M. (name restricted), a junior in Williamstown High School ("WHS"), was on the roster to play baseball for WHS for the 2019-2020 academic calendar. On March 13, 2020, West Virginia governor Jim Justice closed all West Virginia schools because of the Covid-19 global pandemic, and canceled all spring school sports.

L.M. did not want to miss out on his opportunity to finish his junior year, and the time it afforded him to apply to colleges and take college admissions tests, so he petitioned and received from the school board permission to reclassify as a junior when the school opened again in-person. As for his baseball career, he turned to the West Virginia Secondary School Activities Commission ("WVSSAC") for permission to play the two remaining years of his high school tenure and waiver of the Semester and Season Rule. WVSSAC's Semester and Season Rule provides that "a student may…participate in the interscholastic program for four consecutive years (eight consecutive semesters)… after entering the 9th grade." W. Va. C.S.R. § 127-2-5.1 (eff. 2020). By a letter dated August 27, 2021, the WVSSAC denied L.M.'s request for a waiver of the Semester and Season Rule, leaving L.M. with only one more year of baseball. L.M. then appealed to the VSSAC's Board of Review which also denied the request for waiver on December 8, 2021.

In January of 2022, L.M., through his parents, filed a lawsuit in the Ritchie County Circuit Court for an injunction against the WVSSAC, stating that the WVSSAC acted in an arbitrary and capricious manner, and that they improperly looked at extraneous evidence not submitted as part of the official administrative proceedings. On March 7, 2022, the circuit court granted the motion and prevented the WVSSAC from enforcing the Semester and Season Rule against L.M.. WVSSAC appealed to the West Virginia Supreme Court for a writ of prohibition.

The West Virginia Supreme Court first noted that the case was technically moot, as the injunction was to allow L.M. to play during the Spring 2021 semester, which had already passed. However, because a similar issue may arise and, because of the nature of the appellate process, will likely be mooted before it arrives to the West Virginia Supreme Court, the Court allowed it to proceed. See Syl. pt. 1, Israel by Israel v. W. Va. Secondary Schs. Activities Comm'n, 182 W. Va. 454, 388 S.E.2d 480 (1989).

The Court then turned to L.M.'s argument that the manner in which the WVSSAC applied the Semester and Season Rule was "capricious and arbitrary." The Court held that "decisions properly within the purview of the legislative grant of authority to the West Virginia Secondary Schools Activities Commission under West Virginia Code § 18-2-25 (2008), such as the application of WVSSAC Rules and the review of calls or rulings made by game officials, are not subject to judicial review." State ex rel. W. Va. Secondary Sch. Activity Comm'n v. Webster, 228 W. Va. 75, 717 S.E.2d 859 (2011). L.M. was not alleging that the rule itself was unfair, but only its application, and because its application was within the purview of WVSSAC's legislative grant of authority, it was not subject to judicial review.

As such, the Court granted the WVSSAC's writ of prohibition.

The Court also looked at L.M.'s second claim, that the WVSSAC had improperly looked at extraneous evidence, but declined to rule on the matter, because the extraneous evidence was not presented to the Court nor was evidence of its proceedings, which is required to ascertain the sufficiency of the grounds for asserted relief. See State ex rel. W. Va. Secondary Sch. Activity Comm'n v. Webster, 228 W. Va. 75, 717 S.E.2d 859 (2011).

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Articles

Engine Designs and Reserve Driver Roles: Protecting Trade Secrets

By Kerri Cebula

For a majority of the 2022 season, IndyCar drive Alex Palou was involved in a contract dispute. Chip Ganassi Racing (CGR), the team Palou was driving for in 2022, claimed that Palou was under contract to drive for them for the 2023 IndyCar season. Palou and Arrow McLaren SP (ASMP) claimed he had signed a contract with AMSP for the 2023 season and beyond. AMSP is a sister team to McLaren, the Formula One team. The dispute was eventually settled with Palou agreeing to drive for CGR for the 2023 IndyCar season and CGR would allow him to test McLaren's Formula One car (Cleeran, 2022).

In December 2022, Palou was named McLaren's Formula 1 reserve driver for the 2023 season for the races that do not conflict with his IndyCar responsibilities (Medland, 2022). The role of the reserve driver in Formula 1 is to fill in when one of the team's regular drivers is ill or injured and to occasionally drive in a free practice session on race weekend. While this role with McLaren will potentially help Palou move into Formula One, it could also lead to trade secret issues for Honda and CGR.

A trade secret is defined by the Uniform Trade Secrets Act as information that (a) has independent economic value from not being generally known or easily obtained by others and (b) is subject to reasonable efforts to maintain secrecy (Cebula, 2022). Both Indiana, home to CGR and AMSP, and California, home to Honda Racing, have adopted the UTSA (Cebula, 2022). There are many potential trade secret issues as anything under the body work could be considered a trade secret. The main trade secret issue for Honda and CGR is the engine design. Under this definition, a race engine qualifies as a trade secret.

IndyCar rules require that teams run a 2.2 litre turbo charged V6 engine supplied by either Honda or Chevrolet. These are the only specifications that IndyCar makes public, but it is understood that Honda and Chevrolet have some room to be creative with their engine designs under the IndyCar rules (Pruitt, 2021). This is where trade secrets come into play. CGR runs Honda engines and AMSP runs Chevrolet engines. Honda and CGR will want to ensure that their confidential engine information does not fall into the hands of Chevrolet.

