SPORTS LITIGATION ALERT

January 26, 2024 Vol. 21, Iss. 2

Cases

Lawsuit Shows Football's 'Oklahoma Drill' Is No Day at the Beach

By Gary Chester, Senior Writer

It seemed like a good idea at the time. Charles "Bud" Wilkinson, the legendary football coach who guided Oklahoma to three national titles in the 1950s, devised a two-on-two tackling drill in a confined space to improve technique and toughness. More recently, the NFL and many high schools have banned the so-called "Oklahoma drill" over concussion concerns.

But the health and safety issues apparently did not reach TikTok, where the dangerous practice is something of a phenomenon. Millions on social media are watching videos of young participants running the drill without any helmets or padding.

Injuries are certain to follow, and injuries produce lawsuits. One example is Bacoulis v. Bellios, No.

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 23 other sports law periodicals. Visit www.hackney-publications.com to learn more.

Hackney Publications

Copyright © 2024 Hackney Publications. All rights reserved.

FBTCV216110797S, Sup. Ct. Conn. (November 20, 2023), which raises this legal issue: Does one who injures another participant in this activity enjoy immunity because he or she is engaging in a sport?

The Defendant Ran Amok

Alexa Bacoulis and Manny Bellios were playing the Oklahoma drill on a Rhode Island beach in 2022. According to Bacoulis' Amended Complaint, Bellios "suddenly and without warning or provocation" ran roughshod over Bacoulis while carrying a football, causing her to sustain substantial injuries.

The three counts set forth in the Amended Complaint allege that Bellios is liable for (1) negligent assault, (2) willful, wanton, and intentional assault, and (3) negligent infliction of emotional distress. Judge Jennifer Castro-Tunnard considered Defendant Bellios's motion for summary judgment.

Bellios argued that he is entitled to judgment as a matter of law on the first and third counts based on Connecticut's "sports exception" doctrine, and that there is insufficient proof of intent to support the second count. The plaintiff countered that there is a genuine issue of fact as to whether the Oklahoma drill falls within the sports exception doctrine.

Judge Castro-Tunnard relied on Jaworski v. Kiernan, 241 Conn. 399, 412 (1997), where the Connecticut Supreme Court held that "a participant in a team contact sport [has] a legal duty to refrain from reckless or intentional conduct…mere negligence is insufficient to create liability." In determining a defendant's legal duty, courts are to consider four factors: the normal expectations of the participants in the sport in issue, the public policy encouraging participation in "recreational sporting activities," the avoidance of increased litigation, and the decisions of other jurisdictions.

Bellios argued that negligence is insufficient to create liability because the parties were engaged in a sport or recreational activity. If so, the first and third counts should be dismissed. Bacoulis contended that the activity was not an athletic event, contest, or competition, and that the Oklahoma drill, by its very name, is a "drill" and therefore the sports exception doctrine does not apply, so the motion should be denied.

(Another important distinction is that even a football drill starts with a coach's whistle, unlike the activity on the beach that allegedly began without any notice.)

The Precedents That Could Have Shaped the Outcome

The attorneys presented one notable precedent each, and it is the role of the trial judge to decide which precedent best applies to the facts. For Bacoulis, it was Benedetto v. Avon, Canton & Farmington Youth Hockey Association, 2001 Conn. Super. LEXIS 1015 (April 6, 2001), where the plaintiff participated in a hockey "game" between parents of players between the ages of seven and nine and those players. The court noted that even though the activity was a game, it was a "benign and fun activity requiring little skills or conditioning."

In finding that the sports exception did not apply, the court held that the main objective was not to win a competitive, team contact sport, but rather for parents and children to have fun.

Counsel for Bellios argued that D'Agostino v. Easton Sports, Inc., 2010 Conn. Super. LEXIS 3200 (December 9, 2010) was a more applicable precedent. There, a pitcher in a softball game who was struck by a batted ball alleged that the batter had altered his bat so it would strike the ball with more force. The court dismissed the claim against the batter (though not against the bat manufacturer) because voluntary participants in a sport or recreational activity assume or consent to the common, inherent risks of participation.

Hackney Publications

Sports Litigation Alert (SLA) is a narrowly focused newsletter that monitors case law and legal developments in the sports law industry. Every two weeks, SLA provides summaries of court opinions, analysis of legal issues, and relevant articles. The newsletter is published 24 times a year.

To subscribe, please visit our website at
http://www.sportslitigationalert.com

Copyright © 2024 Hackney Publications. All rights reserved.

Bellios urged that the objective of getting past a would-be tackler in the Oklahoma drill is the same as in football, and that both require physical contact and tackling that involve obvious risks.

The Non-Decision Decision

Rather than decide whether the Oklahoma drill was merely an informal drill falling outside the sports exception or whether it was a competitive sport or recreation, the trial judge punted. She found a genuine issue of material fact exists as to "the classification of the type of activity the parties were engaged in."

The defendant argued that Bacoulis had assumed the risk of injury because she had testified that she understood the specific rules of the game and that physical contact was needed to win. Bacoulis argued that she had testified that she knew neither the name nor the rules of the Oklahoma drill. Judge Castro-Tunnard deemed this an issue of material fact that precluded summary judgment.

The result was consistent with the general law of negligence in Connecticut. As the court noted: "Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner." (Fogarty v. Rashaw, 193 Conn. 442 (1984)).

The Takeaway

Whether Bacoulis understood the Oklahoma drill and assumed the risk of injury is a fact issue that relates to all three counts in her Amended Complaint. But whether the sports exception applies to the drill is arguably an issue of law, as it was in the two precedent cases. However, the court left for the jury the fundamental question of whether the defendant enjoyed immunity under the sports exception doctrine.

The court considered the reasonable expectations of the parties, which is only one of the four factors set forth in Jaworski. The judge failed to consider additional factors such as the decisions of other jurisdictions. In New York, for instance, the standard governing a related issue is whether a drill closely resembles the sport itself (see "Two New York Decisions Reflect Confusion Over Assumption of Risk Defense," *Sports Litigation Alert*, June 2, 2023, p. 5).

On the surface, it would appear that playing the Oklahoma drill on a beach without any pads or helmets is closer to a youth hockey exhibition played for fun than a competitive, organized baseball game. If so, then Bacoulis would need to prove mere negligence rather than reckless or intentional conduct. But a jury of her peers, rather than the trial judge, will make that call if the case does not settle before the trial date of April 11, 2024.

Return to Table of Contents

SPORTS LAW EXPERT

Sports Litigation Alert is proud to offer a directory of Expert attorneys and witnesses at our Sports Law Expert website.

Here is this issue's featured expert.

Expert Attorney

Matthew Eisler

Expertise: *Sports Law, Sports Mergers and Acquisitions, Sports Investments, Naming Rights, Licensing and Sponsorship Agreements, Corporate Formation and Joint Venture Agreements, Sports Facility and Event Management, Crisis Management, Player Arbitration, Investigations, NCAA.*

Hogan Lovells

(303) 454-2437

Copyright © 2024 Hackney Publications. All rights reserved.

Malpractice Case Reveals Limits of MLB Arbitration Clause

By Christopher R. Deubert, Senior Writer

Ryan Costello was a promising young baseball player. After being drafted in the 31st round of the 2017 MLB Draft by the Seattle Mariners, and later traded to the Minnesota Twins, he worked his way through the clubs' A and AA affiliates. Sadly, his career was cut short when he was found dead in his hotel room in November 2019 while in New Zealand preparing to participate in the Australian Baseball League. His parents' efforts to obtain justice for his death first had to contend with MLB's arbitration clause.

A Missed Diagnosis

In February 2022, Costello's parents sued Dr. David Olson, a Twins' team doctor, in Florida state court alleging his medical malpractice led to Costello's death. Specifically, Costello's parents allege that as part of a 2019 spring training physical, an electrocardiogram (EKG) revealed that Costello had cardiac abnormalities. Further, Costello's parents claim that Costello should have undergone more testing before being allowed to participate in any strenuous activities. Nevertheless, Dr. Olson allegedly marked Costello's health report as "Normal" with "No Further Action Necessary," clearing Costello to return to spring training.

Costello's parents claim that the abnormalities were later determined to be Wolff-Parkinson-White syndrome, "a cardiac condition that is treatable but that can make vigorous physical activity dangerous and potentially fatal." Indeed, Costello's death was apparently caused by a cardiac arrythmia, a condition connected with Wolff-Parkinson-White syndrome.

The MLB Arbitration Clause

Dr. Olson moved to compel the action to arbitration according to the arbitration provision in the Major League Agreement (MLA), also known as the Major League Constitution. The MLA was incorporated by reference into Costello's minor league player contract.

Before going further, it is important to understand the context of this arbitration provision. Major league players have long been unionized and, as a result, negotiate collective bargaining agreements governing the terms and conditions of their employment, including relevant arbitration clauses. Minor league players did not unionize until 2022 and did not have a collective bargaining agreement until 2023 (and which is not yet publicly available). Consequently, prior to that point, minor league players were subject to the terms unilaterally imposed by MLB, its major league clubs, and their minor league affiliates. Some of those terms, like the arbitration provision, are included in the MLA, which is simply an agreement among the 30 MLB clubs.

The arbitration provision at issue stated as follows:

"All disputes and controversies related in any way to professional baseball between Clubs or between a Club(s) and any Major League Baseball entity(ies) (including in each case, without limitation, their owners, officers, directors, employees and players), other than those whose resolution is expressly provided for by another means in this Constitution, the Major League Rules, the Basic Agreement with the Major League Baseball Players Association, or the collective bargaining agreement with any representative of the Major League umpires, shall be submitted to the Commissioner, as arbitrator, who, after hearing, shall have the sole and exclusive right to decide such disputes and controversies and whose decision shall be final and unappealable."

Major League Constitution, Art. VI, Sec. 1.

Consequently, as explained by the District Court of Appeal of Florida, "the arbitration provision applies to disputes that are related in any way to professional baseball *and* that are between either: (1) two or more Clubs; or (2) one or more Club(s) and one or more Major League Baseball entity(ies)." *Christopher v. Olson*, 2023 WL 8502753, at *2 (Fla. App. Dec. 8, 2023). Importantly, the court reiterated that "[b]oth 'Clubs' and 'Major League Baseball entity(ies)' include their respective owners, officers, directors, employees and players." *Id*.

The Courts' Decisions

The trial court granted Dr. Olson's motion to compel, relying on *Wolf v. Rawlings Sporting Goods Co*., 2010 WL 4456984 (S.D.N.Y. 2010), in which the Southern District of New York, applying the same arbitration provision, also granted a motion to compel arbitration. In *Wolf*, a former minor leaguer sued MLB, Minor League Baseball and a variety of other parties after his

Copyright © 2024 Hackney Publications. All rights reserved.

skull was fractured by a pitch that he said was the result of a defective helmet.

In a December 8, 2023 decision, the District Court of Appeal of Florida, Sixth District, disagreed and reversed. In its reading, the present action "is a dispute between a player of a Club and an employee of the same Club. It is an "intra-Club dispute" and such disputes are not within the scope of the arbitration provision. The court also differentiated *Wolf*, asserting that the claims there "plainly fell within the scope of the arbitration provision."

The case was remanded to the trial court for further proceedings.

The Missing Defendant?

Notably, Costello's family did not sue the Twins. Such claims are typically barred by workers' compensation statutes, which generally provide the exclusive avenue for resolving disputes over workplace injuries, including deaths. It is unknown whether Costello's family is pursuing a workers' compensation claim through either the Florida or Minnesota workers' compensation divisions.

Future Claims Preempted?

The claims by Costello's family are notable for preceding the collective bargaining agreement between minor league baseball players and MLB. Had a collective bargaining agreement been in place, Dr. Olson may have tried to argue that Costello's family's claims were preempted by the agreement, a common defense by sports leagues and teams against tort claims by players. The success of that argument would depend in part on the scope and depth of the agreement's provisions concerning medical care. The more extensive they are, the more likely that tort claims against medical staff could be required to be decided according to the dispute resolution provisions in the agreement.

* * *

The still-to-be disclosed collective bargaining agreement covering minor league players likely contains a dispute resolution provision that will supplant reference to the Major League Constitution. Nevertheless, the Costello case is another reminder of the importance of drafting broad arbitration agreements in the employment context, particularly in light of increased judicial scrutiny.

Return to Table of Contents

EU competition law and sports – three seminal judgments of 21 December 2023 by the Court of Justice of the EU

By Anton Gerber and Jacque Derenne, of SheppardMullin

Taking the view that sport federations, which have or arrogate to themselves powers to regulate a sporting activity are subject to the EU's competition and internal market rules, the Grand Chamber of the Court of Justice of the EU handed down three seminal judgments on 21 December 2023. These judgments concern the rules laid down by sports federations on the organization of sporting competitions or aimed at making the creation of new competitions subject to their prior authorization.

These three rulings were handed down in different contexts, but all three converge in recalling, on the one hand, the application of EU competition and internal rules to such practices by undertakings or associations of undertakings and, on the other hand, that sports federations are required, when implementing these prerogatives, to guarantee equal opportunities and adopt transparent, objective and non-discriminatory procedures.

