SPORTS LITIGATION ALERT

May 31, 2024 Vol. 21, Iss. 11

Cases

Court Delivers Partial Victory to University of Vermont in Title IX Case

By Marie-Victoire Wickers, of Segal McCambridge

Current and former students of the University of Vermont ("UVM") brought Title IX claims against several defendants, including UVM in Ware v. Univ. of Vt. & State Agric. Coll. Title IX generally *prohibits discrimination based on sex in any education program or activity that* receives federal financial assistance. The Plaintiffs allege that they were sexually assaulted while at UVM and that the university was deliberately indifferent to the risk of such assaults. The court partially granted the defendants' motion to dismiss, filed under Rule 12(b)(6), which challenges the legal sufficiency of the claims. This article discusses some of the sport-related claims included in the Plaintiffs'

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complaint and whether they survived the Defendants' motion to dismiss.

Allegations

Plaintiffs claim that UVM was aware and chose to ignore a toxic culture within fraternities that included widespread sexual assault. Plaintiffs also allege that UVM knew about drug and alcohol abuse among student-athletes and had a history of covering up controversies, particularly within the basketball team, which was known for sexually predatory behavior. In addition to that, the Plaintiffs claim that Club sports hosted parties with dangerous alcoholic drinks and operated with little oversight, fostering an environment that encouraged sexual assault. In general, the Plaintiffs also argue that UVM's Title IX policies were generally deficient and should have been improved.

The Question of Pre-Assault Title IX Claims

The first issue the court addressed was whether Title IX permits actions against universities for inaction. The Court emphasized that when deciding a motion to dismiss, it must accept the factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor.

The Defendants argued that Title IX does not allow for actions against universities for inaction despite known risks of sexual misconduct or that such liability should only be imposed in narrow circumstances. The Court noted that nothing in Supreme Court decisions on Title IX supports the notion that a recipient entity cannot be held liable for actions taken prior to an assault. The Court cited the *Davis v. Monroe Cty. Bd. Of Educ*., 526 U.S. 629, 648, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) decision, in which the court explained that liability stemming from recipient actions resulting in third-party discrimination contemplates pre-assault liability. The Court concluded that Title IX aims to eliminate discrimination in education, including taking proactive steps to remedy discriminatory situations when the recipient entity is aware of danger, even before an assault occurs.

The Court then outlined what a plaintiff must allege to state a claim for pre-assault liability under Title IX. These requirements include that Plaintiffs must establish "(1) substantial control, (2) severe and discriminatory harassment, (3) actual knowledge, and (4) deliberate indifference." (See Davis) The question of actual knowledge was particularly important in this decision. The Court found that actual knowledge can be established when the entity has an official policy of discrimination. *Karasek v. Regents of the Univ. of Cal*., 956 F.3d 1093 (9th Cir. 2020); For example, a school that pairs football recruits with female ambassadors to show them a good time is fostering an environment that creates a risk of sexual assault. The Court found that an entity can only be liable under Title IX for its own actions, and when an institution's policy creates a heightened risk of sexual harassment, liability is properly imposed.

The Court found that Plaintiffs have plausibly stated that UVM maintained an official policy supporting a heightened risk of sexual assault on campus. The Court examined whether a general campus-wide policy of indifference to sexual assault could support Plaintiffs' Title IX liability. Courts disagree on whether a general policy of indifference is sufficient. Some courts require allegations of misconduct in a specific context, while others have allowed complaints alleging campus-wide policies of indifference to survive motions to dismiss. Here, the court found that UVM's deliberate indifference to campus conditions that created a substantial risk of severe and pervasive discrimination was adequately alleged. The plaintiffs pointed to multiple instances where regulatory entities recommended changes to UVM's Title IX policies, which UVM either ignored or failed to publicize.

With regards to Plaintiff's claims specific to the men's basketball team, the Court found that the Plaintiffs' allegations were not sufficiently specific to survive the motion to dismiss. The plaintiffs did not provide

specific details about incidents of sexual misconduct involving the basketball team. or a Title IX claim to survive a motion to dismiss, the Plaintiffs must show that a university official with the authority to address the alleged discrimination had actual knowledge of the misconduct. Plaintiffs mentioned that the basketball house was known for sexually predatory behavior and that another basketball player was accused of sexual misconduct, but they did not specify the nature of these incidents or provide concrete examples. Similarly, regarding club sports the Plaintiffs failed to provide detailed, specific allegations connecting UVM's policies or actions to the alleged misconduct within club sports. Plaintiffs were also unable to demonstrate that UVM officials had actual knowledge of these issues. As a result, the judge dismissed these claims.

Negligence

Plaintiffs claim that UVM breached their duty of care owed to the Plaintiffs under Vermont negligence law. Vermont negligence law requires proof of these four elements: a legal duty owed by the defendant to the plaintiff, a breach of that duty, actual injury to the plaintiff, and a causal link between the breach and the injury. The Vermont Supreme Court has established that generally, there is no duty to control the conduct of another to protect a third person from harm. This includes universities, which do not owe a student a duty of care solely by virtue of the university/student relationship. However, a university may incur a duty if it foresees or could have foreseen an unreasonable risk of injury through reasonable investigation.

The plaintiffs argued that UVM had a duty to protect students from foreseeable sexual assault, particularly by male athletes and members of the Men's Basketball team. They pointed to: (1) Posts on public forums documenting sexual misconduct within the Men's Basketball team and UVM Athletics more broadly (2) Knowledge by a Coach that the Basketball House was a site for sexually predatory behavior and that at least one resident had previously acted inappropriately towards women; (3) A 2017 lawsuit against UVM centered on a sexual assault committed by a male club sports player.

The court dismissed the Plaintiffs' negligence claims, finding that the allegations did not plausibly establish that UVM had specific knowledge of a foreseeable risk of harm to the Plaintiffs. The court emphasized that generalized knowledge of inappropriate behavior is insufficient to expose an entity to liability. Instead, the Court explained that there must be knowledge of specific, similar acts or incidents of harm. Here, the Plaintiffs did not provide sufficient specific evidence that UVM officials knew of a particular risk posed by the Men's Basketball team or club sports that would necessitate a duty of care. The

claims were deemed too vague to establish a legal duty based on specific knowledge of future risk.

Conclusion

The court's decision in the UVM case underscores the stringent requirement for specific allegations in Title IX and negligence claims. Plaintiffs are required to provide detailed evidence of actual knowledge of risks or specific incidents to support their claims. The decision also clarifies that an entity can be liable under Title IX for its own actions when its policies create a heightened risk of sexual harassment. Such liability is properly imposed when an institution's deliberate policies foster an environment conducive to harassment.