The second trade secret issue involves McLaren's Formula One team. IndyCar and Formula One are two different racing series, but the engine specifications are similar. Both series run a V-6 engine; IndyCar's is a 2.2 litre while Formula One's is a 1.6 litre. IndyCar runs a turbo charged engine while Formula One runes a turbo hybrid engine. These specifications may seem different enough, but a V-6 engine is a V-6 engine. In addition, the Formula One regulations allow teams much more freedom in their engine designs. This is a potential trade secret issue because McLaren runs Mercedes engines while Honda supplies engine to McLaren rivals Red Bull and Alpha Tauri. Honda will want to ensure that their engine secrets stay out of Mercedes hands. Trade secrets are believed to be one of the reasons Honda refused to supply engines to McLaren and Fernando Alonso's 2019 Indianapolis 500 entry. They are also believed to be the reason that when Arrow SMP merged with McLaren to form what is now Arrow McLaren SP, Arrow SMP gave up their contract with Honda (Ayello, 2019).

CGR and Honda will need to take steps to ensure that Honda's trade secrets remain a secret. One way is to require Palou sign a confidentiality agreement forbidding him from passing the information on to McLaren and AMSP. A second way is to ensure that Palou does not have access to the engine information at all. Once a driver announces he is leaving a team, the team typically stops the flow of confidential information. One issue in this case is that it is unknown if Palou is leaving CGR for the 2024 season. It is believed he has a contract with AMSP that begins with the 2024 season, but nothing has been announced (Medland, 2022). Either way, Honda and CGR need to take steps to protect their trade secrets.

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Emerging Issues Involving Gender and Religion Surface in Esports

By Jared Good, Esq.

Although Esports are oft debated on whether they are a true "sport" by the conventional metrics, they still are plagued with the same issues that face the "traditional" sports; namely diversity and inclusion; doping (medicinal and mechanical); and opportunity to compete. The focus of this article will focus on the first main issue, specifically gender and religious inclusion. If I were to ask you to imagine the average esports professional player, a very large percentage would immediately picture an individual that is male and likely between the ages of 15-25ish. This is obviously a largely generalized and gender-norm subscribing view that plays to the idea that only men play video games, which is a very outdated belief as stats taken from 2021 indicate that upwards of 41.5% of video game players in the United States are female.

Religion in video games is another area that has provided contention over the years with how various religious themes are depicted. Admittedly, there is not a hefty discussion of religion involved in the world of esports, but to build the foundation for what role religion plays in the esports sphere, it is necessary to understand the premise of religion in gaming at-large. For years the gaming industry has faced controversy for presentation of real-world issues and ideas in a manner that lays bare the hypocrisy of everyday life, while simultaneously stripping away the façade of eternal goodness and exposing true evils that exist. It's no wonder that video games are always targeted as evidence of increased violence in society, even when numerous studies have rebuked those findings. Understanding these basic ideas is paramount to addressing issues with religious inclusion.

Gender and Esports Today

As the popularity of video games began to rise through the 1980s, the advent of competitive gaming was almost a foregone conclusion. In the 1990s this came to fruition with the creation of the numerous world championship competitions. Popularity exploded primarily in East Asia at the start, with South Korea becoming the major power in the world of eSports development, a trend that has continued through the past two decades. eSports remains heavily male-dominated sphere, with studies showing "women compose 35% of eSports players, but only 5% of professional players." Rogstad. Many commentators have argued that this is a symptom of a larger culture of toxicity and masculine hegemony. Think of the current situation that has plagued Activision Blizzard over their alleged "frat boy" workplace, that was allegedly strife with sexual harassment and an almost pseudo-quid-pro-quo culture.

An interesting analysis done by Emily Hayday and Holly Collison looked at a combination of factors to examine how social factors limit access to women in the eSports world. They acknowledge that eSports presents a unique opportunity to create a truly skill-based sporting environment, where physical traits do

not play an outsize role, but there are several necessary corrections that must be made. Hayday and Collison reference the existence of "exploitative companies," "sexism being … accepted … supporting that culture," and a readily apparent existence of "communities [that] are much more fractured than real life." Hayday & Collison. In their interviews, they found a common theme of tribalism. Specifically, a respondent stated that "[t]here's very distinct separate tribes … generally split by game [and] by company …," which works to divide the existing infrastructure and opportunities, that otherwise could allow for a stronger and more cohesive grouping. Id.

An important avenue to examine is the idea of treatment discrimination within the eSports world as currently exists. Treatment discrimination is defined as "people who are different from the majority in a particular setting, generally are treated more poorly than their majority counterparts." Darvin et. al. Studies conducted have shown that online interactions between male and female eSports athletes vary widely. Whereas males tend to receive more comments and remarks centered around their performance, females tend to receive far more comments that were objectifying and/or focused on the idea that "gaming [] incongruent with feminine identity." Id.

This discussion segues perfectly to a real-life example of the struggles that female gamers face within the eSports world. Wang 'BaiZe' Xinyo made waves as a trailblazer on the eSports circuit, becoming the first woman to compete in a Hearthstone Championship Tour event in 2017. Schelfhout et. al. During the leadup to the finals, BaiZe was actually defeated in the knockout rounds of a qualification tournament in Shanghai, but a visa issue prevented one of the qualifiers from being able to enter the US and BaiZe was awarded an alternate spot. Immediately following her qualification, media attention centered on her presence as a female, rather than as someone genuinely skilled and able to compete on a world stage. Id. BaiZe's competitors made similar remarks, being able to only offer up that she was a female but nothing about her talents. This balancing act that female gamers face, without question, hampers whether females feel as if they can succeed or even feel included in an otherwise hegemonic male space. BaiZe herself made statements that reaffirmed her sentiment, saying "[m]y opponents joked that they lost to me because they were giving me an easy pass, because I was a woman. Or [they would complain] losing to me (a woman) was too humiliating." Id. It is not a stretch to say that these sentiments are reflected by female gamers at-large. Given the perpetual view that video games are a male-dominated activity, women who want to participate are required to work twice as hard to earn the same level of respect and respect that would otherwise be easily given to a male player of the same caliber and skill level.

For the eSports to work through the incredibly gendered identity that exists currently, these old institutions and views need to be torn down and replaced with ones that actually reflect the market and statistics.