Judgment of the Court (Grand Chamber) of 21 December 2023, *European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA)*, C-333/21, EU:C:2023:1011, request for a preliminary ruling from the Juzgado de lo Mercantil de Madrid

Facts

The Fédération internationale de football association ("**FIFA**") is an association governed by Swiss law whose objectives include, *inter alia*, to draw up regulations and provisions governing the game of football (soccer in the US) and related matters, and to control

Copyright © 2024 Hackney Publications. All rights reserved.

every type of football at world level, but also to organize its own international competitions. FIFA is made up of national football associations which are members of six continental confederations recognized by it – which includes the Union of European Football Associations ("**UEFA**"), an association governed by Swiss law whose principal missions consist in monitoring and controlling the development of football in Europe. As members of FIFA and UEFA, those national associations have the obligation, *inter alia*, to cause their own members or affiliates to comply with the statutes, regulations, directives and decisions of FIFA and UEFA, and to ensure that they are observed by all stakeholders in football, in particular by the professional leagues, clubs and players.

In accordance with their respective Statutes, FIFA and UEFA have the power to approve the holding of international professional football competitions, including competitions between football clubs affiliated to a national association ("interclub football competitions"). They may also organize such competitions themselves (such as the FIFA World Cup, the UEFA Champions League, or others) and exploit the rights related thereto.

European Superleague Company SL ("**ESLC**") is a company governed by Spanish law established on the initiative of a number of professional football clubs with the objective of organizing a new European interclub football competition known as the "Super League".

Following the announcement of the creation of the Super League, FIFA and UEFA issued a joint statement on 21 January 2021, setting out their refusal to recognize that new competition and warning that any player or club taking part in that new competition would be expelled from competitions organized by FIFA and UEFA.

In those circumstances, ESLC brought an action before a Spanish court, seeking, in essence, a declaration that those announcements and conduct by FIFA and UEFA were unlawful and harmful.

According to the Madrid court, FIFA and UEFA hold a monopoly or, at least, a dominant position in the market for the organization and marketing of international interclub football competitions, and that of the exploitation of the various rights related to those competitions. In that context, the Spanish court was uncertain as to the compatibility of certain provisions of FIFA's and UEFA's Statutes with EU law, most notably Articles 101 and 102 of Treaty on the Functioning of the EU ("**TFEU**") relating to competition law., and also the provisions relating to the various fundamental freedoms. It therefore referred its question to the Court of Justice of the EU ("**CJEU**") for a preliminary ruling.[1]

By its judgment, delivered the same day as two other judgments,[2] concerning the application of EU economic law to rules adopted by international or national sporting federations, the CJEU, sitting as a Grand Chamber (reserved for particularly important and/or complex cases), stated that the conditions in which the rules put in place by FIFA and UEFA, concerning:

- on the one hand, prior approval of international interclub football competitions, the participation of football clubs and players therein, and also the sanctions provided for to accompany those rules, and,
- on the other, the exploitation of the various rights related to those competitions,

may be viewed as constituting abuse of a dominant position under Article 102 TFEU, as well as an anti-competitive agreement under Article 101 TFEU. The Court also ruled on the compatibility of those rules on prior approval, participation and sanctions with the freedom to provide services guaranteed by Article 56 TFEU.

Reasoning of the CJEU

The CJEU set out three preliminary observations.

First, it observed that the questions submitted by the referring court concern solely a set of rules adopted

1 To ensure the effective and uniform application of EU legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the CJEU and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law.
The CJEU's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised.

2 Judgments of 21 December 2023, International Skating Union v Commission, C124/21, EU:C:2023:1012, and of 21 December 2023, Royal Antwerp Football Club, C680/21, EU:C:2023:1010, see below.

Copyright © 2024 Hackney Publications. All rights reserved.

by FIFA and UEFA. Accordingly, the CJEU was not called upon to rule on the very existence of FIFA and UEFA. Nor, was it called to rule upon the existence or characteristics of the Super League project itself, either in the light of the competition rules or the economic freedoms enshrined in the TFEU.

Next, the CJEU observed that, in so far as it constitutes an economic activity, the practice of sport is subject to the provisions of EU law applicable to such activity. The exception to this principle are certain specific rules which were adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se. The rules at issue however, do not come within that exception, since they relate to the pursuit of football as an economic activity.

Lastly, as regards the consequences that may be inferred from Article 165 TFEU – which specifies both the objectives assigned to Union action in the field of sport and the means to contribute to the attainment of those objectives – the CJEU observed that it is not a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application. It further recalled that the undeniable specific characteristics of sport activity may be taken into account along with other elements and provided they are relevant in the application of the provisions of the TFEU relating to competition law and the freedoms of movement. However, they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those provisions.

Rules on prior approval of interclub football competitions

In the light of those observations and after having noted that FIFA and UEFA must be categorized as "undertakings" for the purposes of EU competition law in so far as they pursue economic activities such as organizing football competitions and exploiting the rights related thereto, the CJEU turned first to the question whether the adoption by FIFA and UEFA of rules on prior approval of interclub football competitions and participation therein, on pain of sanctions, may be held to be an abuse of a dominant position under Article 102 TFEU, on the one hand, and an anticompetitive agreement under Article 101 TFEU, on the other.

Abuse of a dominant position

In that regard, the CJEU observed that the specific characteristics of professional football, including its considerable social and cultural importance and the fact that it generates great media interest, together with the fact that it is based on openness and sporting merit, support a finding that it is legitimate to subject the organization and conduct of international professional football competitions to common rules intended to guarantee the homogeneity and coordination of those competitions within an overall match calendar as well as to promote the holding of sporting competitions based on equal opportunities and merit. It is also legitimate to ensure compliance with those common rules through rules such as those put in place by FIFA and UEFA on prior approval of those competitions and the participation of clubs and players therein. It follows that, in the specific context of professional football, neither the adoption of those rules nor their implementation may be categorized, in terms of their principle or generally, as an abuse of a dominant position under Article 102 TFEU. The same holds true for sanctions introduced as a means of guaranteeing the effectiveness of those rules.

However, none of those specific attributes makes it possible to consider as legitimate the adoption of rules and related sanctions , where there is no framework for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate. More specifically, it is necessary, in particular, that those criteria and those detailed rules should have been laid down in an accessible form prior to any implementation. Moreover, in order for those criteria and detailed rules to be regarded as being non-discriminatory, they must not make the organization and marketing of third-party competitions and the participation of clubs and players therein subject to requirements which are either different from those applicable to competitions organized and marketed by the decision-making entity, or are identical or similar to them but are impossible or excessively difficult to fulfil in practice for an undertaking that does not have the same status as an association or the same powers at its disposal as that entity and which, accordingly, is in a different situation to that entity. Lastly, in order for the sanctions introduced not to be discretionary, they must be governed by criteria that

Copyright © 2024 Hackney Publications. All rights reserved.

must not only also be transparent, objective, precise and non-discriminatory, but must also guarantee that those sanctions are determined, in each specific case, in accordance with the principle of proportionality, in the light of, inter alia, the nature, duration and seriousness of the infringement found.

It follows that the adoption and implementation of rules on prior approval, participation and sanctions, where there is no framework for those rules providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, constitute abuse of a dominant position under Article 102 TFEU.

An anticompetitive agreement

As regards the application of Article 101 TFEU to those rules, the Court observed that, although the stated reasons for the adoption of rules on prior approval for interclub football competitions may include the pursuit of legitimate objectives, such as ensuring observance of the principles, values and rules of the game underpinning professional football, they do confer on FIFA and UEFA the power to authorize, control and set the conditions of access to the market concerned for any potentially competing undertaking. Therefore, they determine both the degree and the conditions in which competition may be exercised.

Moreover, the rules on the participation of clubs and players in those competitions are liable to reinforce the anticompetitive object inherent in any prior approval mechanism that is not subject to restrictions, obligations and review suitable for ensuring that it is transparent, objective, precise and non-discriminatory. This would happen by preventing any undertaking organizing a potentially competing competition from calling, in a meaningful way, on the resources available in the market, namely clubs and players. The latter are vulnerable – if they participate in a competition that has not had the prior approval of FIFA and UEFA – to sanctions for which, as explained above, there is no framework ensuring that they are transparent, objective, precise, non-discriminatory and proportionate.

It follows that, where there is no framework providing for such substantive criteria or detailed procedural rules, the rules at issue reveal, by their very nature, a sufficient degree of harm to competition and have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects.

Possible exemptions or justifications

In the second place, the CJEU turns to the question whether the rules on prior approval, participation and sanctions at issue may benefit from an exemption or be held to be justified. In that regard, the CJEU recalled, first, that certain specific conduct, such as ethical or principled rules adopted by an association, are liable to fall outside the scope of the prohibition laid down in Article 101(1) TFEU. Even if they have an inherent effect of restricting competition, they can be justified by the pursuit of legitimate objectives in the public interest which are not per se anticompetitive in nature, if the specific means used are genuinely necessary and proportionate for that purpose. It states, however, that that case-law does not apply in situations involving conduct that by its very nature infringes Article 102 TFEU or reveals a sufficient degree of harm as to justify a finding that it has as its "object" the restriction of competition within the meaning of Article 101 TFEU.

Second, as regards the exemption provided for in Article 101(3) TFEU, it is for the party relying on such an exemption to demonstrate that all four of the cumulative conditions required for the exemption are satisfied. Thus, the conduct being examined must, with a sufficient degree of probability, make it possible to achieve efficiency gains, whilst reserving for the users an equitable share of the profits generated by those gains and without imposing restrictions which are not indispensable for the achievement of those gains and without eliminating all effective competition for a substantial part of the products or services concerned.

It will be for the referring Spanish court to determine, on the basis of the evidence adduced by the parties to the main proceedings, whether those conditions are satisfied in the specific case. Concerning the maintenance of effective competition, the CJEU observed that the referring court will have to take account of the fact explained above, i.e. that there is no framework for the rules on prior approval, participation and sanctions ensuring that they are transparent, objective, precise and non-discriminatory, and that such a situation is liable to enable entities having adopted those rules to

Copyright © 2024 Hackney Publications. All rights reserved.

prevent any and all competition on the market for the organization and marketing of interclub football competitions on European Union territory.

Consistently with the CJEU's case-law on Article 102 TFEU, abusive conduct by an undertaking holding a dominant position may escape the prohibition laid down in that provision if the undertaking concerned establishes that its conduct was either objectively justified by circumstances extraneous to the undertaking and proportionate to that justification, or counterbalanced or outweighed by "efficiencies" which also benefit the consumer.

In the present case, as regards, first, possible objective justification, the rules put in place by FIFA and UEFA have the aim of reserving the organization of any such competition to those entities, at the risk of eliminating any and all competition from third-party undertakings, meaning that such conduct constitutes an abuse of a dominant position prohibited by Article 102 TFEUnot justified by technical and commercial necessities. Second, as regards the advantages in terms of efficiency, it will be for those two sporting associations to demonstrate, before the referring court, that efficiency gains can be achieved through their conduct, that those efficiency gains counteract the likely harmful effects of that conduct on competition and consumer welfare on the markets concerned, that that conduct is necessary for the achievement of such gains in efficiency, and that it does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

Rules relating to the rights emanating from professional interclub football competitions

As regards the FIFA and UEFA rules relating to the rights emanating from professional interclub football competitions organized by those entities, the CJEU observed that those rules are liable not only to prevent any and all competition between the professional football clubs affiliated to the national football associations in the marketing of the various rights related to the matches in which they participate. The rules may also affect the functioning of competition, to the detriment of third-party undertakings operating across a range of media markets for services situated downstream from that marketing, to the detriment of consumers and television viewers.

It follows that such rules have as their "object" the prevention or restriction of competition on the different markets concerned within the meaning of Article 101(1) TFEU, and constitute an abuse of a dominant position within the meaning of Article 102 TFEU, unless it can be proven that they are justified, inter alia in the light of the achievement of efficiency gains and the profit reserved for users. Thus, it will be for the referring court to determine:

- first, whether the negotiation for the purchase of those rights with two exclusive vendors enables actual and potential buyers to bring down their transaction costs and reduce the uncertainty they would face if they had to negotiate on a case-by-case basis with the participating clubs and,
- second, whether the profit derived from the centralized sale of those rights demonstrably enables a certain form of "solidarity redistribution" within football for the benefit of all users.

An obstacle to the freedom to provide services

Finally, the CJEU held that the rules on prior approval, participation and sanctions constitute an obstacle to the freedom to provide services enshrined in Article 56 TFEU. By enabling FIFA and UEFA to exercise discretionary control over the possibility for any third-party undertaking to organize and market interclub football competitions on European Union territory, the possibility for any professional football club to participate in those competitions as well as, by way of corollary, the possibility for any other undertaking to provide services related to the organization or marketing of those competitions, those rules prevent them outright, by limiting access for any newcomer. Moreover, the absence of a framework for those rules containing objective, non-discriminatory criteria known in advance does not enable a finding that their adoption is justified by a legitimate objective in the public interest.