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Settlement Reached in Case Involving the UFC's Alleged Control of MMA's Elite Talent and Market

By Jess A. Contreras & Michael S. Carroll, PhD

In 2015, MMA fighters Cung Le, Nathan Quarry, Jon Fitch, Brandon Vera, Luis Javier Vasquez, and Kyle Kingsbury (collectively the Plaintiffs) filed a lawsuit on behalf of themselves and other MMA fighters according to Rule 23 of Federal Rules of Civil Procedure against Defendant Zuffa, LLC, which is known as the "UFC" (*Le v. Zuffa, LLC*, 2018). *Le v. Zuffa*, LLC includes the previously named Plaintiffs plus UFC fighters who fought for Defendant from December 16, 2010 to June 30, 2017. Since the close-out period was June 30, 2017, former UFC fighters Kajan Johnson and Clarence Dollaway filed a similar lawsuit *(Johnson v. Zuffa, LLC*, 2021) to *Le v. Zuffa*, LLC in 2021. *Johnson v. Zuffa, LLC* included Johnson, Dollaway, and UFC fighters who competed in the UFC from July 1, 2017 until the recent settlement in 2024.

Both lawsuits were filed as a civil antitrust action under Section 2 of the Sherman Act, 15 U.S.C. § 2, for the damages and other relief out of Defendant's ability to monopolize its power to promote MMA fighter bouts and MMA fighters services (*Johnson v. Zuffa, LLC,* 2021 *Le v. Zuffa, LLC*, 2018). Both cases alleged that the UFC utilized its power to prevent the fighters from fighting in rival MMA promotions during and after their career in the UFC. The UFC also exploited and expropriated its fighters' identities through UFC-licensed merchandise and/or UFC promotional material (*Le v. Zuffa, LLC*, 2018).

MONOPOLY POWER

A monopoly in business is defined as limited competition in a market with few to no product substitutes (Hayes, 2024). In *Le v. Zuffa, LLC*, it is alleged that the UFC built and maintained its monopoly power in the Relevant Input Market through exclusionary tactics, including purchasing actual or potential MMA rival companies. Additionally, the UFC controlled the MMA fighter market by signing all the top MMA fighters, preventing any rival MMA company from signing the top fighters. The UFC had exclusive deals with physical venues and MMA sponsorships that only allowed those venues and sponsors to work with the UFC. If the venue or company did not agree to the exclusive terms to work strictly with the UFC, the company did not use its services. Through these alleged schemes by the UFC, the company had the best fighters, the most prominent sponsors, and key physical and television venues (*Le v. Zuffa, LLC*, 2018).

MONOPSONY POWER

A monopsony is a single buyer who controls the market and drives consumption prices up (Young, 2023). The UFC allegedly had monopsony power in the market for the top MMA fighters in the world (*Le v. Zuffa, LLC*, 2018). The UFC controls the number of fights an MMA fighter will have while controlling their pay. Even if a fighter is unhappy with their contract, no alternative promotion will pay the fighter their worth, since the UFC controls the demand and compensation for the top MMA talent. With the ability to control the Relevant Input Market, the UFC can pay fighters below their market value for a set amount of time, artificially suppress the demand for the top MMA fighter's service below their value, require fighters to sign restrictive contracts, prevent UFC fighters from working with rival promoters, utilize UFC fighter's identities with little to no compensation, and use the UFC fighter identities in UFC Licensed Merchandise and/or Promotional Materials licensed or sold by the UFC (*Le v. Zuffa, LLC*, 2018).

With the UFC's anticompetitive scheme alleged herein, the UFC has been able to maximize its profits while underpaying the fighters through the revenue generated from bouts. The case states that UFC fighters are paid 10-17% of the total UFC revenues from bouts (*Le v. Zuffa, LLC*, 2018). In boxing, another combat sport, boxers earn more revenue from a fight card. The comparison made in *Le v. Zuffa, LLC* is to boxing promoter Bob Arum, who pays his fighters 80% of the proceeds generated by the fight card (*Le v. Zuffa, LLC*, 2018).

With all the complaints filed against the UFC two days before the trial began (March 15, 2024), TKO Group Holdings, Inc. (UFC ownership) agreed to settle all claims in both lawsuits against UFC. The settlement amount was $335 million, which would be paid in installments over a set period (Martin, 2024). The potential damages the fighters suffered through the set timeframe are estimated to be between $894 million and $1.6 billion (Martin, 2024).

CONCLUSION

The fact that neither lawsuit went to trial is not an excellent sign of the future of UFC fighters' pay and compensation. UFC President Dana White was asked about better pay and fighter health and responded that the organization is in an era where everyone wants to win a trophy, and not everyone wins a trophy (Guarino, 2023).

Perhaps the best solution would be for the fighters to start a fighter's union similar to the player's union in other professional sports. Without a union to protect fighters from the UFC, the company will continue to operate as it did before the lawsuits. Fighters have previously tried to form MMA fighter unions like the Mixed Martial Arts Athletes Association (MMAAA), Professional Fighters Association (PFA), and Mixed Martial Arts Fighters Association (MMAFA). However, none of them have been successful in uniting the fighters together. In 2018, former UFC fighter Leslie Smith started Project Spearhead, which was her attempt to unionize UFC fighters. Later that year, Smith was scheduled to fight Aspen Ladd on April 21, 2018. However, the bout was canceled due to Ladd missing weight. The UFC usually only pays a fighter who made weight their show money if their opponent misses weight and the bout is canceled. The UFC paid Smith her show and win money and would release Smith afterward. Smith was coming into the bout against Ladd on a two-fight win streak, so the sudden release from the UFC is strange. Smith stated on The Wrestling Inc. Daily podcast in 2020 that she believed her release was due to her attempt to unionize the fighters (Ounpraseuth, 2020). Smith would file charges against the UFC for being released, but the charges would eventually be dropped.

Another option could be for fighters to push Congress to adopt an MMA version of the Muhammad Ali Boxing Reform Act, or the "Ali Act." This Act protects fighters' rights by preventing exploitive, oppressive, and unethical boxing business practices (United States of America, 2000). The UFC was purchased in 2001 for $2 million and was sold for $4 billion in 2016. In 2024, the company is estimated to be valued at $11.3 billion (Ozanian & Teitelbaum, 2024). The company continues to increase in value, and it is up to the fighters to step out of the octagon and legally fight for their earned percentage of the revenue generated by the UFC.