Intersection of Religion and Video Games

Video games have approached the concept of religion in various ways: having religious identity play a role in the development of a character; religion being an underlying factor that does not play a key in the storyline; or games where religion is mentioned in passing, but is otherwise nonexistent. Admittedly, the world of eSports does not have a large library of literature revolving around the mixture of eSports and religion. But before getting to the eSports portion, it is necessary to discuss religion and video games.

Religion can be easily shown in a video game, with games like Elden Ring having a large emphasis on skills like "holy" with character classes involving religious figures (i.e., nun/priest), to games that only depict religion through the presence of churches/mosques/synagogues and/or religious objects. In an in-depth analysis done on this idea, a set of framework groupings were established that provides great insight.

Game Content: this concept refers to games whose purpose is to instruct about a specific religion or teach characteristics that match desirable trats of one or more religions

Game Context: this concept refers to the environment, symbols, rules, and characteristics (of players and worlds) that represent explicit or implicit religious tones in a game

Game Challenge: this concept refers to the challenges that are presented in a game such as undertaking a god role, being good or evil, and representing characteristics of a religion's deity (e.g., creating or redeeming)

Player Capital: this concept refers to the moral beliefs, the explicit and implicit feedback from others, and the religious essentials that a player brings to a controller regardless of gameplay Ferdig. Obviously, this framework is not foolproof, as there could be games that fit more than one category, or some that may not fall into an existing grouping and thus, requires a new category to be established. But, at its base level, it provides a solid way to analyze how the usage of religion in a particular game impacts the gameplay itself.

Another unique aspect of religion and video games, is how the game themselves can act as a pseudo-religion. Given the expansive worlds within most video games, and the freedom of choice/opportunity that is given to a player, a game can give their own religious experience. The existence of a mythic history, heroes with backstories that have religious undertones: whether someone can be "saved" or "redeemed," or whether their actions make them doomed "to fall." Boren. Though, it is not the game itself that contributes to a religious sentiment, it's the custom and ritual that goes into the gaming experience itself. Gaming can create feelings of something beyond the earthly realm, similar to what is experienced by individuals who partake in religion. Does that mean that the game itself is a religion, no, but it can create an almost religious experience for those who partake.

Halo, like Elden Ring, directly incorporates religion into the gameplay with the existence of the "Covenant." Although at first glance, one would argue that Halo likely wouldn't have a large religious connotation, given its focus on killing aliens and wholesale violence, but that wouldn't be the case. Underlying the Covenant's beliefs, was a focus on the worship of ancient beings called "Forerunners." The lore entails that "the Forerunners discovered a way to transcend the physical world and become divine beings by building and activating seven huge ring-shaped devices called Halos." Corliss. Religion in video games is incredibly intertwined, even where it otherwise wouldn't be thought to have a place.

Turning now to how religious beliefs impact an individual's ability to play video games both casually and in an eSports world. Most gamers who grew up playing video games during the increase capabilities of online lobbies (so Xbox Live circa 2010-2014) can attest to just how toxic the video game subculture can be. There are plenty of stories of individuals being subjected to racial and gendered insults, remarks about one's sexual orientation/gender identity, or religious hatred. In studies done by the Anti-Defamation League, they found that "53% reported being targeted based on their race, religion, ability, gender identity, sexual orientation or ethnicity." Weinreb. Specifically, those who were targeted for their religious views, commonly Jewish or Muslims, "19% … report being harassed because of their religious viewpoints." Id. footnote 126.

eSports has been ripe for instances of racial, homophobic, transphobic and misogynistic scandals over the past several years, but there hasn't been any specifically directed towards someone because of their religious beliefs. In-fact, in my research, I was only able to find a single article even discussing religion and eSports mixed. The author discusses the goals of a man named Mark Stockhoff, who aims to combine the competition and enjoyment of eSports, with the teachings and community of Christianity. Hickey. His organization works closely with the existing Fellowship of Christian Athletes, to diversify opportunities for kids and young adults, whom may have otherwise not have considered themselves athletes or felt as if they had a community to be a part of.

Although religion hasn't faced the same extent of instances of harassment or negative treatment, with the type of visibility that has occurred with gender, racial, and sexual orientation/gender identity, this does not mean it is any less important or prevalent. As eSports continues to develop, it will begin to come into contact with issues of rising religious animosity towards individuals of the Jewish and Muslim faiths, and as such, the eSports world will need to determine how to approach these issues and remedy to procure an inclusive and open opportunity for all those that love video games.

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E.U. Ruling in Super League Case Tracks LIV Golf Decision

By Christopher R. Deubert, Senior Writer

On December 15, 2022, Advocate General *Athanasios Rantos of the Court of Justice of the European Union issued a preliminary opinion for the Court's consideration in a dispute between the* proposed "European Super League" and the Union of European Football Associations (UEFA) and the Federation Internationale de Football Association (FIFA). Judge Rantos' decision echoes of the ongoing litigation between LIV Golf and the PGA Tour in interesting ways.

The Super League is an effort by the twelve best soccer teams in Europe to form a new league separate from the national leagues in which they participate. For example, among its intended participants are Real Madrid of La Liga (Spain) and Manchester United of the Premier League (England). The thinking behind the Super League is that by creating regular contests between the most popular clubs on the continent, they could tap into new revenue streams. To protect the clubs' investment in the league, membership would be "closed," i.e., there would be no promotion and relegation as is a general feature of European sports leagues.

The Super League concept bears similarity to LIV Golf's efforts to disrupt professional golf by creating new events with lucrative prize pools intended to draw the best golfers in the world.

Nevertheless, both upstarts have run into legal woes. In August, several LIV golfers, led by Phil Mickelson, sued the PGA Tour alleging that its decision to suspend any golfer that participated in a LIV Golf event violated antitrust laws. The golfers sought a temporary restraining order against the suspensions.