Analysis

While there can be little doubt that this ruling is a harsh defeat for FIFA and UEFA, which will have to thoroughly review the rules governing the creation of new club competitions by third parties within the EU, it is important to note that the CJEU has not validated the Super League project, on which it has not ruled. FIFA and UEFA will now need to assess whether, on the basis of their rules they will need to review to ensure

Copyright © 2024 Hackney Publications. All rights reserved.

their compatibility with EU law, whether to approve this project.

Moreover, the Madrid court will now have to decide whether the relevant provisions of FIFA's rules are justified under the competition law exemptions available to it under Article 101(3) TFEU, although the wording of the CJEU's judgments makes this unlikely.

The Grand Chamber of the CJEU applied the above principles to the two other cases on which it ruled on the same day.

Judgment of the Court (Grand Chamber) of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012

Facts

International Skating Union ('ISU') is the sole international sports federation recognized by the IOC as responsible for globally regulating and administering ice skating. Hendrik Tuitert and Niels Kerstholt, two ice skaters, had lodged a complaint with the European Commission in 2014, alleging that ISU's set of rules prevented them from participating in an ice skating event in Dubai organized by a third party not authorized by ISU. These rules indeed foresaw a lifetime ban for athletes competing in unauthorized competitions, which could only be challenged before the Court of Arbitration for Sport ("**CAS**"), based in Lausanne (Switzerland).

After taking up the complaint, the Commission concluded that ISU's rules infringed Art. 101 TFEU. ISU challenged this decision before the General Court of the EU ("**GCEU**") and secured a partial annulment. While the GCEU upheld the findings that the eligibility rules were anticompetitive, it considered the arbitration clause justified.

All parties appealed this judgment. The CJEU now sided fully with the Commission, quashing the prior annulation by the GCEU and dismissing the remainder of ISU's action.

Ruling

In line with the Super League ruling, the CJEU first reiterated that the sports sector, while displaying specific characteristics which need to be taken into account, is not exempt from the application of competition law. After laying out the general framework of the legal test, the CJEU noted that private associations such as ISU, which have a de facto power to regulate their sports discipline and to authorize events, may find themselves in a conflict of interests when they also organize events themselves.

The CJEU held that only where these powers are transparent, clear, precise and non-discriminatory, and sanctions proportionate, they are compliant with competition law, mirroring the findings in the Super League ruling. The CJEU then observed that the ISU statutes left broad discretion to ISU to authorize events or not, without possibility for meaningful review. Furthermore, the CJEU considered ISU's penalty system disproportionate and unpredictable. Consequently, the CJEU ruled that the GCEU rightly had dismissed ISU's challenge in that regard.

Regarding the cross-appeal concerning CAS' exclusive jurisdiction over any disputes involving ISU's statutes, the CJEU criticized that its arbitral award could only be reviewed by the Swiss Federal Court. That court cannot, however, refer questions related to EU competition law to the CJEU due to its location outside the EU. In the CJEU's view, this is a fatal flaw since associations such as ISU must not deprive individuals from their EU rights and freedoms, which include competition law rules. Consequently, the CJEU quashed the GCEU's partial annulment and reinstated the original Commission decision in its entirety.

Analysis

In line with the Super League judgment, the ruling severely restricts the gatekeeping function of international sports associations insofar as they hold a dual role in rule-making/authorization and organization of commercial competitions themselves. Third parties trying to establish innovative new formats will cherish the judgment.

An even greater impact may be felt in Lausanne, at the CAS' headquarters. The CJEU's insistence that arbitral awards must be reviewable by a EU court casts doubt on the future of the centralized arbitration system (even though the CJEU limited its ruling on disputes in EU territory).

The current ruling adds another layer of pressure on the current sports arbitration system which is already under strain. The German Federal Constitutional Court had, for instance, ruled in Summer 2022 (Order of 3 June 2022, 1 BvR 2103/16) that the CAS lacked judicial standards, and could not be considered a true court of arbitration. Consequently, an arbitration clause in an

Copyright © 2024 Hackney Publications. All rights reserved.

agreement between a sports federation and an athlete would be null and void.

Judgment of the Court (Grand Chamber) of 21 December 2023, Royal Antwerp Football Club, C-680/21, EU:C:2023:1010

Facts

Europe's football governing body, UEFA, requires clubs competing in its international club competitions to include on their team sheets at least eight players trained as a youth at a club located in the participating club's home country, and four trained at that very club. The Belgian footballs association' ("**URBSFA**") rules provide for very similar conditions applicable to competitions within Belgium.

Royal Antwerp ("**RAFC**") challenged these rules in 2020 before the Belgian Court of Arbitration for Sport, contending that they are in breach of EU competition law and the free movement of workers. The arbitrators rejected the action, and Royal Antwerp appealed to the Brussels Court of First Instance, claiming that the arbitral award infringed public policy. That court referred questions on the compatibility with EU law to the CJEU.

Ruling

The CJEU noted that the home-grown players rules directly impact both the possibilities of employment for players and competition between football clubs . Consequently, the CJEU reiterated that the rule-making activity from organizations having de facto governing powers (such as UEFA and URBSFA) must comply with both EU competition law and the internal market freedoms. The specific characteristics of sporting activity must be taken into account, but cannot exempt that sector from fundamental EU law provisions. Still, the CJEU considered it legitimate in principle that bodies such as UEFA and URBSFA regulate sporting competitions based on merit and equal opportunity, including the composition of teams, provided that they respect EU law.

The CJEU then held that the assessment of that compatibility must, in the present case, consider to what extent the home-grown player rules limit clubs access to an important 'resource' (namely players), and whether they may amount to illegal market partitioning. The CJEU did not make a definitive conclusion regarding an infringement of EU competition law by object (i.e. irrespective of actual or potential effects), but left this up for the Belgian court to determine.

Nonetheless, the CJEU also provided some guidance on a potential justification. It noted that the home-grown player rules may indeed incentivize clubs to invest into training of young players and thereby intensify competition. The Belgian court is still tasked to assess to what extent these effects materialize in reality . The CJEU also stressed that the impact not only on clubs or players, but also spectators or TV viewers must be taken into account, and ascertain that all these affected stakeholders benefit equally. Furthermore, the CJEU notes that potential alternative mechanisms must be explored, such as financial compensations for training young players. Furthermore, the Belgian court will have to assess whether the current minimum number of home-grown players is set appropriately .

Lastly, the CJEU noted that the home-grown player rules constitute an indirect discrimination based on nationality insofar as they make it easier for a player having a connection to a specific country to be recruited by a football club established in that. This infringement of the free movement of workers guaranteed by Art. 45 TFEU may be justified by the legitimate objective to encourage the training of young players, though. The CJEU still expressed certain doubts regarding the suitability of the current home-grown player rules to achieve these objectives, noting that the requirements can partially be fulfilled by recruiting players trained at a different club from the same country (i.e. the possibility to 'outsource' the costly and time-consuming process of recruitment and training of young players). A definitive assessment will, however, again be made by the Belgian court.

Analysis

The CJEU had struck down restrictive rules concerning football players recruitment established by football governing bodies in the past already on several occasions. In the spectacular ruling in *Bosman* (C-415/93), it invalidated UEFA's then system foreseeing a mandatory transfer fee, and in *Olympique Lyonnais* (C-325/08), it struck down French rules obliging young players to sign their first professional contract with the club that had trained them. It is established case-law since those judgments that Art. 45 TFEU, which normally only addresses EU Member States, may also

Copyright © 2024 Hackney Publications. All rights reserved.

apply to non-State governing bodies with a de facto rule-making power.

In that respect, the RAFC ruling is not breaking new ground. The CJEU's ruling that Art. 165 TFEU does not have any bearing on the application of competition and internal market law, and the CJEU's repeated insistence that any rules set by UEFA and others must respect the principles of equal opportunity, will restrict the leeway these governing bodies have. Together with the requirement that any justification for competition restrictions must also take into account the interests of spectators, the current ruling may offer smaller clubs more leverage to ensure that UEFA's rules are not geared towards big-name clubs.

The fate of the home-grown player rules is not sealed yet, though. It will be up to the Belgian courts to determine whether they are justified. Yet, the CJEU's guidance for this assessment makes clear that it is (at least partially) doubtful that they indeed are.

Conclusion

Almost three decades after the *Bosman* ruling which put an end to foreign player quotas in European clubs and revolutionized the movement of footballers in Europe, the CJEU may have just initiated a new era on the basis of competition law. However, it does not rule on the Super League project. It simply reminded UEFA and FIFA that their powers are not above the rules, and that they must, in particular, respect competition law. But the CJEU's ruling leave some margin of maneuver to FIFA, UEFA, the ISU and sports federations in general to "protect" their sport, though this will likely require a thorough revision of their rules.

As with the *Bosman* ruling, the scope of the rulings will probably not be limited to football (or ice skating). All professional and semi-professional sporting disciplines will be affected. All national and international federations will now have to introduce precise material criteria and procedural arrangements to ensure that their rules on the organization of competitions are transparent, objective, precise, non-discriminatory and proportionate.

On its purely legal aspects, the authors note in particular two key takeaways.

First, for the CJEU, where undertakings have a dual role as regulators and economic stakeholders, Articles 101 and 102 TFEU must be read in conjunction with Article 106 TFEU, which imposes obligations on Member States, such as the respect of the principle of equal opportunities and the duty to adopt rules that are transparent, objective, non-discriminatory and reviewable. This point could be relevant beyond the sport sector, for example in relation to digital platforms.

Second, the CJEU has aligned the interpretation of Articles 101 and 102 TFEU, especially, concerning the safeguards that must be in place for sports federations statutes to be compliant with EU law. The alignment also concerned the conditions for justifying a behavior that would otherwise infringe Article 102 TFEU, or exempt it from the prohibition of Article 101(1) TFEU under Article 101(3) TFEU.

Return to Table of Contents

In Wake of Hazing Investigation, Judge Denies Boston College Swimming and Diving Team's Request to Reverse Suspension

By Robert E. Freeman, Jonathan Mollod, and Sabrina Palazzolo of Proskauer

On October 26, 2023, a Massachusetts judge denied the requests of 37 members of the Boston College Swimming and Diving Team (the "Plaintiffs" or "Team") to reverse the indefinite suspension of the Team that was first announced in September 2023, following what Boston College Athletics called "credible reports of hazing." (**Does 1-37 v. Trustees of Boston College,** No. 2381CV02900 (Mass. Super. Ct. Oct. 26, 2023)).

The Team members claimed that they were irreparably harmed when the Trustees of Boston College and Boston College Athletics officials (collectively, "Defendants" or the "University") "arbitrarily" imposed a blanket suspension without conducting a complete investigation of an apparent hazing incident at an annual "Frosh" event on September 3, 2023, where Team members allegedly coordinated binge drinking activities involving freshmen. On September 20, 2023, Boston College made a public statement on the Boston College Athletics website noting that the University had "determined that a hazing incident had occurred" involving the Team. The University later updated the

Copyright © 2024 Hackney Publications. All rights reserved.

statement to say that there were "credible reports of hazing." According to the University, its initial investigation involved interviews with 20 members of the Team, as well as a review of photos, videos and group chat messages. By the time the decision was made to suspend the Team, the Defendants had apparently been made aware of various Team events that occurred between September 2-4, 2023, which allegedly involved underage drinking. For example, the "Frosh" event, which is an apparent annual tradition for the Team, featured organized activities for freshmen Team members, but also allegedly involved initiation of freshmen to the Team by upperclassmen that resulted in reports of excessive drinking (as well as vomiting and passing out).

Boston College Athletics deemed such activities "hazing." Boston College and Boston College Athletics, in relevant student policies, prohibits hazing, which is also a crime in Massachusetts (G.L. c. 269, § 17). Student and Athletic Department policy broadly defines hazing to include "any activity or abuse of power by a member of an organization and/or group used against any individual or group of individuals as a condition to affiliate with ... (or to maintain full status in [the] group), that humiliates, degrades, or risks emotional and/or physical harm, regardless of the subject's willingness to participate," and expressly states that hazing may also involve "implied coercion." In addition, according to the University, there had been reports of a Team hazing incident back in spring 2022. Thus, on September 20, 2023, Boston College Athletics issued a statement that the Team had been "placed on indefinite suspension."

On October 17, 2023, the Plaintiffs filed their complaint while also seeking injunctive relief to reinstate the program based on a selective enforcement claim brought under Title IX of the Education Amendment of 1972. Principally, the Plaintiffs claimed that all-male University teams have faced similar allegations involving excessive underage drinking, but "were not imposed a disciplinary sanction prior to 'an investigation process that amounted to more than what the Plaintiffs in the instant matter received.'" The Plaintiffs' **memo in support of its injunction request** asserted that the decision to suspend the Team "was likely motivated by the fact that [the Team] is a co-ed program." The Plaintiffs also stated that the University violated its own policies by imposing an "unprecedented and unwarranted" indefinite suspension of an entire sports program during the pendency of a conduct investigation by Boston College Athletics. Finally, the Plaintiffs argued that without an order reinstating the program, the team members would lose out on competitive opportunities and suffer irreparable harm to "their entire swimming careers." The Defendants argued that Boston College Athletics' decision to indefinitely suspend the Team was both warranted and within its Athletic Director's discretion. In its **opposition brief**, Defendants countered that the "decision to suspend team activities had nothing to do with the fact that the team is co-ed. Nor is there any case involving 'similar circumstances' involving an all-male team known to the University." The University also argued that the evidence gathered in the initial investigation was "sufficient" to make a finding that hazing occurred, which "warranted the team-suspension," with individual student discipline to be later adjudicated "through the student conduct process."