References

Guarino, N. (2023, April 15). The fight for unionization in the UFC. https://ublawsportsforum.com/2023/04/15/the-fight-for-unionization-in-the-ufcHayes, A. (2024, March 2). What is a monopoly? Types, regulations, and impact on markets. Investopedia. **https://www.investopedia.com/terms/m/monopoly.asp#:~:text=A%20monopoly%20is%20a%20business%20characterized%20by%20a,there%20are%20no%20similar%20substitutes%20for%20its%20product**.

Johnson v. Zuffa, LLC, Case No.: 2:21-cv-01189-APG-VCF (D. Nev. 2021). Retrieved from **https://www.classaction.org/media/johnson-et-al-v-zuffa-llc-et-al.pdf**

Le v. Zuffa, LLC, Case No.: 2:15-cv-01045-RFB-(PAL) (D. Nev. 2018). Retrieved from **https://casetext.com/case/le-v-zuffa-llc-10**

Martin, D. (2024, March 20). UFC reaches a settlement to close out antitrust lawsuits; promotion agrees to pay out $335 million. Retireved from **https://www.mmafighting.com/2024/3/20/24106823/ufc-reaches-settlement-to-close-out-antitrust-lawsuits-promotion-agrees-to-pay-out-335-million**

Ounpraseuth, J. (2020, November 20). Leslie Smith discusses UFC cutting her while she was attempting to unionize fighters. Retrieved from **https://www.wrestlinginc.com/news/2020/11/leslie-smith-discusses-ufc-cutting-her-while-she-was-677147/#:~:text=In%202018%2C%20after%20the%20UFC%20paid%20Smith%20her,her%20for%20trying%20to%20unionize%2C%20which%20is%20illegal**

Ozanian, M., & Teitelbaum, J. (2024, April 18). The most valuable combat sports promotions 2024. Forbes. Retrieved from **https://www.forbes.com/sites/justinteitelbaum/2024/04/18/the-most-valuable-combat-sports-promotions-2024/?sh=30fa0279abde**

United States of America. (2000). H. R. 1832 (106th): Muhammad Ali

Boxing Reform Act. Retrieved from https://www.govinfo.gov/content/pkg/BILLS-106hr1832enr/pdf/BILLS-106hr1832enr.pdf

Young, J. (2023, February 20). Monopsony: Definition, causes, objections, and example. Investopedia. Retrieved from https://www.investopedia.com/terms/m/monopsony.asp#:~:text=A%20monopsony%20refers%20to%20a%20market%20dominated%20by,geographical%20constraints%2C%20government%20regulation%2C%20or%20unique%20consumer%20demands.

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Trial Court's Decision Affirmed; Defendant Held Not Liable for Surfing Injury

By Guoxin Sun & Michael S. Carroll, PhD

This Appellate decision stems from a case that involves Mark Olson and Patrick Saville, who were both part of a surfing group. Saville was riding a custom longboard without a leash at Miramar Beach in Montecito, when Olson caught a wave. Olson alleged that Saville deliberately cut off his path of travel and continued surfing forward, ignoring his evasive action, which led to a collision in which Olson was struck by Saville's board. Olson pursued legal action against Saville for liability of negligence, arguing that Saville's actions were reckless and displayed a wanton disregard for safety of others, particularly because he was not using a leash and had a sharp fin on his longboard.

Saville moved for summary judgement on the grounds that Olson's negligence cause of action was barred under the primary assumption of risk doctrine. The trial court granted Saville's motion for summary judgement, which dismissed Olson's claim for liability. The court determined that the inherent risks of the sport of surfing included surfers "dropping in" on each other, not wearing leashes while riding longboards of the type used by Saville, and using surfboard with sharp fins. Olson appealed the decision, not disputing the application of the primary assumption of the risk but contending that there were triable issues of material fact regarding Saville's recklessness and the heightened risks he posed. The appellate court conducted a de novo review of the case, construing the evidence in support of Olson and resolving any doubts concerning evidence in his favor. The appellate court exercised discretion regarding the following legal issues.

Primary Assumption of Risk

First, the court determined that the application of the doctrine of primary assumption of risk was appropriate to this case by considering the related case law, published materials, and documentary evidence, in addition to the common experience. The court took into account the following factors:

1. Principle of Primary Assumption of Risk Doctrine: The court applied the doctrine of primary assumption of the risk, which bars liability for injuries caused by a negligent participant in a sport to another participant if those injuries were caused by risks inherent in the activity. It rests on a need to avoid chilling vigorous participation in or sponsorship of recreational activities by imposing a tort duty to eliminate or reduce the risks of harm inherent in those activities.

2. Case Precedent: In California, the assumption of risk doctrine had been applied to cases in a variety of sports, particularly in skiing. The court considered the precedents set by skiing cases, which could exert a significant influence on the current case involving surfing. The comparison drawn between skiing and surfing highlighted common characteristics, such as the use of a nature propulsion mechanism, similar equipment, and right-of-way. The resemblance supported applying the assumption of risk doctrine to surfing.

3. Expert Testimony: The court received expert testimony on the sport of surfing for the purpose of determining whether the inherent risks of the activity were increased by the defendant's conduct. Ian Cairns, a champion surfer and coach, opined that surfing was an extreme sport with many inherent risks, including the known risk of collision. He emphasized that though the sport was largely regulated by un-

written surfing etiquette encompassing priority, right-of-way, and sharing waves, actions violating rules of surfing etiquette like choosing to forego leashes and modifying boards were common practices. Additionally, surfers were supposed to be aware of both the inherent risks of surfing and the potential harm from etiquette violations.

Negligence

Olson's expert did not oppose the core components of Cairn's opinion, including that surfers commonly collided and lost control of boards; that boards had sharp fins that can cause injury; and that some surfers chose to forego leashes because they can inhibit speed and agility. Consequently, the appellate court concurred with the trial court that the primary assumption of risk doctrine precluded Olson's claim of negligence unless there was evidence demonstrating that Saville acted recklessly or increased the inherent risks of surfing.

Recklessness

Olson's expert, Shaun Tomson, argued that Saville's conduct was reckless and increased the risks of surfing based on several factors:

1. Surfing Code and Rules of Etiquette: Tomson contended that Saville failed to adhere to the Surfers Code and Rules of Etiquette, thereby increasing the risk of harm to others. He further cited examples of such etiquette, including observing the right of way of others, looking for other surfers before entering the wave, avoiding cutting off others' path, holding onto one's own board, wearing a leash, and being aware of other surfers nearby. Tomson expressed the view that Saville's actions exhibited a conscious and reckless disregard for the safety of fellow surfers.