Judge Beth Freeman of the Northern District of California denied the golfers' request. In finding that the golfers had failed to demonstrate irreparable harm, the court noted that the golfers "are not barred from playing professional golf against the world's top players, from earning lucrative prizes in some of golf's highest-profile events, from earning sponsorships, or from building a reputation, brand, and fan following in elite golf. The only thing [the golfers] are barred from is pursuing these goals at PGA TOUR events." *Mickelson v. PGA Tour, Inc.*, 22-cv-04486, 2022 WL 3229341, at *5 (N.D. Cal. Aug. 10, 2022) (emphasis in original). In other words, the golfers chose to play in another league for economic reasons and cannot then be heard to complain about being excluded from the league they chose to leave. The case is ongoing.

Similar to the LIV golfers, the Super League sued FIFA and UEFA, the global and European soccer governing bodies respectively, after they threatened to sanction and bar any clubs or players that participated in the Super League. The Super League alleged that such actions violate European competition (antitrust) law. A Spanish court referred the matter to the Court of Justice in a process designed to ensure uniform application of European Union law.

Here, the legal process diverges from American practice. Under the Court of Justice's rules, the referral by the Spanish court calls for a preliminary, nonbinding ruling from an Advocate General after a full briefing and hearing. The Advocate General's ruling is then reviewed by the Court for either adoption or additional proceedings. The process is akin to a federal magistrate judge issuing a report and recommendation to a district court judge under Rule 72 of the Federal Rules of Civil Procedure.

In the Super League matter, Advocate General Rantos, like Judge Freeman, was unmoved by the upstart's

complaints, writing that "[f]rom the perspective of competition law, an undertaking (or an association of undertakings such as UEFA) cannot be criticized for attempting to protect its own economic interests, in particular in relation to such an 'opportunistic' project that would risk weaking it significantly." Further, Advocate General Rantos, again like Judge Freeman, was unsympathetic to the claimant's efforts to maintain "dual membership."

Advocate General Rantos based his opinion in part on the special nature of the "European Sports Model," as protected by Article 165 of the Treaty on the Functioning of Europe (TFEU), one of the foundational treaties of the bloc. Article 165 recognizes the European Union's interest in "developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen." Advocate General Rantos recognized this provision as providing a constitutional preference for "a pyramid structure with, at its base, amateur sport and, at its summit, professional sport." The Super League ran afoul of this structure and thus, according to Advocate General Rantos, was less deserving of protection under European Union law. Specifically, he found FIFA and UEFA's rules in support of "legitimate objectives," including "the principles of participation based on sporting results, equal opportunities and solidarity upon which the pyramid structure of European football is founded."

Advocate General Rantos thus proposed that European Union competition law "must be interpreted as not prohibiting FIFA, UEFA, their member federations or their national leagues from issuing threats of sanctions against clubs affiliated to those federations when those clubs participate in" the Super League. The Advocate General did, however, find that the threatened sanctions against the players unwarranted since they not been involved in the creation of the Super League (whereas the LIV golfers have had varying levels of involvement in that tour's genesis).

The Super League was temporarily or perhaps permanently shelved due to backlash from all corners of European society. While the Court of Justice may overrule Advocate General Rantos' preliminary opinion, the odds are clearly against the Super League. An affirmation of the opinion may finally be the death knell for the long dreamed of Super League.

As for LIV Golf, it remains to be seen whether the PGA Tour's currently enforced prohibition against dual membership will prevent further defections and/or cause any golfers to return to the Tour. Either way, the Tour may wish to cite the Court of Justice's recent opinion as persuasive authority for the proposition that existing sports leagues are within their rights to protect their businesses from innovative challengers.

Deubert is Senior Counsel of Constangy, Brooks, Smith & Prophete LLP.

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New York's New NIL Law – an Analysis

What follows is an exclusive interview with Morgan Lewis partner David McManus and associate Elizabeth Polido about New York's new NIL law.

What is the basis of the New York Student Athlete NIL Law?

New York Governor Kathy Hochul recently passed a law that, effective immediately, allows student-athletes at colleges in New York State to receive compensation for using their name, image, and likeness ("NIL") to endorse products and services, without the risk of losing their scholarships or eligibility to participate in their sports. The law permits student-athletes to obtain compensation for their NIL through camps and clinics, as well as brand partnerships, media appearances, and social media advertisements, among other things. In addition to allowing student athletes to enter into NIL deals, the New York law provides guidance and resources to student-athletes navigating this new landscape, including by allowing them to be professionally represented by an agent or attorney (provided they are otherwise registered under the New York General Business Law or admitted to the New York bar, respectively). The law also requires colleges to offer assistance programs to guide student-athletes on topics related to NIL deals, including financial literacy, career development, and mental health support services.

How is the law different than other NIL state legislation?

In passing the law, which comes on the heels of the NCAA's recent guidance clarifying colleges' involvement in students' NIL deals, New York joins several other states with similar NIL legislation (including California, Pennsylvania, and New Jersey). New York's NIL law is unlike that of other states in that it does not explicitly prohibit deals endorsing certain categories of products or services (e.g., alcohol, tobacco, and gambling). But there are still a number of restrictions on the NIL deals New York student-athletes may enter into. For example, the law prohibits student-athletes from endorsing products or services that conflict with existing sponsorships or endorsements between their college and third parties. The law also includes a general prohibition on endorsement deals that, from the college's perspective, "would reasonably be judged to cause financial loss or reputational damage to the college," providing broad bases to potentially nullify NIL deals.

How will the law impact student athletes?

The impacts of the New York law may be minimal for most student-athletes as NIL deals tend to gravitate towards the most prominent athletes at the largest schools in the most lucrative sports. In that regard, the bill suggests that colleges take additional measures to support all student-athletes by establishing student-athlete assistance programs such as savings plans and funds for financially distressed student-athletes.

How will the law impact businesses?