The court was unmoved by the Plaintiffs' arguments and denied their motion for a preliminary injunction to reinstate the Team. The court stated that the Plaintiffs' claims of selective enforcement of a disciplinary sanction on their co-ed sports team were based on allegations made only "upon information and belief," not firsthand knowledge, and thus were insufficient to establish a likelihood of success on the merits of the Title IX claim.

The Plaintiffs also failed to convince the court that they were likely to succeed on the merits of their other claims, which included breach of contract, denial of fairness, defamation, and intentional infliction of emotional distress. After reviewing the materials presented, the court concluded that the University's suspension was not "arbitrary and capricious" in light of a prior 2022 hazing incident, and the fact that the upperclassmen on the Team had been repeatedly warned that student-athlete hazing was prohibited by Boston College Athletics, Team rules and Massachusetts law and could result in "serious consequences." The court further found that the University's submissions substantiated their public announcement that hazing had occurred, thus the Plaintiffs' defamation claims were also ruled by the court to be insufficient at this point to warrant injunctive relief. Additionally, since

Copyright © 2024 Hackney Publications. All rights reserved.

the Plaintiffs failed to show that the Defendants acted unlawfully or showed a likelihood of success on the merits, the court determined that it was unnecessary to address the question of irreparable harm.

On October 27, 2023, one day after the court's ruling, the Plaintiffs filed a **notice of discontinuance of the action without prejudice**, given that the goal of the court action was to reinstate the program pending further investigation by the University. For the moment, the Plaintiffs have decided to end their legal challenge and have expressed hope that the University decides to lift the suspension at some point in the future.

Return to Table of Contents

Court: State High School Athletic Association Eligibility Rules Can't Trump Desegregation Orders

The Fifth U.S. Circuit Court of Appeals has affirmed the ruling of a district court, finding that granting a temporary restraining order to a high school basketball player and his parents and ultimately holding that the Louisiana High School Athletic Association ("LHSAA") cannot render an eligibility ruling is adverse to a desegregation order, which was sufficient and resolved the plaintiffs' litigation.

Plaintiffs Taj Jackson and his parents appealed the district court's modification of its desegregation order as it pertains to the athletic eligibility of certain student transfers. Jackson, an African American student and high school basketball player, received an approved "Majority to Minority transfer" ("M-to-M") from Hammond High School, with a predominately black student body, to Ponchatoula High School, with a predominately white student body, in June 2022.

After receiving the transfer, Jackson was informed by the LHSAA that he would be ineligible to play on the varsity basketball team at Ponchatoula that year. The relevant provision of the desegregation order in effect at the time of Jackson's transfer followed all LHSAA eligibility requirements—including one year of ineligibility for any student who transferred to another school outside of their athletic zones.

Jackson sought equitable relief in the district court, including a temporary restraining order that would allow him to play basketball at Ponchatoula High School. In January 2023, the district court granted the temporary restraining order, finding that the language of the desegregation order in effect at the time could potentially have "a chilling effect upon achieving student assignment improvements and final unitary status."

In April 2023, the district court modified the athletic eligibility provision of the desegregation order in the opinion, which is now being appealed by the plaintiffs. That modification stated that:

"High school interscholastic athletic eligibility shall be governed by rules of the Louisiana High School Athletic Association with the following exceptions:

> *(A). M-to-M or Diversity transfer, magnet transfer and academic transfer students, students enrolled under the joint custody provisions in Paragraph 5 of Rec. Doc. 876, students enrolled in a school pursuant to the transfer option in Paragraph 1(H) of Rec. Doc. 876, and students enrolled in school pursuant to the transfer option in Paragraph 6 of Rec. Doc. 876, regardless of grade level at the time of transfer, shall be eligible to participate in all interscholastic athletic programs in the year of the initial transfer.*
>
> *(B). M-to-M or Diversity transfer, magnet transfer and academic transfer students, students enrolled under the joint custody provisions in Paragraph 5 of Rec. Doc. 876, students enrolled in a school pursuant to the transfer option in Paragraph 1(H) of Rec. Doc. 876, and students enrolled in a school pursuant to the transfer option in Paragraph 6 of Rec. Doc. 876 electing to return to their sending or home student attendance zone school shall be immediately eligible to participate in all interscholastic athletic programs."*

Because of this amendment, "students who utilize any transfer option available under the desegregation orders are immediately eligible for athletics in their new schools and are no longer required to sit out for one year as otherwise required by LHSAA rules," according to the appeals court. "Several days after issuing the opinion, the district court also issued an order that dismissed as moot plaintiffs' motion for injunctive relief.

The latter ruling led to the plaintiffs' appeal that "the relief he has obtained up to this point is insufficient."

Copyright © 2024 Hackney Publications. All rights reserved.

The appeals court disagreed:

"The newly modified desegregation order ensures that Jackson, and all other African American students subject to the desegregation orders, will have immediate athletic eligibility in their new schools after utilizing any transfer option available under the desegregation orders. The district court considered plaintiffs' issues and ruled in their favor. As a result, no additional injunctive relief is necessary and the plaintiffs' request for additional injunctive relief is moot. In any event, plaintiffs have failed to brief, and therefore waived, any other issues."

The district court elaboration on this was significant. It wrote:

"It is important to state that plaintiff-student's M&M transfer from Hammond High School to Ponchatoula High School was approved on June 13, 2022. He received the Official LHSAA Eligibility Response Form on October 20, 2022, stating that he was "ineligible for varsity & sub-varsity [sports.]." The principal of Ponchatoula High School sought an appeal on October 26, 2022, but plaintiff does not indicate any outcome. The basketball season started on November 15, 2022, and plaintiff filed the motion for a TRO on December 11, after eleven games had passed. Plaintiff's counsel on the subject motion appears therefore to have had ample time to request a TRO prior to now. There is no allegation that after missing two-thirds of the season that the student would even be afforded the opportunity to play in one of the remaining games."

M.C. Moore et al. v. Tangipahoa Par. Sch. Bd. et al.; 5th Cir.; No. 23-30328; 12/5/23

Opinion can be found here: **https://www.ca5.uscourts.gov/opinions/unpub/23/23-30328.0.pdf**

Return to Table of Contents

Articles

NCAA Convention 2024 Recap

By Kasey Nielsen and Joel Nielsen, of Bricker Graydon

Every day of the NCAA convention brings a certain flare to it, and this year was no different. What follows are our takeaways for each day:

Day One

1. New Division I NIL Rules to "Protect" Student-Athletes

Division I approved rules that are intended to protect student-athletes and provide greater transparency. The NCAA announced its commitment to (1) establishing a voluntary registration process for NIL service providers (agents, financial advisors, etc.), (2) working with schools to provide template NIL contracts and recommended contract language, and (3) providing comprehensive NIL education. Our take is that there is certainly room for this type of assistance from the NCAA, though many schools are well down the road already with an NIL compliance structure and model contract language will need to be vetted through applicable state laws.

Student-athletes are now also going to be required to disclose to their school any NIL deals that exceed $600. It's not entirely clear how this is designed to protect student-athletes, particularly those attending public institutions. Nevertheless, schools are also required to notify the NCAA, which will be creating a "deidentified database" of those deals. Privacy concerns abound and no word on what enforcement would look like here if there was a failure to disclose.

These rules are effective August 1, 2024.

Division I also proposed rules around institutional involvement and recruiting activities, including defining an NIL entity (collective) and expressly prohibiting contact between NIL entities and prospects (recruits). Schools would also have more freedom communicating with NIL entities regarding current student-athletes. These rules could be adopted as early as April 2024.

2. New Division I Enforcement Rules to Hold Schools, Coaches, Staff Members Accountable

In addition to the NIL rules, Division I approved new rules that will likely impact the infractions process. Under the new rules, coaches, and staff members, rather than the student-athletes, will see an increase in

Copyright © 2024 Hackney Publications. All rights reserved.

penalties and (theoretically) accountability for violations of the NCAA bylaws. For example, naming individuals responsible for certain wrongdoing, a public-facing database of serious NCAA infractions, and longer suspensions for coaches.

These rules are effective immediately.

Arguably the most eyepopping is the proposal to increase institutional fines from the existing $5,000 to $25,000 or even $50,000, plus an increased percentage of an involved program's budget (up to 10%, on top of the base fine for the most severe cases) in Level I or Level II infractions cases. This rule could be adopted and effective as early as June 2024.

3. All Divisions – Updated Mental Health Best Practices

The NCAA updated its Mental Health Best Practices document, which all Division I, II, and III members are required to follow. Division I members also have to attest in November 2025 that they are following this document. The document will be available in the next few weeks and has information on the intersection between mental health and a variety of topics like sports betting, social media, and NIL.

Day Two

1. NCAA goes (back) to Washington

Perhaps in a nod to its recent track record, the NCAA doubled-down on its position that federal legislation is the best avenue for a more uniform system. Specifically, the Association is seeking to advance four priorities (and tell us if you've heard these before):

- NIL protections for student-athletes;
- that student-athletes should not be considered employees;
- a way for the NCAA to operate without the persistent threat of litigation (the antitrust exemption); and
- preempting state law to allow for uniformity across Association membership.

NCAA President Charlie Baker said that the Association would "need some sort of protection and special status from Congress." That's just what they're after.

2. Restructuring College Athletics through the Conferences

Everyone has an idea of what the future of college athletics should look like. From a shift to the professional model to preserving the "unique educational nature" of the existing model – or at least the version immediately before the existing model – there are no shortage of ideas. Now we have a new one to add to the mix. The Knight Commission on Intercollegiate Athletics presented a model, called the Connecting Athletics Revenues with Educational Model (C.A.R.E. Model). C.A.R.E. is predicated on the idea that conferences need to adopt certain requirements prior to schools receiving their "piece of the pie." Based on what we heard and read, it sure sounds like these requirements are fairly aligned with the NCAA's existing foundational/constitutional values.

C.A.R.E. is aimed at incentivizing four categories: (1) Transparency, (2) Independent Oversight, (3) Incentives for Core Values of Education, Gender Equity, and Opportunity, and (4) Financial Responsibility for Education, Health, Safety, and Well-Being. Within each category are requirements and benchmarks for institutions to follow. For instance, the third requirement incentivizes schools to achieve academic success, provide equitable opportunities for both female and male sports, and offer a broad base of sport opportunities. The final category is an attempt to limit schools on spending large sums of money on coaching contracts, and instead require athletic departments to spend that money on student-athletes. Panelists even discussed a luxury task.

The C.A.R.E. model champions a conference-based approach because, according to the Knight Commission, it is more likely to withstand antitrust legal challenges. We're not entirely sure that argument would be on all fours with antitrust law, but it does shift the discussion a bit.

As of today, all DI schools would meet the target numbers required under this new model except 44 of the autonomous institutions, which are some of the highest resourced institutions of the 350+ Division I members. This is largely attributed to the last category, as those schools spend a majority of their revenue on salaries, buyouts, and other non-student-athlete areas.

The Knight Commission is encouraging conferences and institutions to adopt the model immediately and are offering up to $100,000 in grant money motivation. Up to 21 college coaching organizations are already in

Copyright © 2024 Hackney Publications. All rights reserved.

support of the Knight Commissions new model. Many of the non-revenue producing sports see this as a deterrent to dropping programs in the future world of college athletics.

This will be one proposal to watch to see if it gains any significant momentum in future days/months. To learn more about the details of the C.A.R.E Model, see here.

3. NIL Violations

While not tied to the Convention, we saw the NCAA penalize Florida State for NIL-related violations. An assistant football coach facilitated an impermissible recruiting contact between a transfer student-athlete and the CEO of a NIL collective– violating the recruiting bylaws – and that CEO impermissibly offered a NIL deal to the transfer student-athlete to encourage the player to attend Florida State – violating the NCAA's NIL interim rules. Florida State agreed to a list of penalties.

This is the second time the NCAA has penalized an institution for NIL-related violations, which should put schools on notice that this could be a trend.

Return to Table of Contents

Sports Grapples with the Transgender Issue – a Legal Analysis

By Courtney E. Dunn, of Segal McCambridge

The specifics of transgender athletes competing both with and against cisgender athletes has become a topic on which schools, sports programs, and leagues nationwide have been seeking guidance. With positions rooted in tradition, fairness, privacy, and the risk of personal injury on both sides of the coin, interscholastic athletic associations and local leagues are in the process of navigating best practices for all athletes. While there has been no clear answer to this new legal landscape, defining factors determining the placement of transgender athletes have been emerging on a state-by-state basis, with an amendment to Title IX and similar governing authority in the mix. Ultimately, it will likely take a Supreme Court ruling on this topic to reach a conclusion, but in the meantime, leagues are left to their own devices to come up with a plan that best suits all athletes.