2. Surfing Policy: Tomson supported his conclusion by citing the "Leash/Legrope Policy" from the International Surfing Association (ISA) Rule Book as further evidence, asserting ISA as "the World Governing Body for surfing." While the policy did mandate leash/legrope use at events, it also allowed riders discretion for free surfing, stating the use of a leash was recommended if there was a possible danger to third parties, but it was not mandatory. Despite Tomson's argument that the use of a leash was advisable in such situation, its persuasiveness was limited given that the accident occurred within the realm of leisure sport rather than professional sport.

3. Case Precedent: Olson referenced the *Campbell v. Derylo* (1999) California appellate decision in support of his case, in which the appellate court overturned the trial court's grant of summary judgement for a plaintiff based on the grounds of primary assumption of risk involving a snowboarding accident. In *Campbell*, the court ruled that the defendant's failure to use a retention strap increased the inherent risk of injury to coparticipants from a runaway snowboard. The court cited both a local ordinance as well as a Skier Responsibility Code posted at the ski resort, requiring the use of a retention strap. Furthermore, it was accepted that using a strap would not impede or alter the sport of snowing board or chill or deter vigorous participation.

However, the appellate court distinguished Olson's case from that of *Campbell* based on the fact that there were no regulations governing the use of surfboard leashes, nor were there posted signs at Miramar Beach. Additionally, Olson did not contest Cairn's opinion that a leash could change the nature of the sport of surfing by interfering with a longboard surfer's footwork and speed and by creating tripping hazards to surfers who walked on their board. As such, the court found a clear distinction between these two cases, with no application of case precedent.

Acknowledgement of Risk

Olson admitted several facts about the sport of surfing, including the routine nature of surfing without a leash, a leash's obstruction effect to a surfer's movements, the chances/likelihood of a collision between surfers, observation of loss of control of the board, and the likelihood of being cut off from a wave. These facts lent credence to the argument that a failure to follow the rules of etiquette is widespread among surfers.

Preserving Athletic Enthusiasm

In addition, the court took into consideration the role of the primary assumption of risk doctrine in safeguarding

the flourishing of athletic activities. In sports, this doctrine shields sport participants from liabilities for unforeseeable accidents and avoids a flood of litigation related to sport injury, preserving the enthusiasm of athletic competitors.

Conclusion

Because Olson had fully acknowledged the inherent risks of surfing, the principle of primary assumption of risk doctrine, which barred ordinary negligence, was applied. Olson needed to demonstrate Saville's recklessness within his actions in order to establish liability and thus recover damages. Unfortunately, Olson's expert only described that Saville was supposed to reduce the risks of sport by exercising a duty of care, which did not rise to the level of recklessness. Even though both parties' experts agreed on Saville's breach of surfing etiquette, there was a lack of direct evidence to sustain an absolute prohibition against cutting off other's path, surfing without a leash, or modifying a surfboard. On the contrary, these practices were commonplace and widely observed in the community of surfing, thus rationalizing Saville's actions. Athletes are generally not held liable for injuries resulting from their unintentional actions, as this helps to maintain the continuation of sports. As a result, the charge of recklessness was not substantiated, and the appellate court affirmed the trial court's judgment.

References

Olsen v. Saville, 2d Civ. No. B324465 (Cal. App. 2nd., 2024). Retrieved from **https://law.justia.com/cases/california/court-of-appeal/2024/b324465.html**

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Lawsuits Against NFL, Fanatics Evokes *American Needle* Case

By Christopher Deubert, Senior Writer

In 2010, the sports industry had one of its rare opportunities for the Supreme Court to weigh in on a major legal issue. In *American Needle, Inc. v. NFL*, 560 U.S. 182 (2010), the Court unanimously decided that the NFL's 32 clubs were not a single entity under antitrust law for purposes of licensing intellectual property and thus were subject to legal challenges. That case is relevant to multiple actions brought against the NFL, its clubs, and Fanatics, a licensed retailer of NFL products. In those cases, Casey's Distributing, Inc.,[1] a retailer, and Charles Franz,[2] a consumer, allege that the defendants have conspired to dominate the retail market for online sales of NFL licensed products in violation of antitrust laws. The cases could, once again, have important impacts on the sports licensing landscape.

Revisiting *American Needle*

American Needle, a Chicago-based headwear company, was a longtime licensed manufacturer of headwear containing NFL club intellectual property, *i.e.*, it sold hats with NFL team logos on them. Prior to the 2001 season, the NFL and Reebok entered into a ten-year deal whereby Reebok would be the exclusive apparel licensee of the NFL, at a cost of $250 million. American Needle, and other manufacturers like it, suddenly no longer had the legal right to NFL club-branded merchandise.

In 2004, American Needle sued the NFL and its clubs, alleging that the arrangement with Reebok violated antitrust laws. More specifically, American Needle alleged that the agreement violated Section 1 of the Sherman Antitrust Act, which prohibits the unreasonable restraint of trade in a market by a multiplicity of actors. The NFL and its clubs argued that for purposes of licensing intellectual property, which it did through an entity known as NFL Properties, they were a single-entity and therefore incapable of violating Section 1. They made this argument despite some version of it being previously rejected several times before.3

After prevailing at the lower courts, the Supreme Court unanimously disagreed with the NFL's arguments and reversed. As explained by the court, "competitors

1 *Casey's Distributing, Inc. v. National Football League*, 22-cv-3934 (S.D.N.Y.).

2 *Franz v. National Football League*, 23-cv-11288 (S.D.N.Y.).

3 See Gabe Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 Wis. L. Rev. 835 (2009).

cannot simply get around antitrust liability by acting through a third-party intermediary or joint venture."

The American Needle case was remanded to the district court where the parties engaged in litigation centered around ultimately evaluating whether the NFL's Reebok deal could survive antitrust's rule of reason test, which essentially weighs the anticompetitive effects of the arrangement against its procompetitive effects. In April 2014, the court denied dueling motions for summary judgment. *Am. Needle, Inc. v. New Orleans La. Saints*, 2014 WL 1364022 (N.D. Ill. Apr. 7, 2014). In particular, the court rejected the NFL' argument that American Needle's proposed product market - the wholesale market for NFL trademarked hats – was too narrow to state a claim under antitrust law. The case subsequently settled, after eleven years of litigation.

The New Lawsuits

The new actions allege that the NFL and Fanatics have conspired to limit the ways in which officially licensed merchandise can be sold online, resulting in supra-competitive prices.