Businesses interested in signing NIL deals and colleges alike should review the New York law to ensure that potential NIL deals are compliant. Such companies and institutions should also remain cognizant of similar legislation at the state and federal level, as well as the implications of these laws. In particular, NIL laws, which effectively remove certain barriers that prevent student-athletes from earning compensation, potentially create increased risk of claims that these student-athletes should be deemed employees of their respective colleges. For instance, if student-athletes are deemed employees for purposes of the Fair Labor Standards Act—which is the question currently before the Third Circuit in Johnson et al. v. National Collegiate Athletic Association et al.—colleges will be required to comply with federal minimum wage and overtime requirements, and may soon find themselves subject to other labor and employment laws, such as Title VII. The legal landscape is changing quickly and colleges and businesses should ensure that they stay ahead of the game by monitoring NIL and other laws that may impact college sports.

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Heptathlete Files Lawsuit Against USA Track & Field after Collapsing at Event

Elite women's heptathlon competitor Taliyah Brooks has filed a lawsuit against USA Track & Field (USATF), the national governing body for the sport of track and field in the United States, after an incident on June 27, 2021, at the 2021 U.S. Olympic Trials when she collapsed and suffered heat-related injuries.

Taliyah Brooks alleged that the USATF was liable because it held the heptathlon competition during the hottest part of the day on the hottest day in recorded history in Eugene, Oregon. On track temperatures that day reportedly near 150 degrees Fahrenheit, the plaintiff alleged.

In advance of the seven-event heptathlon competition, athletes on the USATF Athletes' Advisory Council petitioned USATF to move the time of the heptathlon trials to protect the safety of the athletes, but USATF denied the request, according to the complaint.

The plaintiff further alleged that not only did USATF refuse to move the competition to a time of day more protective of athlete safety, but USATF had inadequate equipment in place to protect the athletes and provide for their care, even failing to have an ambulance at the venue available to promptly transport her to the hospital.

Brooks had been in second place at the end of the first day of the heptathlon, but her collapse, heat injuries, and resulting hospitalization left her unable to complete the competition and deprived her of the opportunity to represent the United States in the Olympic

Games in Japan, according to the complaint, which was filed in the Marion County Superior Court in Indiana.

After the Olympic Trials, Brooks sought assistance from USATF in getting her medical records and other records about the event. But she was allegedly confronted with an indemnification provision that USATF claims she was subject to as a condition of participating in the Olympic Trials. Not only would the provision, as interpreted by USATF, prevent Brooks from recovering for injuries "caused by USATF's own negligence but it would purportedly require her to pay USATF's attorneys fees if she even tried to hold USATF accountable."

Brooks is being represented by veteran sports lawyer Bill Bock, of Kroger, Gardis & Regas, LLP. Bock is seeking to have the exculpatory provision that is being relied upon by USATF declared "unconscionable and unenforceable."

"This is an important case for the protection of the health and well-being of athletes," said Bock. "There is no duty more important for a sport national governing body than protecting the safety of its athletes. But, if a national governing body like USATF can avoid accountability for its negligence as a condition of entry into the U.S. Olympic Trials then any promise by USATF that it will protect its athletes is empty and unenforceable. USATF's effort to shed its duty to protect the health and safety of its own athletes competing in the U.S. Olympic Trials is unconscionable. We are asking the court to find that USATF can be required by its athletes to hold reasonably safe Olympic Trials and National Championships, and that USATF can be sued by its member athletes for negligence if USATF fails to conduct these events safely."

A copy of the complaint can be found **here**.

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Native American Names, Mascots, and Images in Professional Sports

(Editor's Note: What follows is an excerpt of Understanding Sports Law, written by Professors **Timothy Davis** *and* **N. Jeremi Duru** *and recently published by Carolina Academic Press recently published. You can learn more about the book here:* **https://cap-press.com/books/ isbn/9781531019846/ Understanding-Sports-Law)**

Professional sports has no NCAA analogue; no single administrative body with broad-based oversight. Instead, professional sports leagues are entirely independent of each other. Moreover, the clubs in most leagues are individually owned, and while league commissioners likely have authority to issue league-wide regulations with re- spect to the use of Native American names, mascots, and images, none have done so. potentially offensive Native American names, mascots, and images are conse- quently more prevalent in professional sports than in collegiate sports. Indeed, some professional teams' current and past names, mascots, and images — were they used in college — would certainly have been deemed "hostile and offensive" under the NCAA policy. MlB's Cleveland Guardians (until 2021 called the Cleveland "Indians") and the NFl's Washington Commanders (before 2020, called the Washington Red- skins, and from 2020 to 2022, called the Washington Football Team) are prime examples. The Cleveland Indians' name would not likely run afoul of the policy (as Catawaba College, referenced above, successfully petitioned to continue using the name "Indians"). Its longtime logo — a caricatured red-faced Native American with an exaggerated nose, oversized teeth, and a feather in its hair named Chief Wahoo— certainly would. As would the Washington Football Team's former name— the "Red- skins" — which dictionaries define variously as "disparaging" and "offensive."[219] Be- cause the NCAA policy has no application in professional sports, however, those opposing such names and mascots have had to resort to legal challenges.