Title IX Amendment

The purpose of Title IX is to regulate equity and fairness in sports. Naturally, then, it is a starting place to seek answers for transgender athletes' eligibility on teams which have historically been cisgender. Under the proposed Title IX regulation, schools are met with flexibility; it mandates that public schools from kindergarten to the twelfth grade would not be permitted to adopt a "one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity." Instead, schools are given the opportunity to develop "team eligibility criteria." The Department of Education, however, has not addressed what criteria to apply to determine an athlete's eligibility. For example, questions remain as to what criteria is in the realm of Title IX's non-discrimination on the basis of sex requirement. Can a school determine a player's eligibility based upon his or her birth certificate information? Does the criteria take into account certain sports versus others, and the likelihood of injury or privacy issues associated with them? Can a school determine criteria based upon a student's gender identity, regardless of whether he or she has begun to/plans to transition physically? With ambiguities, the Title IX amendment has not set forth a clear path tailored to all athletes that would absolve schools of liability based upon discrimination.

Protection of Women and Girls in Sports Act of 2023

This bill[3], which passed the House of Representatives on April 20, 2023, generally acts to prohibit school athletic programs from allowing individuals whose biological sex at birth was male to participate in programs that are for women or girls. It suggests that it would be a violation of Title IX for federally funded education programs or activities to operate, sponsor, or facilitate athletic programs or activities that allow individuals of the male sex to participate in programs or activities that were previously designated for women. According to the bill, sex is based on an individual's reproductive biology and genetics at birth. It is worth noting that the bill does not prohibit male athletes from training alongside female athletes, as long as doing so does not deprive female athletes of corresponding

3 https://www.congress.gov/bill/118th-congress/house-bill/734

Copyright © 2024 Hackney Publications. All rights reserved.

opportunities, such as scholarships – another factor that is heavily weighed within this general landscape.

State-By-State Regulations

In the absence of a categorical set of instructions, states have formed their own guidelines by which they currently operate. Across the country, some states have taken to determining which team an athlete will play on based solely upon the sex listed on his or her birth certificate. Other states have banned transgender women from participating in women's sports, though there is often no reciprocating ban for transgender men who seek to participate in men's sports. Perhaps this is a less sought-after endeavor. Not all policies have been as cut and dry – Arizona, for example, requires students to submit a letter telling the student's "gender story," which is a letter of support from a parent or healthcare provider. Arizona has a Gender Identity Eligibility Committee which then reviews a prospective athlete's gender story to determine placement. New Jersey previously proposed the "Fairness in Women's Sports Act." This Act mandated that athletes were required to "prove" their gender by providing a doctor's note indicating a genital exam or a testosterone/chromosome panel. Not every state has drafted such strict legislature, and it is expected that these policies will continue to shift as the legal landscape is solidified.

While this topic is widely debated, there is no official count of transgender athletes at any level. That being said, there is still the risk of exposure to liability for sports programs if not handled with care. While the obvious risk is discrimination, remaining concerns include personal injury lawsuits and privacy violations. In terms of personal injury, there is no set statistic regarding increased risk of harm on the playing field, or whether insurance companies can expect to adjust their policies accordingly. Seemingly handled on a case-by-case basis, the latter has been considered discretionary for the time being so long as adequate consideration is given to accommodations on a nondiscriminatory basis.

Despite the various attempts at inching toward general resolution, anecdotes are publicized daily detailing perceived discrimination from both transgender and cisgender athletes who have been affected by this growing issue. A topic to be taken in stride, schools and organizations should expect to be met with more questions than answers while the details of eligibility are parsed out. Aside from the unresolved question of transgender athletes performing on cisgender teams, yet to become broadcast have been these same questions with regard to athletes who identify as nonbinary or gender fluid, and what their eligibility criteria for their preferred teams and sports would look like.

For now, there is no hard and fast rule delineating how to proceed liability-free. The only clear guidance is that a categorical ban of transgender athletes participating in a sport, absent the consideration of some form of eligible criteria, is discriminatory.

Return to Table of Contents

States' Antitrust Action Against the NCAA Expands with Addition of the Justice Department and More States

By Christina Stylianou & Gregg E. Clifton

No stranger to antitrust lawsuits, the NCAA closed out 2023 with a temporary restraining order (TRO) from the Northern District of West Virginia enjoining it from enforcing its Transfer Eligibility Rule against student-athletes seeking to transfer schools for a second time. Before the District Court had an opportunity to rule on the plaintiff states' application for a longer-term preliminary injunction providing the same relief, the NCAA voluntarily agreed to convert the 14-day TRO into a preliminary injunction shortly after receiving the first decision. (See our prior article for The Official Review detailing these December 2023 developments here).

As the case now progresses into the new year, a further development has already emerged, as the United States Department of Justice announced the filing of an Amended Complaint in the action that would add the Justice Department and three more states, Minnesota, Mississippi, and Virginia, as well as the District of Columbia to the current list of plaintiffs. (The original plaintiff states included Ohio, Colorado, Illinois, New York, North Carolina, Tennessee, and West Virginia.) The Amended Complaint alleges that the NCAA's Transfer Eligibility rule unreasonably restrains competition in the markets for athletic services in men's and women's Division I sports, particularly in basketball

Copyright © 2024 Hackney Publications. All rights reserved.

and football. It also alleges that the restriction on multi-time transfers limits college athletes' bargaining power and harms their educational and athletic experiences.

The addition of these new parties is significant in that it signals potential increased involvement by the federal government, and the Justice Department in particular, in NCAA antitrust litigation. Interestingly, the Amended Complaint was filed on the same day the House Energy and Commerce Committee held a **legislative hearing** to discuss the draft federal name, image, and likeness (NIL) legislation proposed by Congressman and Committee Chair Gus Bilirakis (R-FL), the **FAIR College Sports Act**. Relief from the federal government in the form of federal legislation on matters of payment and benefits to student-athletes has become a key mission for the NCAA over the last year. Until such legislative relief arrives, if it ever does, it will be interesting to see what position and how much of a stance the Justice Department takes against the NCAA in this litigation (and potentially in others) as it moves forward.

NCAA Is Dealt Another Blow As the Ninth Circuit Denies Petition to Appeal Class Certification in House

In a new development in the *House* case, the Ninth Circuit has declined to hear an appeal of U.S. District Court Judge Claudia Wilken's decision late this past year, which certified a class of plaintiffs that could invite recovery potentially upwards of $4 billion for student-athletes' lost media revenue. Perhaps concerned that the decision could severely impact the NCAA's existence and potentially reshape college athletics and the industry surrounding it, the NCAA petitioned the Ninth Circuit for a rarely successful interlocutory appeal, arguing that "denial of th[e] petition would be the death knell of the litigation," as the NCAA would be pressured to settle to avoid the risk of facing the exorbitant damage figure. Judges Kim McLane Wardlaw and Jacqueline Hong-Ngoc Nguyen, nevertheless, denied the request.

The litigation will continue in the Northern District of California, with trial scheduled to proceed in 2025. The NCAA could still seek appeal of a final judgment on the matter following trial.

Return to Table of Contents

Microtransaction Theft? Class-Action Lawsuit Takes Aim at NBA 2K Developer 2K Games for Loss of Virtual Currency Upon Server Shutdown

By Jason Re, Esq.

One of the most prevalent, and some may say invasive, trends in modern videogaming is the rise of the "microtransaction." In video games, a microtransaction is a payment of (usually) a small value for a special item, feature, or privilege in a video game, giving the player-purchaser virtual goods of some kind in exchange for real-world currency. This microtransaction is in addition to the price already paid for the video game - which has risen to between $60-$70 for new games on the most modern consoles. For example, in the wildly popular battle royale game Fortnite, a player may pay money for cosmetic items for their character. In the worldwide hit game EAFC, a soccer video game, a player may use real money to purchase customizable items for their player or club, as well as buy randomized players to be used against other real-world opponents. Microtransactions have received harsh criticism since their introduction into the gaming world, with critics now citing that these transactions foster a "pay-to-win" environment in online multiplayer spaces, discourage gaming meritocracy, encourage poor releases that can simply be fixed afterward by sinking more money into a game, and more.

Another common element of modern videogaming is dedicated servers hosted by the game publisher. These servers save player information and host playing spaces for multiplayer games so that two people from across the world can connect to compete virtually. Server-based games are games that, at least in some component, rely on the company distributing the game to maintain dedicated servers for all, or some, features of the game. Most sports video games, for instance, rely on servers to maintain the multiplayer features and modes of the game. Sports video games are typically released annually, requiring new servers to maintain the different multiplayer modes, features, and massive player base for each successive game. Some companies leave servers for older versions of games

Copyright © 2024 Hackney Publications. All rights reserved.

up for years, while others shut them down in a shockingly short period of time, disabling access to content and game modes for those still using the older version. Combining these two concepts of microtransactions and server-based games, causes a particular question to arise: What happens to all of the digital items, features, and bonuses that a player paid for in an older version of the game when the new version is released, and the servers for the old version are shut down?

This question may be addressed in a consumer class-action lawsuit, originally brought by a minor, simply listed as "J.A.," represented by his mother, filed on November 17th of 2023 in Federal Court in California. Attorneys from Erickson Kramer Osborne, a San Francisco law firm, are counsel for the plaintiff and are actively seeking further injured persons in similar situations to join the class. The defendant in the class-action complaint is 2K Games. 2K Games is an American-based video game publisher - originally founded as a subsidiary of Take-Two Interactive, a video game software and holding company. 2K Games has a massive catalog of action and adventure, shooters, turn-based strategy, and racing video games, but is commonly known for its various lines of sports video games, such as NBA 2K, PGA Tour 2K, and WWE 2K, each followed by the year of their release, respectively.

The complaint focuses on 2K Games' sale of virtual currency through microtransactions, and the inability to transfer this currency or any digital goods purchased to the next version of the game. Moreover, it alleges that 2K Games constantly shows gamers marketing to get them to spend real-world currency to purchase in-game virtual currency through microtransactions. Further, it alleges that it releases a new version of the game annually, notifies users that it will shut down its servers for the older games, and deletes any data (including, most notably, the digital currency) remaining in the gamers' accounts. The class-action complaint further suggests that while some video game publishers allow players to transfer their in-game virtual currency (paid for with real-world money) to new versions of their game, or keep those old versions active and playable for years, 2K Games does not. The complaint claims that 2K deactivates the servers for the old versions of the games relatively rapidly compared to the industry standard and leaves huge sums of virtual currency and goods inaccessible. Specifically, the complaint mentions the basketball series of sports video games published by 2K Games - NBA 2K - but also points to "similar franchises published" by the company. Ultimately, the essence of the complaint is that 2K Games accepts payments from players for virtual currency or vanity items, but then has no procedure in place to offer refunds or transfers in the scenario that this virtual currency or digital content can no longer be used, more so as to when the servers for a game go down. The class action goes even further to equate this practice to "theft," and calls 2K Games' approach "unfair, illegal, and greedy."

The class action lawsuit accuses 2K Games and its parent company Take-Two Interactive ("Take-Two") of unfair business practices, and violating California's civil theft statutes, stating in pertinent part that, "By removing Plaintiff and the Class members' [virtual currency], Defendants took and stole their personal property, or fraudulently appropriated property that had been entrusted to the Defendant." In California, one statutory based consumer claim is under Unfair Competition Law ("UCL"), found at Business and Professions Code § 17200. Despite the use of the word "competition," the UCL covers the individual consumer's right to protection form fraud, deceit, and other such unlawful conduct in the marketplace. The analysis partially focuses on some vague terms - "fraudulent," "unfair," "fraudulent," and, of course, the allegedly violative act must be "unlawful." As noted, the complaint alleges that 2K Games and Take-Two committed conversion, and violated the state's civil theft statute, requiring a showing of criminal intent, actual taking, and damages.

When considering if a business practice is "unfair," California courts may find that a practice is unfair if it "offends established public policy, that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, or that has an impact on the victim that outweighs defendant's reasons, justifications, and motives for the practice." The "fraudulent" prong of the analysis focuses on whether the business conduct is likely to deceive or confuse members of the public, using a reasonable consumer standard. In order for this to be "likely," the conduct must rise above a "mere possibility" that the practice or advertising confused or mislead, but rather reasonably acting consumers are probable to be misled. Additionally, there must

Copyright © 2024 Hackney Publications. All rights reserved.

be some showing of reliance on the fraudulent, misleading, or unfair business practice, leading to some material injury.

The basis for the class-action lawsuit at hand is that, as the complaint states, "when terminating an older game, 2K Games also terminates gamers' access to the funds that remain in their in-game wallets." The funds cannot be transferred to another game or redeemed in any way. Further, the complaint states that gamers, who are largely minors susceptible to misleading or unfair tactics, are given no warning when they purchase this in-game currency that it can and will be destroyed whenever 2K Games sees fit. Additionally, some of the marketing for these microtransactions specifically target children through partnerships with kid-friendly brands, like Chips Ahoy and Reese's Puffs Cereal. Video games generally are a hundreds of billions of dollars business, and microtransactions alone account for billions of dollars of revenue for game publishers, largely by underage participants. Regardless of how the class-action complaint progresses, it is undeniable that minors need protection from malicious, greedy, and unfair business practices of video game publishers. Safeguards, such as warnings, parental controls, or general education will be necessary to better protect minors (and their wallets) from microtransactions that may be lost to time in just a matter of years.