The genesis of the factual allegations is the NFL's 3% investment in Fanatics in 2017 for $95 million. At the time, Fanatics was only in the merchandising business and was valued at a reported $4.5 billion. The company has since moved into sports betting and, per the complaint, is worth $27 billion today.

The complaints allege that after the NFL's investment in Fanatics, through which Fanatics also began to licensed retailer of NFL-branded sportswear, the parties sought to prevent the sale of licensed products through third-party online marketplaces (TPOMs), such as Amazon. Instead, the NFL only wanted licensed products to be sold through the Fanatics website or the NFL's website (which Fanatics controlled), even though other retailers had obtained the right to use NFL intellectual property.

The defendants allegedly accomplished this goal in two main ways. First, they contractually prohibited licensors from selling their licensed products through TPOMs and boycott any they did so. These restrictions would seem to make it hard to find licensed products since TPOMs are the principal method by which consumers purchase products online. Further to that point, the complaints allege that Amazon is responsible for 38-48% of the e-commerce retail market. Second, the defendants allegedly prohibited retailers from using NFL-related keywords in online advertising. For example, according to the complaint, a retailer selling a shot glass with a Miami Dolphins logo is limited to describing the product as a "shot glass" without any reference to the team. As a result, any internet searches for NFL-licensed products would result in the NFL and Fanatics websites being at the top of the search results.

Only when the NFL sold the broadcast rights to its Thursday night games to Amazon, did NFL-licensed products begin to be approved for sale on its website. But even then, it was Fanatics operating the NFL's "storefront" on Amazon. Consequently, whereas Fanatics and Amazon previously competing outlets for buying NFL gear, they were now working together. Moreover, Amazon allegedly agreed to prohibit sales of NFL-licensed products unless the NFL had approved the retailer.

The alleged end results of these agreements are limited retail avenues and supercompetitive prices for NFL licensed products.

Arbitration End Around

Franz's complaint was not his counsel's first bite at the consumer complaint apple. They had filed a substantively identical lawsuit in March 2022. However, the Court granted the defendants' motion to compel that action to arbitration based on the Terms of Use on the Fanatics and NFL websites. *Maldonado v. Nat'l Football League*, 2023 WL 4580417 (S.D.N.Y. July 18, 2023).

The plaintiff in the instant suit alleges he avoided agreeing to arbitration because he "used a third-party digital wallet and was not presented with any hyperlink or other text indicating that by completing his order he purportedly would be agreeing to Defendants' Terms of Use."

The Defendants' Motion to Dismiss

In October 2023, the NFL and Fanatics moved to dismiss the Casey's case. The NFL argued that its Online Distribution Policy (ODP), which requires retailers to obtain the NFL's approval before selling licensed NFL merchandise, is pro-competitive because it "supports retailers who invest the time and resources to create a positive, consumer-friendly, and successful

retail experience that reflects the prestige and quality of the NFL brand." Next, the NFL insists the ODP is legal downstream restraint "imposed by a single actor" - NFL Properties. Consequently, the NFL asserts, it "has every right to refuse to deal with licensees who allow NFL merchandise to appear on third party sites like Amazon without approval." Additionally, the NFL argues that Casey's lacks standing because it is not a licensee of NFL trademarks. Fanatics filed its own motion to dismiss relying on much the same arguments, and also arguing that Fanatics does not have market power in any relevant antitrust market.

Casey's responded by asserting that the restraints are horizontal – not vertical. The first step in this argument is unpacking NFL Properties into the 32 individual clubs, a position seemingly supported by *American Needle*. Casey's argues that the clubs, the NFL, and Fanatics have come together to "concentrate and control" the TPOM market for NFL licensed products and have unlawfully boycotted Casey's from that market.

In March 2024, Judge Andrew L. Carter, Jr., assigned to both cases, stayed the *Franz* action pending the outcome of the motion to dismiss *Casey*'s complaint.

American Needle Redux?

The market for NFL licensed apparel is undoubtedly robust. It is thus perhaps not surprising then that the way in which the NFL controls or asserts its authority in such a market might attract antitrust scrutiny, particularly when it partners with Fanatics and Amazon, both behemoths in their own industries. While the NFL and Fanatics have multiple arguments in their motions to dismiss, it seems that one of the major issues will again be a consideration as to whether NFL Properties is a single-entity or really 32 clubs that should be competing as much off-the-field as they do on it.

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Massachusetts Judge Green Lights Stadium Renovation Project for NWSL Team

A Massachusetts state court judge denied various neighborhood groups' request for a temporary restraining order and preliminary injunction that would have stopped the renovation of Franklin Park's White Stadium.

The groups, which call themselves the Franklin Park Defenders had argued that the project did not follow proper protocols and would ultimately privatize a public space.

The $80 million project is supported by Boston Mayor Michelle Wu's administration and Boston Unity Soccer Partners (BUSP), with plans calling for the stadium's use as the home field for Boston's future National Women's Soccer League (NWSL) team, which begins play in 2026.

The court wrote that the "Proposed Use Agreement, establishing the hierarchy of Stadium uses, further reinforces the predominant public purpose. The scheduling of professional soccer games and practices would be preempted by BUPS sporting events and ceremonies, as well as public festivals and events. The private benefits are not primary, but instead subsidiary to White Stadium's public purposes."

BUSP praised the ruling, noting that it "demonstrates the court's understanding that the communities around Franklin Park and White Stadium should not have to wait any longer for the decades of neglect and underuse to be addressed."

Meanwhile, the spokesperson for the plaintiffs, Karen Mauney-Brodek, pointed out that they will continue to fight the project, since it is supported by $50 million in taxpayer funds. "We will continue to stand up for the students of Boston, who deserve a state-of-the-art public White Stadium and should not have to yield to the demands of for-profit investors to get it," she said.

Mayor Wu also praised the court's decision.

"I'm thrilled to see the court's clear ruling that this frivolous lawsuit from the Emerald Necklace Conservancy must not block our ongoing community engagement to deliver a generational investment in White Stadium and Franklin Park," she said. "Now, for the first time since the stadium's opening, the City has a committed partnership to invest in and sustain the improvements that our students, park lovers, and neighbors deserve—while dramatically expanding the hours of usage for BPS sports and community events."

In the months since the decision, Mauney-Brodek has maintained that the fight will continue.

BUSP welcomed the challenge.