"Cleveland Indians"

Since the Cleveland Indians (now, the Guardians) began using the Chief Wahoo logo in the mid-twentieth century, opponents of its use have challenged it through grass roots efforts and — as early 1972 — through the courts.[220] Although legal action was not successful in forcing a logo change, it did, together with the grass roots ac- tivism, raise awareness and bring attention to the concern. The team's 2016 run through the playoffs to the World Series, however, brought the issue to a head. After defeating the Boston Red Sox in the Wild Card round of the playoffs, the Indians faced the Toronto Blue Jays in the American league Championship Series (AlCS). In advance of Game 3, the first game of

the series to be played in Toronto, a Canadian citizen and member of the Blackfoot Tribe named douglass Cardinal brought suit against the Indians and MlB. The suit in an ontario Court sought to enjoin the In- dians from using their name or the Chief Wahoo logo on their uniforms while playing in Canada.[221] he alleged the team's use of its name and logo constituted racial dis- crimination against indigenous Canadians under both ontario provincial and national human rights legislation, causes of action not available under United States law.[222] The suit elevated to the international level concerns activists had long raised. Although the injunction was denied,[223] controversy around the name and mascot clouded the AlCS as well as the World Series, to which the Indians advanced but ultimately lost. Moreover, Cardinal continued to press his case, which despite jurisdictional challenges, progressed through the Canadian legal system and increased pressure on MlB and the team.[224] At the same time, local activists, including a coalition called the Cleveland American Indian Movement (CAIM), intensified protests against the team's name and logo.[225]

In 2018, under mounting pressure, MlB Commissioner Rob Manfred persuaded the team's owner paul dolan to remove the Chief Wahoo logo from team uniforms for the 2019 season.226 dolan had long resisted doing so, trumpeting the logo's nostalgic pull: "you can't help but be aware of how many of our fans are connected to Chief Wahoo. We grew up with it. I remember seeing the little cartoon of The Chief in the paper each day, showing if the Indians won or lost."227 Although dolan acceded to strip the uniforms of the Chief Wahoo logo, the team continues to welcome fans' use of the logo in cheering the team at home games.228 CAIM continued to protest the team, arguing that the team name, continued prevalence of the logo, and culture sur- rounding them both will continue to inspire the "racism that happens at the stadium with the red-face and the people dressing up as natives and the hooping and hollering."229 In 2020, with pressure intensified by the nationwide protests against systemic racial discrimination that summer, dolan finally relented and committed to changing the name.230 In 2021, the club announced its new name: the Cleveland Guardians.

The challenge to the Chief Wahoo logo illustrates the power of lawsuits in chal- lenging the use of Native American names, mascots, and images, even if not ini- tially— or ever— successful in court. Cardinal's initial goal of preventing the Indians from wearing the team name and Chief Wahoo logo during the 2016 American league Championship Series failed, but his continued litigation operated as an activist tool, raising awareness and applying pressure.

"Washington Redskins"

The legal attack on the Washington Redskins' name — the most intense and sus- tained legal challenge to a Native American name, mascot, or image in United States history — also raised awareness despite failing to compel the club to change.

Two sets of plaintiffs, one after the other, sued pro-Football, Inc. (pro-Football), which owns the Washington Redskins football team, over the course of twenty years in an effort to make pro-Football change the team's name.231 They took a novel legal approach, petitioning the United States patent and Trademark office's Trademark Trial and Appeal Board ("TTAB") to cancel pro-Football's trademarks of the term "Redskins" and several derivations thereof pursuant to Section 2(a) of the lanham Trademark Act of 1946, which prohibits trademarks on words or phrases that are "scandalous" or "may disparage" a person or group of people.232 Trademark cancel- lation would not force pro-Football to change the name, but it would mean pro- Football could not prevent other entities from using the name in producing and selling merchandise.233 This would economically disadvantage the club, and, it would seem, incentivize a name change.234

The first group of plaintiffs, in Harjo v. Pro-Football. Inc.,235 petitioned the TTAB in 1992 to cancel the trademarks.236 The TTAB agreed that the trademarked term "Redskins" "may disparage Native Americans" and ordered that the trademarks be cancelled.237 pro-Football appealed, and the United States district Court for the district of Columbia (the court to which TTAB appeals typically go) reversed.

221 Cardinal v. Cleveland Indians Baseball Co., 2016 ont. Superior Ct. of Just. 6929 (2018).

222. Id.

223. Id.

224. Peter Edwards, Challenge to Cleveland Indians Name Proceeds, ToRoNTo STAR (June 5, 2017), **https://www.thestar.com/news/gta/2017/06/05/challenge-to-cleveland-indians-name-proceeds.html.**

225. A.J. Perez, Rob Manfred, Indians Have Had Talks on 'Transitioning Away' from Chief Wahoo, USA TodAy (Apr. 12, 2017), **https://www.usatoday.com/story/sports/mlb/2017/04/12/rob-manfred-indians-chief-wahoo/100369802/.**

226. Bill Shaikin, Cleveland Indians to Retire Chief Wahoo Logo, loS ANGElES TIMES (Jan. 29, 2018), **https://www.latimes.com/sports/mlb/la-sp-indians-wahoo-20180129-story.html.**

227. Id.

229. Kevin Barry, Cleveland Indians Start Home Opener without Chief Wahoo, but Will Continue to Sell Wahoo Merchandise, NEWS 5 ClEvElANd (Apr. 1, 2019), **https://www.news5cleveland.com/sports/ baseball/indians/cleveland-indians-start-home-opener-without-chief-wahoo-but-will-continue-to-sell- wahoo-merchandise** discrimination that summer, dolan finally relented and committed to changing the name.230 In 2021, the club announced its new

name: the Cleveland Guardians.

230. perez, supra note 225.

231. doori Song, Blackhorse's Last Stand?: The First Amendment Battle Against the Washington "Redskins" Trademark After Matal v. Tam, 19 WAkE FoREST J. BUS. & INTEll. pRop. l. 173, 174–78 (2019).

232. Id.

233. Casey leins, Washington Redskins Lose 6 Trademarks in Landmark Case, U.S. NEWS (June 18, 2014), https://www.usnews.com/news/articles/2014/06/18/washington-redskins-lose-6-trademarks-in-landmark-case.

234. Id.

235. 50 U.S.p.q.2d 1705 (T.T.A.B. 1999).

236. Id. at *1.

237. Id. at *48.

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Attorneys Seeking Responses from Concussed Female Lacrosse Players in Class Action Investigation Against NCAA

by Gina McKlveen

Undoubtably, female lacrosse players ought to be just as protected as the men. But right now, according to a group of attorneys conducting an investigation into the NCAA, this equal protection is questionable.