Return to Table of Contents

Spain's #MeToo moment – Revisiting Jenni Hermoso and Luis Rubiales

By John Wendt

The 2023 FIFA Women's World Cup was a success on so many levels, including attendance, viewership, and prize money. As FIFA President Gianni Infantino said, "This FIFA Women's World Cup has been truly transformational, not only in Australia and New Zealand, but all over the world…In the host countries, we had almost two million spectators in the stadiums – full houses everywhere – and two billion watching all over the world – and not just watching their own country, but watching the World Cup, because it's an event [where] I don't just watch my team. It's great sport, it's entertaining and people love it."[1] Unfortunately, the actions of Luis Rubiales, then president of Spanish Football Association (Real Federación Española de Fútbol or "RFEF") and vice-president of the Union of European Football Associations ("UEFA"), marred the celebration. As one commentor noted, it was "an unpleasant reminder to many of the sexism that has plagued women's soccer."[2]

Spain had just defeated England 1 – 0. Presenting the awards on the dais were luminaries including, Queen Letizia of Spain, her 16-year-old daughter Sofía, FIFA President Gianni Infantino, Australia Prime Minister Prime Minister Anthony Albanese, and Luis Rubiales. Players lined up to receive their medals and congratulations from the members on the dais. All the English players and coaches received their silver medals.

Then, the Spanish Team walked up to receive their medals and congratulations. All went well until Spanish player Jenni Hermoso's turn came. After Hermoso received her medal from President Infantino, Luis Rubiales reached around her, hugged her, spoke briefly with her, and then put both his hands on the back of her head and kissed her on the lips. On Instagram Live, Hermoso said that she "didn't like it."[3] FIFA's outgoing Secretary General Fatma Samoura said that Rubiales' actions "derailed" the celebrations and that "I didn't take one second to realize that, oh, that was very inappropriate…I know that football can unite the world … and to have it ruined at the last minute after this celebration of the biggest World Cup, was just something that was unfortunate."[4]

The response to Rubiales' actions triggered a crisis in Spanish football and resulted in universal condemnation. Miquel Iceta, Spain's acting minister for sports and culture said, "(It) is unacceptable to kiss a player on the lips to congratulate her."[5] Irene Montero, Spain's government equality minister said, "It is a form of sexual violence that women suffer on a daily basis, and which has been invisible so far, and which we should not normalize."[6] The Fédération Internationale des Associations de Footballeurs Professionnels ("FIFPRO"), the players' union said, "Uninitiated and uninvited physical gestures towards players are not appropriate or acceptable in any context. This is especially true when players are put in a position of vulnerability because a physical approach or gesture is initiated by a person who holds power over them."[7]

Copyright © 2024 Hackney Publications. All rights reserved.

Yet, Rubiales defended his actions as a consensual kiss and refused to resign. Rubiales stated that is was spontaneous and consensual and it was "exactly the same as if I'd have been kissing one of my daughters."[8] Rubiales went on to say, "The spontaneity and happiness of the historic moment led us to carry out a mutual and consented act, the product of great enthusiasm. At no time was there any aggression, indeed, there was not even the slightest discomfort, but an overflowing joy in both. I repeat: with the consent of both parties, both in the affectionate hugs, as well as in the peak and subsequent farewell full of affectionate mutual gestures, that occurred during the medal presentation."[9] Rubiales, whose mother locked herself in a church and threatened a hunger strike in support of her son, blamed "false feminists" and that, "These people are trying to assassinate me and I'm going to defend myself. The false feminists destroy people. … The press, in the majority, will keep killing me, but I know the truth, and what my family and the people who love me think. The truth is the truth."[10]

Hermoso has consistently insisted that the kiss was nonconsensual. The Spanish soccer federation initially tried to downplay the incident and released statements alleging Hermoso's support of Rubiales. But Hermoso alleged that the federation pressured her and her family to do so and she pointed out in a streaming video on social media, "I didn't like it, but what can I do?"[11] She went on to say, "I want to clarify that, as seen in the images, at no time did I consent to the kiss he gave me…I do not tolerate my word being questioned, much less that it be made-up words that I haven't said."[12]

Jorge Ivan Palacio, the chairman of the FIFA Disciplinary Committee, provisionally suspended Rubiales from all football-related activities at national and international level for 90 days pending disciplinary proceedings that were opened against Rubiales. The Committee was investigating whether Rubiales' actions were violations of Article 13 of the FIFA Disciplinary Code, which includes offensive behavior and violations of the principles of fair play.[13] Examples of this behavior include "violating the basic rules of decent conduct" and "behaving in a way that brings the sport of football and/or FIFA into disrepute."[14]

The Disciplinary Committee found, among other things, that not only that Rubiales had kissed Hermoso (CHECK), but that during the match and sitting next to the Queen and her daughter he celebrated the Spanish victory by grabbing his crotch/genitals.[15] The Committee also found that he carried Spanish player Athenea del Castillo over his shoulder during celebrations on the pitch. The Committee noted that Hermoso said, "I believe that no person, in any work, sporting or social environment, should be a victim of this type of non-consensual behaviour. I felt vulnerable and a victim of aggression, an impulsive, sexist act, out of place and without any type of consent on my part… ZERO TOLERANCE (sic) with such behaviour."[16]

The Committee further found that the RFEF originally released a statement supporting Rubiales and that, "We have to state that Ms. Jennifer Hermosa lies in every statement she makes against the president… The kiss was consensual. The consent was given in the moment with the conditions of the moment. Later you can think that you have made a mistake, but you cannot change reality."[17]

As to the merits of the case, the Committee found that "both protagonists had different interpretations of the kiss and the events surrounding it." Yet, they also found that the RFEF threats of punishment against Hermoso for expressing her opinion cannot be tolerated. They further emphasized FIFA's interest in protecting the integrity and reputation of football had been significantly affected by the events. They noted that FIFA has a "statutory objective to promote and develop Women's football worldwide, (and) FIFA also has a duty to protect it as well as those involved in women's football, in particular female players."[18]

In their decision the Committee found that Rubiales had breached Article 13 and banned him from all football-related activities at national and international levels for three years stating, "FIFA reiterates its absolute commitment to respecting and protecting the integrity of all people and ensuring that the basic rules of decent conduct are upheld."[19] In 2022 the Spanish Sports Law (Law 39/2022) was enacted and the Superior Sports Council (Consejo Superior del Deporte, CSD) with new changes to the structure of sport in Spain. Included in those reformations were rules that make ineligible anyone who has been sentenced by the disciplinary bodies of national or international federations or sports tribunals, meaning that Rubiales can no longer run for RFEF presidency or General Assembly.[20]

Copyright © 2024 Hackney Publications. All rights reserved.

Rubiales, who continues to deny the allegations, is now under investigation for two different crimes of sexual assault and coercion, the assault from the kiss and the coercion from the alleged intimidation efforts. Regarding the kiss in 2022, Spain's Parliament enacted the "Ley Orgánica de Garantía Intégral de la Libertad Sexual" popularly called "Solo sí es sí" (Only yes is yes) which states, "It will only be understood that there is consent when it has been freely manifested through acts that, in attention to the circumstances of the case, clearly express the will of the person."[21] Under Spanish law a non-consensual kiss can be considered sexual assault with the possibility of one to four years in prison.[22]

Judge Francisco de Jorge in Spain's National Court is conducting the preliminary investigation into the incidents and will then decide whether the case should go to trial, or whether the case should be dismissed. On January 2, 2024, Hermoso gave evidence before Judge de Jorge and as she was leaving the court said, "All is in the hands of justice, that is all I can say."

Additionally, Rubiales, Albert Luque, new director of the Spanish Men's National Team, Rubén Rivera, RFEF marketing director, and former Spanish Women's coach, Jorge Vilda could also face charges for attempting to coerce Hermoso to show support for Rubiales. The court has already imposed a restraining order on Rubiales from communicating with Hermoso and prohibiting Rubiales from coming within 200 meters of Hermoso.[23] Finally, Rubiales is also being investigated over "irregularities" in the use of the Federation's funds.[24]

Shortly after Spain won the World Cup Nadia Tronchoni, an editor at the Spanish newspaper El País, emphasized that the victory was "more than a title" saying "The women, the girls of this country celebrated the fact that our stubbornness has finally defeated machismo…Rubiales's kiss to Hermoso reminds us that the road ahead is a long one."[25]

Return to Table of Contents

A Lawyer Examines Safety on the Ski Slopes

As snow enthusiasts turn their attention to the 2024 ski season, Christopher Deacon, a partner in Stewarts' International Injury department outlines what to consider to stay safe on the slopes.

Planning your annual ski trip should be a time of escape and excitement. Tragically, however, in recent years there have been a number of high-profile fatalities. The death of a five-year-old British girl in Flaine in early January 2022 was followed by news a few days later that French actor Gaspard Ulliel had been killed in the Savoy ski area of La Rosière.

Both deaths arose in the context of a collision involving other skiers, putting into sharp focus the potential dangers of winter sports at even the most rudimentary levels. In the case of the British girl, who lived with her ex-pat parents in Geneva, she had been participating in a beginners' lesson on a blue slope when a skier, who reportedly was skiing at high speed, knocked her down.

In January 2023, a young woman died and two people were critically injured after separate crashes at the Hintertux resort in Austria. These incidents were reportedly linked to unusually warm skiing conditions changing the nature of the piste and increasing safety risks.

Whether you are an experienced thrill seeker or a fledgling novice, preparation is key to managing the risks that are an inevitable part of hitting the piste.

1. Being properly insured is a basic starting point if you are a winter sports traveller

The costs of not being insured can be significant. If skiers do end up injured and being lifted to a private clinic or hospital by the pisteurs then, without proper insurance cover, they could end up footing a hefty bill.

If you forget to arrange insurance in advance, you can buy it as a daily supplement to the lift pass in many resorts.

You may also consider the services of a specialist global emergency response company, who will provide 24-hour assistance in an emergency situation for you and your family wherever you may be travelling across the globe.

2. Familiarise yourself with the rules set by the International Ski Federation (Federation Internationale du Ski or FIS).

Both skiers and snowboarders should have regard to these rules, which form the "highway code" of the ski slopes in Europe. Similar rules are in place in Canada and the USA. The FIS rules are often the starting point

Nicole Repetto

Copyright © 2024 Hackney Publications. All rights reserved.

when establishing who is responsible for an accident on the slopes.

3. Ski collisions have been described as road traffic accidents on the mountains.

One of the most important rules set by the FIS is that the skier lower down the slope has priority. If you happen to be knocked to the ground by another skier who has approached from up-piste then there is a good chance they have ignored or negligently flouted the rule that you have priority as a skier further down-slope.

Not only could this expose the individual responsible to a substantial claim for civil damages, it might also result in the authorities taking criminal action. In the Flaine accident mentioned above, a French man is now facing a manslaughter charge and is in the custody of the local judicial authorities.

4. If the worst comes to pass and you are involved in a skiing accident then you should:

- Take full details of anyone who may be responsible, including details of their insurer. It is possible that a seriously injured victim will not be able to react at the scene, so if you witness a serious collision then make sure anyone who may have been involved does not set off without leaving their details.
- Report the accident to the piste authorities and ask for a copy of the report.
- Cooperate with any investigation by the local authorities. In Europe, this is often led by the police at the direction of the public prosecutor. It can seem intimidating to those impacted by a winter sports accident, but it is often a crucial step in ensuring early gathering and preservation of evidence, maximising the prospect of advising successfully on a victim's options.
-
- Report the incident to your insurers, regardless of who you think may be at fault for the accident.
- Make sure you note down the full name and contact details of any witnesses to an incident or accident.
- Take photos of the accident location and get someone in your group to return and make a sketch plan pin-pointing where the relevant parties were coming from and going to at the point of impact and of any other key landmarks or pointers which may be relevant to the accident circumstances.

5. Avoid collision

To avoid a collision in the first place, be sure to carefully check further up the piste when setting off or at intersections when joining another piste. Make sure you remain visible to other skiers wherever possible. Give beginners a wide-berth when passing as they may turn, stop, fall in your path or not be as adept at moving to avoid a collision as you are.

6. Don't ski drunk, it really does impair your abilities and judgment.

7. Look after your ski equipment and make sure it is suitable for your requirements.

It may sound surprising but faulty or poorly fitted ski equipment is the cause of many accidents each year. Ski resort equipment suppliers should be asking for your age, ability, height and weight before kitting you out. Make a note of this basic information in both metric and imperial before heading abroad and if the supplier doesn't ask for these details then make sure you provide them.

If you are involved in an accident that is caused by faulty equipment then it is important to have full details of who provided the equipment, what steps they went through when fitting the skis and bindings, and what exactly the problem was with the equipment that has caused injury. Take photos or video of the faulty equipment and make sure the equipment is preserved for an expert to comment on (you could try getting an initial comment on issues with the ski equipment from another ski hire shop), or for the local police to inspect.