"As indicated by the judge's ruling last month, there is no legal basis to challenge this public-private-community partnership to revitalize White Stadium," BUSP said in a statement. "The (plaintiffs') sentiments are not consistent with the feedback we've heard from neighbors, civic leaders, community groups and elected officials in our more than 180 meetings and conversations since starting the process over a year and a half ago."

Articles

Panel at SLA Conference Tackles Sports Betting's Changing Landscape

By Gina McKlveen, Esq.

The sports betting landscape is ever evolving and changing as more states across the country legalize this betting activity and technology continually helps it develop. Speaking on "Legal Bets: Navigating Sports Betting a Legal Realities" Jill Kelly, former General Counsel of PointsBet, current General Counsel and Vice President of Legal Affairs for the New York Jets and Jennifer Roberts, General Counsel and Vice President of WynnBET tackled topics in sports betting during a panel discussion moderated by Christopher Harrington, Senior Corporate Counsel of DraftKings.

Of note, the panelists emphasized the importance of collaboration, be it aligned interests between operators and sports betters, state partners and league teams, and especially tribal and non-tribal gambling facilities. The latter has been a topic of conversation in political discourse and a topic ripe for litigation in the courts, including the United States Supreme Court ("SCOTUS").

Specifically, in late October 2023, SCOTUS issued a two-page order denying a request by two non-tribal, Florida-based casinos to temporarily stay a U.S. Court of Appeals For the District of Columbia Circuit ("D.C. Circuit") decision that permits a compact allowing a Seminole Tribe of Florida to operate online sports betting beyond tribal lands to anyone in the State of Florida. The case, *West Flagler Associates, Ltd. et al. v. Debra Haaland, Secretary of the Interior, et al.*, dates back to June 21 2021, when Secretary of the Interior, Debra Haaland, received a copy of a gaming compact between the State of Florida and the Seminole Tribe of Florida, which expanded the Tribe's ability to host sports betting throughout the State.[4] The compact was approved by default on August 5, 2021.[5] Secretary Haaland then wrote an approval letter to the Tribe, explaining this decision. Her letter explained that the Indian Gaming Regulation Act ("IGRA"), allows the Tribe to offer online sports betting to persons who are not physically located on its tribal lands, but insists Florida residents could not place sports bets while physically located on another tribe's lands.[6] The reasoning behind Secretary Haaland's decision was that the IGRA supports negotiations between states and tribes and Florida consented to the compact with the Tribe.[7]

On August 11, 2021, in accordance with the proper legal procedures, Secretary Haaland published a notice of the compact in the Federal Register.[8] On November 1, 2021, the Tribe launched online betting.[9] However, following the compact taking effect and prior to the Tribe launching online betting, two non-tribal, Florida-based casinos, West Flagler Associates and Bonita-Fort Myers Corporation, brought a civil action to challenge Secretary Haaland's approval of the Compact.[10] The casino-plaintiffs argued that IGRA only authorizes gaming compacts to be made on tribal lands, not non-tribal lands; therefore, Secretary Haaland's approval of the compact violated federal law.[11] United States District Judge for the District of Columbia, Judge Dabney L. Fredrich agreed and granted the casino-plaintiffs request to reject the previously-approved compact.[12]

4 *See* https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2021cv02192/234532/43/.

5 *See id.*

6 *See id.*

7 *See id.*

8 *See id.*

9 *See id.*

10 *See id.*

11 *See id.*

12 See id.

Secretary Haaland appealed this decision. Last year, on June 30, 2023, the D.C. Circuit reversed the lower court's decision and reinstated the gaming compact, allowing the Tribe to continue online sports betting throughout the State. With SCOTUS's recent opinion to decline to stay the D.C. Circuit decision, this sports betting operation remains in effect.[13]

As both panelists, Roberts and Kelly noted, tribes will continue to have a big say in what happens in the sports betting scheme amongst the states. Kelly referenced California as a state that will be keeping a careful eye on the state of online sports betting in Florida, after tribes in California defeated major gambling operators not just from legalizing sports betting in California, but ensuring that the issue will not be brought to a vote until at least 2025, at the earliest.

Gina McKlveen is a litigation associate based in Pittsburgh, Pennsylvania. In 2021, Gina graduated from The George Washington University Law School (GW Law) with recognition for her pro bono achievements and by the National Association of Women Lawyers (NAWL) for her contributions as President of GW's Law Association for Women. She concentrates her legal practice in the areas of art law, intellectual property, nonprofit formation and governance, and sports & entertainment. To contact Gina directly email her at: **gmcklveen@law.gwu.edu**.

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Sticking the Landing: Considerations for College Athletics Stakeholders Implementing Recent NCAA Rule Changes

By Traci Bransford and Lexi Trumble, of Parker Poe

The ever-evolving collegiate athletics landscape experienced yet another seismic shift in April 2024 when the NCAA Division I Board of Directors ratified two rule change proposals from the Division I Council. that grant student-athletes two massive wins: increased flexibility to transfer schools and retain immediate eligibility and, second, access to additional institutional support and assistance with name, image, and likeness (NIL) activities.

These changes come in the wake of significant litigation battles, targeted legislative efforts, and passionate national discourse surrounding the current and future state of college sports. Effective immediately, the changes require careful consideration by student-athletes, athletics administrators, and third parties alike to avoid potentially catastrophic legal pitfalls.

Institutional NIL Support: A Play by Play

Much like a dominant offense's shots on goal, NIL developments just keep coming following the implementation of the NCAA's interim policy in July 2021. This recent news permits institutions to increase NIL-related support for student-athletes, including by identify NIL opportunities and facilitate deals between student-athletes and third parties.

In order to receive that school support for their NIL activities, however, student-athletes are required to disclose to their school information related to NIL activities equal to or exceeding $600 in value, no later than 30 days after entering or signing the NIL agreement. Student-athletes' receipt of this increased institutional support is contingent upon their disclosure of information regarding their NIL activities, including applicable parties' contact information, services rendered, term length, compensation, and payment structure. Prospective student-athletes will be required to disclose the same information for pre-enrollment NIL activity within 30 days of enrollment to accept school assistance in NIL activities after becoming a student-athlete. The NCAA clarified that student-athletes are not obligated to accept assistance from the school and that they must maintain authority over the terms in their own NIL agreements.

Important guardrails still surround NIL activity. Critically, the NCAA stated explicitly that existing prohibitions against outright pay-for-play and schools compensating student-athletes directly for use of their NIL will remain in place.