Current NCAA guidelines prohibit the use of protective helmets in women's lacrosse because the sport is defined as a "non-contact" for the women. Meanwhile, the NCAA requires the use of a full protective helmet in men's lacrosse because it is considered a "full-contact" sport for the men.

Given this discrepancy, attorneys from Milberg Coleman Bryson Phillips Grossman, LLP, a leading class action law firm, are launching an investigation into whether the NCAA put female lacrosse players at risk for concussions. The firm is working alongside Public Justice, a national nonprofit organization that confronts discriminatory systems to ensure equal access to justice for all. Last month, ClassAction.org, an online forum connecting a network of professionals to facilitate class action and mass tort lawsuits, announced that the attorneys are seeking input from women lacrosse players who played for NCAA-governed schools and suffered concussions while playing the sport. Such players are encouraged to fill out the form on ClassAction.org's website to get in touch with an attorney.

The attorneys conducting the investigation believe that the NCAA's rules differentiating women's lacrosse as "non-contact" and men's lacrosse as "full-contact" are discriminatory and outdated. Some spectators view men's lacrosse as more closely related to ice hockey, whereas women's lacrosse resembles field hockey. Essentially, the distinction between the similar sport played by the two sexes is that in men's lacrosse "body-checking," or player-on-player contact, is permitted; however, in women's lacrosse this type of body-checking is strictly prohibited. In fact, according to previous report by USA Lacrosse, a foul will be called in women's lacrosse if a seven-inch imaginary sphere around the female player's head is breached. This rule and other penalties attempt to deter the type of hits that lead to major head injuries and brain traumas.

Nevertheless, statistics show that despite technically playing a non-contact sport, female lacrosse players suffer higher rates of head injuries than their male counterparts. A Future Medicine's Concussion medical journal article from 2017 revealed that women players had a higher rate of head, face, and eye injuries than men with 40% of these injuries being classified as concussions. The article further elaborated that while most of concussions in men's lacrosse were caused from player-to-player contact, the primary mechanism of head injuries in women's lacrosse were from stick or ball contact. Stick checking, knocking the ball out of an opposing player's possession, while limited, is still allowed in women's lacrosse. So, even though referee rules have been modified to penalize body-checking in women's lacrosse, these type of rules do not prevent the occasional, and often inevitable albeit accidental, hit to the head by a flying ball or stray stick to the face.

Moreover, the article compares having the proper protective helmets in women's lacrosse to equipping baseball players with batting helmets or construction workers with hardhats—both of which are designed to prevent head injury caused by objects impacting the head. The same type of lacrosse ball is used in both men's and women's lacrosse. This ball is hard, inflexible, and fast moving, designed to be flung from a lacrosse stick at speeds reaching over 100 miles per hour, which has the potential to cause significant injury to any part of the body not properly protected upon

impact. Yet, despite the same ball usage and risk of significant head injury, the equipment requirements vary drastically between men's and women's lacrosse—a mandatory helmet for the men, but merely protective eyewear and mouthguard for the women.

According to Journal of Cartilage & Joint Preservation journal article published in December 2022, "[a]nother notable difference between men's and women's lacrosse is that the head of a women's lacrosse stick is flat and without a deep pocket…[causing] female players [to] carry the head of the stick close to their heads to increase ball control and prevent defenders from knocking the ball loose…[but] this method of ball handling by female players puts them at a greater risk of sustaining injuries to the head and face."

Still, some critics of a protective helmet requirement in women's lacrosse argue that it will have a "gladiator effect" amongst female players, convincing them that a helmet will make them invincible, amplifying aggression over skill in the sport. These same helmet nay-sayers are instead proponents of consistent enforcement of previously established rules by referees and proper education among officials, coaches, and players.

The protective helmet wearing debate takes on additional relevance given that lacrosse is one of the fasting growing sports in the United States. To date, a total of approximately 826,000 individuals participate in the sport from youth to collegiate levels. In women's lacrosse specifically, there are currently more than 500 active women's collegiate lacrosse programs across all the NCAA divisions, which has also expanded opportunities for young girls on youth and high school teams. At this growing rate of participation, so too has the rate of injury increased amongst participants, which makes the on-going investigation into protective helmets for female players on NCAA women's lacrosse teams all the more urgent for future generations.

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Foreign Student-Athletes and Name, Image, Likeness

By Brenda Oliver and Amy Peck, of Jackson Lewis

Prior to 2021, collegiate student-athletes were not able to make sponsorship deals and profit from their names, images, and likenesses (NILs). However, in 2021, that changed when the NCAA adopted a new policy allowing student-athletes (those headed for professional teams, as well as less prominent players) to profit from, and build their brands, while in school.

Colleges, sports associations, and states have enacted various rules to help and protect student-athletes. But there is one group of athletes who have yet another hurdle to jump. Foreign students who are on F visas are in murky waters with respect to the work authorization that would allow them to participate in endorsement-type deals in the United States. NIL deals do not currently qualify as authorized on-campus employment for students on F visas. Until the regulations are changed or clarified, there are some options for foreign student-athletes, but these do not hold much promise for most.

Nonimmigrant Visas

Although the standards are difficult to meet, student-athletes could apply for O or P visas. To apply for an O visa, a student must be able to show they have extraordinary ability in athletics, demonstrated by sustained national or international acclaim. The student must be in the small percentage of those who have risen to the very top of their field. Although not impossible (only one has been granted to date), this is a very high standard to meet, especially for a student just coming out of high school.

As for P visas, the student-athlete must come to the United States to perform at an internationally recognized level. Unless the student will be participating in something akin to the Olympics, it could be very difficult to meet the eligibility requirements.

Green Cards

An EB-1 extraordinary ability green card could be another path to work authorization. The student must meet an even more heightened version of the O visa standard– again, a difficult road.