8. It is not just faulty ski equipment or collisions caused by fellow skiers that can lead to injury.

Back in 2012, the resort of Font-Romeu in France was ordered to pay almost €1million to a young woman who suffered multiple trauma when she hit a patch of ice on a green run, skidded off-piste and collided with some rocks. Familiarity with your surroundings will minimise the risk of such injuries.

9. Check out the position on the law for safety helmets in the destination country.

The tragic death of actress Natasha Richardson from a skiing head injury in Quebec, Canada back in 2009 put the ski helmet debate centre stage once more

Copyright © 2024 Hackney Publications. All rights reserved.

and it continues to be an area of great discussion. In some resorts, it is compulsory to wear a helmet for certain age groups. You should consider wearing a safety helmet and other protective ski equipment, such as a spine protector, particularly if you are feeling adventurous and may be heading off-piste.

10. Going off-piste?

If you do dare to venture off-piste then you should hire an experienced mountain guide and carry an avalanche transceiver, probe and shovel. If you frequently go off-piste you could consider an ABS (airbag) ruck sack. While this may seem extreme, every year this basic safety equipment helps save lives in the event of an avalanche.

Even if you have safely undertaken an off-piste route previously the conditions can vary day by day and local knowledge is essential. You should also check the small print of your travel insurance as off-piste is frequently excluded or subject to requirements such as being accompanied by a guide.

11. Think twice before signing up for potentially dangerous excursions such as snow-mobiling or even more leisurely activities such as sledging.

They are as powerful as many large motorbikes and a loss of control can very rapidly turn into a serious accident. If you do go, make sure you receive full safety instructions and a chance to practice on level terrain, including an emergency stop.

Even with more leisurely activities such as sledging, if you are a novice or undertaking activities on an unfamiliar piste, then check safety guidance and make sure you practice, familiarising yourself with the sledge on lower ground before undertaking the activity further up the piste.

12. Check the conditions on the piste

The ever-changing climate across the globe is also impacting ski and winter sports conditions year-on-year. Unusually warm conditions on the slopes can create icy conditions and less snow at the side of the piste to cushion the blow if a skier or winter sports enthusiast loses control. Some resorts are relying increasingly on artificial snow, which is thought to turn to ice more quickly, creating a further potential hazard. It is important to carefully check the conditions on the piste you intend to use and not take it for granted that the snow will be the same as in previous years, no matter how familiar you are with the resort you are visiting.

Observing some basic tips will help you to manage the risks and will help ensure you have a safe and successful skiing holiday this season.

Return to Table of Contents

Risk Management and Its Pivotal Role in the Business of Sports – an Interview with Dave Dwortz

Risk management is an ever-present factor in the business of sports. Too often, it is overlooked, perhaps because it is not as sexy as the game, itself.

Bucking that trend, Hackney Publications recently sought out **Dave Dwortz**, President & CEO, Helmsman Management Services LLP, who specializes in the sports industry and influential board member of **Sports and Entertainment Risk Management Alliance** (SERMA®). What follows is his interview.

Question: How does your company intersect with sports?

Answer: Our connection in sports starts with clients like Disney and Comcast, right? Both of whom have very deep involvement in the sports and entertainment industries. We also work directly with a few teams directly. We've got a few of the NFL, MLB, and NHL teams, primarily from a workers' compensation perspective.

Q: How did your relationship with the sports industry influence your decision to participate in SERMA and why SERMA?

A: Taking advantage of the opportunity to engage in SERMA and why SERMA are really closely tied together. SERMA offers a unique opportunity to combine deep personal and professional interests. So that certainly was a plus. But the real reason that I decided to join SERMA is the founder of SERMA, Rich Lenkov. Anyone who knows Rich knows that he's just a force of nature. He has endless energy. So, when Rich asks you to join something, he asks you if you want to be a part of something, you know he's going to put a ton of energy behind it.

And then he shared the quality of the other people that were coming together to form his advisory board, and it was incredibly compelling. When he described who was joining, I thought, 'I would love to work and learn from these folks.' We have some of the best risk

Copyright © 2024 Hackney Publications. All rights reserved.

management minds in the sports industry in SERMA. We have risk managers of the major leagues, some of the team's iconic events and facilities as well as seasoned legal experts and claims leaders. And he creates an open and inclusive environment where folks are openly sharing ideas and their experiences. I mean it's a pretty unique environment and really energizing to be a part of. It was pretty much a no-brainer.

Q: What are some of your company's top initiatives in the sports industry in 2024?

A: In terms of top initiatives, three things really come to mind.

One, talent retention and development. There's a talent war in a lot of industries, and in particular in sports. The battle for claim professionals is really no different. So, that's really at the top of my list – talent retention and developing claim expertise. It's not sexy. But it's really the key to our success.

Two, we've been investing a lot in artificial intelligence and predictive analytics to help augment our claims people. And we are seeing the fruits of that labor in terms of creating efficiencies and making faster and better decisions. I see AI and analytics as a constant investment area, given how fast the technology is evolving. I have over 200 data scientists on staff to make sure that we're keeping pace. So that is a big commitment from us.

Three is loss prevention. And this might sound a little counterintuitive coming from a claims organization who makes money handling claims, but from my clients, the best claim is the one we prevent from happening in the first place. I have more than 300 risk control professionals, and their job is to engineer risk out of the equation for our clients. In the sports industry, this can take a lot of different forms from helping to design policies and procedures to protecting the organizations and the people who work for them to structural design of facilities and the materials used throughout their businesses. It's pretty far encompassing. But the best claim is the one that never actually happens.

Q: What are some of the trends that you're anticipating at the intersection of sports and risk management in 2024?

A: Unfortunately, most of the trends I'm watching aren't things I'm looking forward to happening. Honestly, they're more on the negative side, which is kind of the nature of what we do. We're always looking around corners for what can go wrong. How can we protect and help clients in all industries and specifically sports and entertainment? So, of the things that we're really watching and trying to help influence, claim severity continues to grow. It's across all industries, but specifically in sports and entertainment. Medical inflation is also gaining new momentum, which is adding to the problems. And then legal system abuses are on the rise and driving up the costs of doing business. The verdicts that are being handed down across the country are just really hard to understand. So again, a lot of industries are dealing with these, but they're impacting sports and entertainment, and they're having a material impact on everybody's ability to put a product out there and to do business. And it's making the role of the risk manager more and more complex.

Q: Can you elaborate on claim severity?

A: claim severity is really just the cost of claims. They're becoming more and more severe, so more and more expensive. A claim that used to cost $10,000 is now 2X or 5X, depending on the type of claim. The cost of settlements, the cost of rectifying a situation, or certainly if something goes into litigation, are all types of situations are just becoming more and more severe.

Q: How did you get your start in the industry

A: I've been involved in the insurance industry in one way or another my entire career, spanning over 30 years. I spent the first ten years in the finance side of the world. I was a consultant and worked for Ernst and Young in the accounting industry, supporting and working with insurance companies. Then I joined Liberty Mutual in 2000, and Helmsman is wholly owned by Liberty Mutual. I became the CEO and president of Helmsman about seven years ago.

Q: What is the best part about your job, about your profession? What do you enjoy most about it?

A: This one is the easiest question in the world to answer. It's all about the people, right? Whether you're talking about the sports industry or you're talking about the insurance industry, and in particular my lane of the claims industry, it is the people. It's my colleagues, our partners, our clients, the relationships that you develop with some of the most amazing people. And then you get to work side by side to solve complex problems and share success. It's extremely fulfilling.

Return to Table of Contents

Copyright © 2024 Hackney Publications. All rights reserved.

Dr. Ashleigh Huffman of the Institute for Sport and Social Justice to Give Keynote Address at Upcoming SRLA Conference

The Sports and Recreation Law Association (SRLA) will hold its annual meeting at the Kimpton Monoco Hotel in Baltimore on February 21-24, 2024.

Dr. Ashleigh Huffman, Vice President of Global Engagement at the Institute for Sport and Social Justice, will give the keynote address at 12 noon on February 23.

Among the notable panels are the:

Hot Topics Panel on Maryland Sports on February 22, which will feature panelists:

- Terry Hasseltine, STS, CTA, Executive Director, Maryland Sports Commission and Vice President, Marketing and Communications Group, Maryland Stadium Authority
- Philip Huston, CCM, LEED AP, Vice President, Capital Projects and Planning, Maryland Stadium Authority
- Matt Kastel (Moderator), Manager of Stadium Operations, Oriole Park at Camden Yards, Maryland Stadium Authority

DEI Panel on February 24, which will feature panelists:

- Anna Ivey, Anna Ivey Consulting
- Gbemende Johnson, University of Georgia
- Shelia Akbar, Signet Education
- Professor Tan Boston (Moderator), Northern Kentucky University Chase College of Law

SRLA serves academicians and practitioners in private and public sport and recreation settings. Members have diverse educational and experiential backgrounds and represent a variety of occupations and interests. They may teach or be students at institutions of higher education (sport and recreation management programs, law schools), practice law, operate risk management firms, or serve in other related fields.

The purpose of the conference is to provide quality peer-reviewed scholarship in the area of sport and recreation law. Scholarship is disseminated through 25 or 50-minute presentations, 75-minute symposium sessions, and poster sessions. Conference attendees also have opportunities to interact with scholars and practitioners from across the country, engage in social activities, and network with industry professionals. The annual conference is beneficial for professionals, academics, and students alike.

To register for the conference, visit **https://srla2024.exordo.com/**

Registration rates for the conference are as follows:

Professional Member: $600
Professional Non-Member: $725 (includes SRLA Membership for 2024)
Student Member: $150
Student Non-Member: $200 (includes SRLA Membership for 2024)

Professional Registration includes access to all conference sessions, the SRLA Welcome Bash, the Keynote Luncheon, the SRLA Awards Luncheon, the SRLA Teaching and Learning Breakfast, a conference gift item, and a digital program.

Questions about the conference can be directed to Kerri Cebula at **ucebula@kutztown.edu**.

About Dr. Ashleigh Huffman

Dr. Ashleigh Huffman is the newly appointed Vice President of Global Engagement at the Institute for Sport and Social Justice and the former Chief of Sports Diplomacy at the U.S. Department of State based in Washington, DC. In both roles, Ashleigh works with governments, sports leagues, nonprofits, educational institutions, and businesses to tackle global issues in sport and advance foreign policy priorities such as gender equity, diversity and inclusion, disability rights, climate change, mental health, and racial justice. As the Chief of Sports Diplomacy, Ashleigh served as a leading advisor on international sport policy and oversaw international exchange opportunities, including world championships, the Olympics and Paralympics, and the World Cup.

Dr. Ashleigh Huffman

Copyright © 2024 Hackney Publications. All rights reserved.

Before joining the State Department, Ashleigh was a professor at the University of Tennessee and co-founder of the Center for Sport, Peace, and Society. In that role, Ashleigh worked closely with the State Department and espnW to launch the Global Sports Mentoring Program, which was awarded in 2018 with the ESPN Stuart Scott Humanitarian Award and the Peace and Sport "Diplomatic Action of the Year" Award. Ashleigh has worked with professional, university, and amateur athletes and coaches from more than 120 countries, including the United States, on leadership development, cultural understanding, and social change. She frequently leads workshops and keynotes on women's empowerment, sports diplomacy, public-private partnerships, and social change.

Ashleigh earned her PhD at the University of Tennessee in Sociocultural Studies and was a two-time captain of her basketball team at Eastern Kentucky University.

Return to Table of Contents

Green and Spiegel Dips a Toe in Sports Law Space by Absorbing Maiorova Law and Its Immigration Practice

In order "to serve the growing sports immigration market and economic growth in the Southern part of the United States," Green and Spiegel, LLC has expanded its footprint with a sixth office location in Orlando. Two new attorneys join the team, Ksenia Maiorova, Partner, and Stephanie Scamman, Associate.

"With a long history of representing foreign nationals entering the United States for professional sports teams and athletic competitions, we are pleased to be further enhancing this focus with the addition of Ksenia Maiorova, Esq.," said Jonathan Grode, U.S. Practice Director and Managing Partner.

Ksenia Maiorova

Maiorova has long been viewed as a leader in this specific field of immigration law, increasingly focusing on athletes, especially in the emerging area of NIL. The firm says it "is now positioned to guide both teams and individual foreign national athletes at an unparalleled level."

Maiorova has more than 15 years of legal experience and has significant experience representing athletes, coaches, and other sports industry professionals in connection with their applications for visas and permanent resident status as well as corporation sponsorship and individual immigrants with family needs.

"Joining Green and Spiegel serves to amplify our existing strengths in sports immigration. By joining forces, we're unlocking new synergies that will allow us to offer an enhanced suite of services to our clients. Together, we're uniquely positioned to navigate the complexities of U.S. immigration for athletes and other sports industry professionals as well as to offer innovative legal solutions in the NIL landscape", added Maiorova.

Over the last few years, Maiorova has had several legal victories, most notably EB-1A victory for Olympic hammer thrower Camryn Rogers, which is recognized as the first-ever NIL-related EB-1A for an NCAA student-athlete.