The NCAA contends that those prohibitions remain in effect even though NCAA President Charlie Baker announced in March that enforcement staff would "pause and not begin investigations" related to certain categories of NIL infractions. Reconciling that enforcement suspension with the NCAA's stated caveats

13 *See* https://www.supremecourt.gov/opinions/23pdf/23a315_3d9g.pdf.

to permitted NIL activity expansion will require colleges and universities to carefully consider conflicting authority from the NCAA, federal courts, and state legislatures.

Of note to athletics administrators and compliance staff, suspension of the NCAA's investigative and enforcement actions related to "inducement" activities does not preclude the NCAA from continuing or commencing investigations related to other guardrails, such as those that state NIL deals must include quid pro quo, compensation cannot be conditioned on performance, and schools cannot pay players directly. Recent legislative efforts, however, including Virginia's modification of NIL laws to allow schools to bring NIL operations in-house and directly compensate student-athletes for the use of their NIL and North Carolina's rescission of its Executive Order guiding NIL compensation, undoubtedly create inconsistent state-by-state and institution-by-institution policies and procedures.

Compliance with federal statutes, including Title IX, remains paramount as schools adjust to recent developments. Title IX of the Education Amendments of 1972 is a federal law that prohibits sex discrimination in any federally funded education program or activity and requires gender equity in 13 different athletics program areas. Institutional support for or facilitation of NIL activities may implicate at least two of those Title IX program areas — athletic financial assistance and publicity.

With respect to athletic financial assistance, the U.S. Department of Education's Office for Civil Rights (OCR) has declared in guidance documents related to athletic scholarships and cost of attendance that "athletic financial assistance includes any financial assistance expenditures through the institution's athletics program and any other aid that is connected to a student's athletic participation." Direct compensation of student-athletes for NIL activities flowing from an education institution may effectively double schools' budgets for such NIL payments: Title IX may require the school to make equivalent benefits proportionately available to male and female athletes.

The requirement to equitably provide male and female student-athletes with publicity resources is also likely triggered when institutions exercise greater control over NIL activities. Schools are required to expend equitable efforts to publicize male and female athletes, and permission to offer increased "assistance in supporting [NIL] activities" granted by the NCAA in May does not relieve institutions of that gender equity mandate.

Institutions should engage experienced legal counsel to advise coaches, athletics administrators, compliance staff, and other athletics stakeholders on the complex regulatory and statutory schemes governing NIL activities. As the NCAA and state legislatures continue to move the chains with respect to "permissible" NIL activities, Title IX remains a pivotal piece of civil rights law and requires schools to promote aggregate gender equity.

Transfer Athletes' Eligibility: Out of the Penalty Box

Effective immediately, Division I student-athletes who transfer will be immediately eligible to play at their next school, regardless of whether they transferred previously — as long as they meet certain academic eligibility requirements. Under the new guidelines, transfers must have left their previous school in good standing (not subject to disciplinary suspension or dismissal) while academically eligible and will have to meet progress-toward-degree requirements at their new school in order to receive immediate eligibility. Student-athletes are expected to enter the transfer portal within their sport's notification-of-transfer windows (except in the case of departure of a head coach or discontinuation of a sport), and athletes are not able to transfer mid-year and play for a new school in the same athletic season. Division II leadership passed similar legislation eliminating year-in-residence requirements and implementing new academic standards for immediate eligibility.

The revision of the transfer eligibility rules intersects with changes to permissible NIL activities in that schools must now contend with NIL discussions related not only to attendance at a particular institution but now also related to retention. As student-athletes consider significantly expanded enrollment options for their collegiate athletics career, schools should remain mindful of rules restricting (or permitting) NIL opportunities related to recruitment and retention.

Conclusion: Reviewing the NCAA's Game Film

Recent rule changes for Divisions I and II represent the continuation of shifting attitudes toward and regulation of collegiate athletics nationwide. Consultation with experienced legal counsel is critical as colleges and universities grapple with implementing recent developments and avoid potentially costly legal landmines.

Particularly for institutions that elect to bring NIL activities in-house, athletics budget line items related to those NIL activities may increase exponentially, resulting in a financial flag on the play as such transactions constitute permissible enrollment or transfer inducements and as Title IX requires aggregate gender equity.

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Virginia's Revolutionary Approach to Compensation in Collegiate Athletics

By Joseph M. Ricco IV

Virginia looks to set a groundbreaking precedent in the evolving Name, Image, and Likeness (NIL) space with the ratification of House Bill (HB) 1505, reshaping how student-athletes may receive compensation. Governor Glenn Youngkin signed House Bill 1505 into law on April 18, 2024, enacting legislation that permits Virginia's universities to directly compensate their athletes, thereby challenging NCAA restrictions and establishing the Old Dominion state as a leader in the national evolution of NIL rights. The intention behind this law is to enable Virginia's universities to directly offer incentives to their athletes, aligning compensation with professional representation and marketing freedoms. This article will explore the intricate details of House Bill 1505, assess its implications for Virginia's colleges and their athletes, and analyze the potential ripple effects across the national collegiate sports landscape.

What is House Bill 1505?

House Bill 1505 represents a significant legislative shift within the realm of collegiate athletics, directly challenging the traditional framework governed by the NCAA. The bill, endorsed by Virginia's legislative body and signed into law by Governor Glenn Youngkin, establishes a legal basis for universities within Virginia to engage directly in NIL compensatory activities with their student-athletes. Under this new legislation, Virginia universities are no longer passive entities in the NIL transactions, but rather active participants, capable of offering compensation for the use of an athlete's name, image, and likeness. This transformative approach breaks away from the NCAA's long-standing regulations that prohibit educational institutions from compensating athletes beyond traditional scholarships.

The legal framework of HB 1505 is meticulous in ensuring that these engagements are structured within a regulated environment. It mandates that each university develop and adhere to a set of clear policies approved by their respective governing boards. These policies must detail the permissible scope of NIL activities, ensuring they do not conflict with academic commitments and uphold the integrity of both the sports and academic programs. Furthermore, the bill specifically prohibits any NIL agreements related to alcohol, tobacco, gambling, and other sectors deemed inappropriate, thus safeguarding the welfare of student-athletes. Importantly, the legislation also empowers athletes by providing them the right to secure professional representation and legal advice, ensuring they are fully informed and supported as they navigate their NIL opportunities.

Redefining the Landscape

As House Bill 1505 is set to take effect on July 1, 2024, Virginia's universities are primed to experience immediate changes in their approach to athlete compensation. This progressive legislation not only challenges the existing NCAA restrictions, but it also places Virginia at the forefront of the NIL evolution, potentially influencing other states to reassess their own NIL regulations. In the short term, universities within the state

will need to swiftly develop and implement policies that align with the new law, preparing for a new era in athlete recruitment and retention. This may see Virginia institutions gaining a significant early advantage in attracting top talent, as they can now offer direct NIL compensation that is still prohibited in other states.