If the student is an immediate family member of a U.S. citizen, a family-based green card is a possibility. This means the student would have to be sponsored by a U.S. citizen spouse or parent (if the student is under 21 years of age and unmarried).

Other Family-Based Possibilities

Students married to certain individuals on H-1B, L, or E visas might be eligible for work authorization based upon their dependent status. Dependents of individuals on L or E visas have work authorization incident to their status. Those married to H-1B visa holders who have reached a certain stage in their green card process are eligible for H-4 employment authorization.

Humanitarian Possibilities

There are various humanitarian statuses that allow for work authorization, including Temporary Protected Status (TPS), Deferred Action for Childhood Arrivals (DACA), and Deferred Enforced Departure (DED). Students from countries that have been designated eligible for TPS due to country conditions may be eligible for work authorization. The same could be said for students who are eligible for DACA or DED.

The Student and Exchange Visitor Program (SEVP) is overseen by Immigration and Customs Enforcement (ICE). There are reports that ICE is considering whether students can participate in NIL deals on F visas, but guidance has yet to be issued. Participating in NILs without a proper visa could lead to damaging immigration consequences. Given the financial stakes, some students attempt to walk a very narrow line by entering contracts with companies outside of the United States or arguing that some of these endorsement agreements are simply passive investments that do not require them to "work" in the United States. This path must be carefully considered and analyzed by an experienced immigration attorney.

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BCLP's Sports & Entertainment Group Lands Key Partner Hire from NFL

Bryan Cave Leighton Paisner (BCLP) has announced that Douglas Mishkin, formerly senior counsel at the National Football League, has joined the firm as a partner in its global Sports & Entertainment Group. He will be based in the firm's New York office.

Mishkin brings with him "a unique skillset across transactional, regulatory and policy matters," according to the firm. "Over the course of his six-year tenure at the NFL, he was responsible for structuring, drafting and negotiating contracts across a variety of NFL business units (including Football Operations, Consumer Products and Club Business Development) and overseeing the League's commercial policies."

When the Professional and Amateur Sports Protection Act (PASPA) was overturned in May 2018, Mishkin became the lead attorney for the League's gambling-related commercial activities, handling the NFL's first-ever casino sponsorship, daily fantasy sports sponsorship, official sports betting data and live video distribution deals, slot machine license, Approved Sportsbook Operator agreements, and numerous sportsbook sponsorships (domestic and international)." In addition to handling the League's gambling and sports betting commercial transactions, Mishkin also supported Government Affairs in their sports betting advocacy and legislative drafting initiatives, advised the NFL's member clubs on structuring their sportsbook partnerships, and was instrumental in shaping the League's post-PASPA gambling policies, according to the firm. As the League's primary contact on all commercial policy matters, he also advised and counseled NFL clubs in connection with their partnerships across various emerging categories, including sports betting market access deals and blockchain digital asset sponsorships.

Prior to the NFL, Mishkin worked in Las Vegas as SVP, Legal and Business Affairs of Metric Gaming, an international sports betting technology, software and services company. In that role, he was responsible for the company's legal and regulatory matters, including securing the company's first gambling license, and handling a variety of licensing and investment transactions with global iGaming and sports betting operators. He started his career as a litigator in the New York office of Willkie Farr & Gallagher.

"We are thrilled to welcome Doug to the BCLP Sports & Entertainment Group," said Ryan Davis, the group's co-chair. "His unique and broad experience with the NFL and in advising all of its teams, along with his specialized legal experience in gaming, sports betting and other emerging categories, will provide tremendous value to our clients across the sports and entertainment industry. His insights and knowledge on these trending issues within the sports industry will

play a key role in the continued growth of our global practice, and his experience will be particularly valuable to our significant group of existing professional sports team clients, which include 31 NHL teams, over 20 Premier League, La Liga, Championship and other international football clubs across seven countries and various MLB, MLS, NBA and NFL teams."

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News Briefs

Sports Lawyer Kevin Warren Leaves Big Ten for President Post at Chicago Bears

Kevin Warren, a sports lawyer who rose within the ranks of the Minnesota Vikings (initially in the GC's office) before assuming the Commissioner job at the Big Ten Conference, has moved back to the NFL. Specifically, Warren was named President of the Chicago Bears. The Bears shared the following quotes from ownership and Warren in a press release: "Kevin is a man of integrity, respect and excellence, all of which are critical core values of the Chicago Bears, and we welcome his perspective and diverse thought to lead this storied organization," said Bears Chairman George H. McCaskey. "He is a proven leader who has many times stepped outside of his comfort zone to challenge status quo for unconventional growth and prosperity. In this role, Warren will serve in the primary leadership position of the franchise to help bring the next Super Bowl championship trophy home to Bears fans." General Manager Ryan Poles added: "Kevin is going to be a tremendous resource and I am excited to get started with him. In my time spent with him during the interview process, it quickly became apparent his resumé and business acumen will be a powerful asset to helping improve our organization and ultimately reach our goal to be a championship organization." Warren will begin official club business in the spring.

Sports Law Expert Podcast Highlights Sports Lawyer Bob Wallace of Thompson Coburn's Sports Law Practice

Hackney Publications announced has published its latest segment of the Sports Law Expert Podcast, with future releases set to be distributed on January 30 and February 15. The latest guest is sports lawyer Robert (Bob) Wallace, chairman of Thompson Coburn's Sports Law Practice. The segment can be heard here. "Bob is a huge asset to the sports law industry," said Holt Hackney, the founder and publisher of Hackney Publications. "Having worked both in-house and as outside counsel, he brings an important perspective that will benefit our listeners. In addition, his participation in the Sports Lawyers Association, as President and as a long-time board member, should be recognized. He cares about the profession." Going forward, those interested in being notified when a segment goes live can subscribe by **visiting here.**

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