Ksenia is a frequently invited speaker at continuing legal education conferences organized by the American Immigration Lawyers Association and other organizations. She is the founder and interim director of the Sports Immigration Lawyers Association and the founder and conference chair of the annual Sports Immigration Law Conference.

Return to Table of Contents

Rugby Australia to Implement Trial to Lower Tackle Height in Community Rugby

Rugby Australia (RA) has confirmed that it will implement a new trial that will see the legal height of tackles in the game lowered to below the sternum from February.

The governing body has begun an extensive stakeholder engagement and educational program to reach administrators, coaches, match officials and

Copyright © 2024 Hackney Publications. All rights reserved.

players around the country with the details of the new law and expectations around its application.

The trial is primarily designed to reduce the risk of head-to-head and head-to-shoulder contact between ball carriers and tacklers. According to comprehensive World Rugby research, the risk of concussion is more than four times higher when the tackler's head is above the ball carrier's sternum.

The new law (9.13) will see dangerous tackling now deemed to include, but not be limited to, tackling or attempting to tackle an opponent above the line of the sternum.

Match officials will be asked to place greater emphasis on the existing law preventing a ball carrier from "dipping" into a tackle and placing themselves, and potentially the defender, in an unsafe position for contact.

The new law will not change the ability for an attacking player to "pick-and-go" where the ball carrier typically starts and continues at a low body height. The defender will still be required to avoid contact with the head and neck of the ball carrier as stipulated in the existing World Rugby Head Contact framework.

The two-year trial comes after Rugby Australia announced its support for World Rugby's global research initiative last March, and will apply to all levels of Rugby below Super Rugby level when introduced in February.

It follows more than six years of research that has already seen trials of lower tackle heights undertaken in nations including France, England, New Zealand, South Africa, Ireland, Wales and Scotland.

Preliminary data in South Africa has shown a 30 per cent reduction in concussions, while France recorded a 64 per cent reduction in head-on-head contact – as well as a 14 per cent increase in participation on pre-COVID levels.

This change in law will apply to all competitions below Super Rugby that commence on or after 10 February, 2024, through till the end of 2025. This will include all Premier Grades, School Competitions, and Pathway Competitions.

Rugby Australia CEO Phil Waugh says the extensive research done on this project by World Rugby indicates a significant opportunity to make the game safer.

"Research from around the world has clearly identified safety as the number one issue preventing fans and potential players from taking up the game," said Mr Waugh.

"Obviously it is impossible to remove all risk from the game, however we firmly believe that promoting safer tackle techniques, and reducing the risk of head contact and concussion will lead to an even safer game. I am confident our players and coaches at all levels of the game will continue to work on safe and effective tackle technique.

"This is firmly in the best interests of the game, however there may be an adjustment period for players and match officials, and I would ask for patience and respect between all parties as we embark on this journey.

"In the French trial, they saw a significant increase in penalties in the first year of the trial, followed by a substantial drop in those numbers over the next two years as players and officials adjusted to the new measures.

"We will continue to ensure that any decisions that have the potential to impact the game are driven by research and evidence that prioritise player safety."

Rugby Australia's General Manager, Community Rugby, Michael Procajlo says the decision to lower the tackle height involved consultation with the game's stakeholders.

"We have been engaged with our Member Unions, coaches, match officials, administrators, and medical professionals since March, when we first signalled our intent to participate in the global law trial – and that consultation has informed the implementation in Australia.

"The research undertaken by World Rugby to date has shown there are three different risk zones for tackling.

"The green zone encompasses the ball carrier's torso from the sternum to the hips – this is the safest zone to tackle. Statistically, there is a little more risk once the tackle drops below the hips – hence it becomes amber. However, the greatest risk is present when tackles go above the sternum line and there is a higher risk of head-on-head or head-on-shoulder contact.

Copyright © 2024 Hackney Publications. All rights reserved.

"Training and education will remain a strong focus for RA and the State and Territory Unions. We will roll out additional face-to-face coach education sessions and an eLearning course, game management guidelines for coaches and match officials, webinars for clubs and schools, and a range of online resources to assist with the change.

"This trial is just one component of Rugby Australia's player welfare measures, which include the Blue Card and Concussion Management Procedure, Match Day Safety and Medical Requirements as well as comprehensive education and training for players and coaches on tackle and scrummaging techniques.

"We were fortunate to have the support of the Nick Tooth Foundation to develop the Blue Card and Concussion Management Procedure and are pleased to confirm they will also be supporting this trial as we assess it over the next two years."

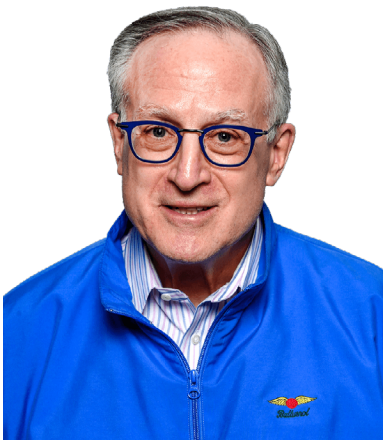
Key points:

- New trial will see legal tackle height lowered to "below the sternum"
- Primarily reduces risk of head-to-head and head-to-shoulder contact between ball carrier and tackler
- Two-year trial to be implemented from 10 February 2024 across all Rugby in Australia below Super Rugby level
- The result of more than six years of research and trials led by World Rugby
- Clear interpretations for players "dipping" into contact, and pick-and-go
- RA undertaking extensive stakeholder engagement, and educational program for players, parents, administrators, coaches, and match officials.

Return to Table of Contents

Former New York Giants GC William J. Heller Joins Genova Burns As 'Of Counsel'

Genova Burns has announced that William J. Heller, former Senior Vice President and General Counsel of the New York Football Giants, has joined the firm as Of Counsel.



William J. Heller

While GC for the Giants, Heller supervised all legal affairs, overseeing matters pertaining to the Giants and its affiliates, including assisting in MetLife Stadium legal affairs. His tenure with the Giants, one of the NFL's original franchises, covered a spectrum of sports law, including licensing, sponsorships, marketing arrangements, labor and employment and privacy issues.

Prior to serving as GC of the Giants, Heller made his mark during a 32-year career in private practice serving as a partner at two premier New Jersey law firms, where he gained substantial expertise in transactional and counseling engagements, particularly in commercial deals. His private practice experience also embraced various intellectual property issues and the significant negotiation and licensing of agreements in high technology, internet, and privacy.

An experienced trial lawyer, Heller's notable cases spanned complex employment discrimination, commercial, technology, and intellectual property disputes. His court room experiences include trade secrets cases and technology counseling for defense contractors, and successful copyright vindication for a leading China manufacturer whose work appeared in an Oscar-winning motion picture without permission.

Angelo J. Genova, Esq., Genova Burns Chairman, said the firm feels "very privileged and excited to have Bill Heller return to private practice under the Genova Burns banner. Having known Bill for decades, I know him to be one never content to rest on his laurels. Bill will contribute greatly to our firm in many ways. We expect Bill will offer a wonderful opportunity to our clients now and in the future by serving as a mediator and alternative resolution counselor that will benefit litigating parties to resolve their disputes.

Copyright © 2024 Hackney Publications. All rights reserved.

"I have no doubt," she continued, "that Bill will provide an insightful, efficient and cost-effective alternative to traditional litigation."

Heller has been recognized as a leading lawyer in New Jersey and nationwide. His dedication extends to volunteer, charitable and pro bono activities including his service as the founding President of the Wyckoff Education Foundation. Admitted to the bar in 1978, he is currently a member of the New Jersey bar and various federal courts.

Return to Table of Contents

Brain Lesions in Former Football Players Linked to Vascular, Brain Changes

Signs of injury to the brain's white matter called white matter hyperintensities, as seen on brain scans, may be tied more strongly to vascular risk factors, brain shrinkage, and other markers of dementia in former tackle football players than in those who did not play football, according to a study published in the December 20, 2023, online issue of Neurology®, the medical journal of the American Academy of Neurology.

"Studies have shown that athletes exposed to repetitive head impacts can have increased white matter hyperintensity burden in their brains," said study author Michael L. Alosco, PhD, of Boston University Chobanian & Avedisian School of Medicine. "White matter hyperintensities are easily seen on MRI as markers of injury of various causes. We know these markers are more common as people age and with medical conditions such as high blood pressure, but these results provide initial insight that they may be related to multiple aspects of brain damage from repetitive head impacts."

Alosco said looking at white matter hyperintensities on brain scans may be a promising tool to study the long-term effects of repetitive head impacts. Repetitive head impacts have also been associated with chronic traumatic encephalopathy (CTE), a neurodegenerative disease that can result in dementia.

The study does not prove that repetitive head impacts and white matter hyperintensities cause other brain changes. It only shows an association.

The study involved 120 former professional football players and 60 former college football players with an average age of 57. They were compared to 60 men with an average age of 59 who had no symptoms, did not play football, and had no history of repetitive head impacts or concussion.

The participants had brain scans and lumbar punctures to look for biomarkers of neurodegenerative disease and white matter changes, along with other assessments.

In the former football players, a higher burden of white matter hyperintensities was associated with greater vascular risk factors; increased concentrations of p-tau proteins found in Alzheimer's disease, CTE, and other neurodegenerative diseases; more brain shrinkage and a decrease in the integrity of the white matter pathways in the brain.

The relationship between white matter hyperintensities and stroke risk was more than 11 times stronger in former football players than in those who did not play football. For p-tau, the relationship was 2.5 times stronger in the football players. For a measure of white matter integrity, the relationship was nearly 4 times stronger in the former football players.

"While our research previously showed that former football players still have elevated white matter hyperintensity burden after controlling for sleep apnea, alcohol use and high cholesterol, it is still important to consider working on modifying these risk factors due to their effects on cognitive problems and other symptoms," Alosco said.

A limitation of the study was that participants volunteered to take part, so they may not represent all former football players. In addition, since only elite football players were included, the results cannot be easily translated to other populations.

Return to Table of Contents

Copyright © 2024 Hackney Publications. All rights reserved.

News Briefs

Sports Law Expert Podcast Interviews Jani Memorich and Catherine Buchanan of McGowan PAE about Intersection of Sports and Insurance

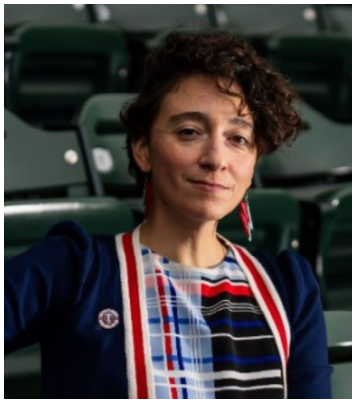
Hackney Publications has announced today the release of the latest episode of Sports Law Expert Podcast, which features Jani Memorich and Catherine Buchanan of McGowan PAE about intersection of sports and insurance. McGowan PAE designs and creates personal and commercial insurance programs and products for professional athletes, entertainers, NIL college athletes, social media influencers, Family Offices, coaches, broadcasters, spokesmodels, directors, TV and movie producers, screen writers, ballclub owners, front office personnel and high net worth individuals. The podcast segment can be heard here. "The team at McGowan PAE, led by Jani and Jim Convertino (Director of PAE), has decades of experience in the space, making them the perfect choice when a sports industry professional, the individual or their agency representing them, has unique insurance exposures and wishes to address them as an integral part of their wealth management," said Holt Hackney, the publisher of Hackney Publications. "The interview with Jani and Catherine sheds light on the services that McGowan PAE offers as well as what to expect in the future with regard to sports and insurance."

Hogan Lovells represents Michele Kang in acquisition of the London City Lionesses Football Club

Hogan Lovells recently guided client Michele Kang in the purchase of a 100% interest in the London City Lionesses, an English Women's Championship Level Football Club from founder Diane Culligan. A Washington and London-based Hogan Lovells team, working alongside co-counsel Northridge, worked on the transaction. Hogan Lovells previously helped Kang, a businesswoman, investor and philanthropist, purchase controlling interests in the 2021 National Women's Soccer League champion Washington Spirit in Washington, D.C., and eight-time Champions' League winner Olympique Lyonnais Féminin in Lyon, France. The timing follows a recent announcement that the Barclays Women's Super League (BWSL) and Barclays Women's Championship (BWC) will move to a new governance structure with a club-owned model and away from Football Association control by the time of the 2024-2025 season. Hogan Lovells' Sports Team representing Kang included U.S. attorneys Steve Argeris, Mark Weinstein and Robert Welp as well as London attorneys Karen Hughes, Daniel Norris, Adela Komorowska, Rosie Shields, and Paola Bruni.

Twins Elevate Guttman to Vice President and Deputy General Counsel

Sports Lawyer Mari Guttman has been promoted to Vice President, Deputy General Counsel of the Minnesota Twins. Guttman joined the Twins legal department in August of 2021. Prior to that, she had a 3-year stint at the Memphis Grizzlies, where she was Associate Counsel and Special Advisor to Business Operations. Before joining the Grizzlies, Guttman was an attorney at Skadden, Arps, Slate, Meagher & Flom LLP. She graduated from Stanford Law School in 2015



Mari Guttman

Copyright © 2024 Hackney Publications. All rights reserved.