However, while Virginia sets a precedent with its approach to direct NIL compensation, the majority of other states have yet to begin enacting similar legislation allowing universities to engage directly in financial interactions with their athletes. This discrepancy could create immediate pressures for legislative changes across the country as other states might rush to introduce similar measures to avoid losing competitive edge. Therefore, the impact of Virginia's law could be a catalyst for a rapid reformation of college sports nationally, compelling both the NCAA and other state legislatures to reevaluate their current NIL policies. As colleges and universities navigate these new regulations, the first few academic years following the implementation of HB 1505 will be critical in setting precedents and potentially reshaping the national approach to university-sanctioned student-athlete compensation.

Expert Analysis

With HB 1505 preparing to transform the collegiate sports landscape, legal experts weigh in on its potential effects and challenges. Drew Dorner, an attorney at Duane Morris, recently highlighted in a blog that the new law, effective July 1, 2024, imposes significant restrictions on the NCAA's enforcement capabilities. Dorner wrote, "Virginia's amended law not only reaffirms the rights of student-athletes to earn from their NIL but also introduces a private right of action, allowing aggrieved athletes and institutions to seek legal redress against any adverse actions from the NCAA or other athletic bodies." This legal empowerment is seen as a critical step toward ensuring compliance and protecting the interests of players and educational institutions alike.

Adding to the discussion, sports attorney Mit Winter, from the law firm Kennyhertz Perry, shared his perspective on the broader implications of Virginia's approach. "Virginia's law is the nation's most permissive and progressive regarding NIL rights," Winter told sources. He elaborated that the legislation not only allows universities to directly compensate athletes for marketing their teams, but it also prevents any governing associations from penalizing in-state schools for complying with state law rather than NCAA rules. This, Winter suggests, could fundamentally alter how schools engage with their athletes and promote their sports programs.

The combined insights from Dorner and Winter suggest that while Virginia's new NIL law sets a precedent, it also casts a spotlight on the NCAA's current policies and other states' legislative frameworks. Both experts agree that the push by Virginia could compel a reevaluation of NIL rules nationally, possibly leading to similar legislative changes in other states and potentially at the federal level. As Dorner noted, the growing support for such changes could enhance Virginia's position while simultaneously pushing for a harmonized national solution to the complexities of NIL compensation in collegiate sports.

Anticipating Long-Term Impacts

With the July 1, 2024 adoption date rapidly approaching, the broader implications for collegiate sports are just beginning to unfold. This legislation from Virginia is not just a regional shift, but a potential precursor for nationwide changes in the collegiate athletic landscape. Over the next few years, as Virginia's universities implement these groundbreaking changes, they will become a focal point for assessing the practical outcomes of such policies. Their experiences will likely influence other states pondering similar legislative adjustments, possibly accelerating a national reconsideration of the NCAA's traditional stance on NIL.

Looking forward, the integration of direct NIL compensation could fundamentally alter the recruitment dynamics and competitive balance across states. This shift may prompt the NCAA to modify its regulations to provide a more unified and fair playing field, reducing the disparities that could arise from a state-by-state approach to NIL compensation. Additionally, the success of Virginia's approach could push for a federal legislative framework, aiming to standardize NIL practices across the country, ensuring equity and clarity for all stakeholders involved.

When projecting further into the future, the evolution of NIL policies will likely reshape the framework of collegiate athletics, blending the line between amateurism and professional sports. This transformation

will require careful navigation to preserve the integrity and primary educational mission of collegiate sports. The changes instigated by Virginia's HB 1505 might just be the beginning of a new era, where the rights and welfare of student-athletes are more prominently recognized and valued. Ultimately, the collective experiences from Virginia's implementation will guide other states and inform national discussions on the best path forward for supporting student-athletes in a fair and sustainable manner.

Joseph M. Ricco IV is a second-year Sport Management and Government double major at the University of Texas at Austin. Joseph is actively involved as a Texas Longhorns Football Recruiting Operations Intern while also preparing to join the Kansas City Chiefs as a Training Camp Operations Intern. As the founder of the Model National Football League (MNFL) organization, Joseph merges sports management and legal insights while striving to innovate within the realm of sports law.

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The Most Powerful Legal Organization In Sports That You May Have Never Heard Of

By Christopher Deubert, Senior Writer

The NFL is an American sports colossus, gathering fans, television ratings, and revenues at prodigious rates. That growth relies in large part on the league's relations with its players. And, in turn, that relationship relies on the National Football League Management Council, an organization not well known in the public.

As explained in the collective bargaining agreement between the NFL and the NFL Players Association (NFLPA), Management Council is "the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League." In this role, for decades, Management Council has operated much like a law firm within the league structure, with its exclusive focus on legal issues between the NFL and its clubs on one hand and players on the other. In the process, it has produced countless attorneys across the sports industry and developed a reputation of prestige and influence within the sports law community.

A History of Labor Disputes

The NFL and its players have a long history of not getting along. In the 1970s, players in baseball, basketball, and hockey had secured rights to meaningful free agency through litigation and collective bargaining. When the collective bargaining agreement expired in 1982, NFL players went on strike for 57 days in an effort to obtain the same rights. However, they ultimately settled for improved salaries and benefits.

The expiration of that agreement in 1987 marked a dramatic and litigious turning point in NFL labor relations. Over the next six years, the players and the NFL and its clubs engaged in a series of lawsuits concerning the league's restrictions on player movement. After a series of wins by the players, those lawsuits ended in 1993 with a class action settlement that ushered in proper free agency and paid over $100 million in damages to players.

That settlement served as the core of a new collective bargaining agreement, the general structure of which has held ever since, including through more litigation in 2011 and a related league lockout before the parties reached a new agreement.

Management Council's Role

It may surprise some to learn that the NFL is not, itself, a legal entity – it's not a corporation or limited liability company or anything of that nature. Instead, it is an unincorporated association, a grouping of 32 individual legal entities (the member clubs), who have come together and agreed to operate the NFL. This agreement is memorialized in the NFL's Constitution and Bylaws.

To be clear, NFL clubs have created a variety of collective legal entities for purposes of conducting various parts of the league's business. Most notably, NFL Properties LLC is responsible for the joint selling of clubs' intellectual property. In 2010, in the American Needle case, the Supreme Court held that this joint venture structure did not immunize clubs from antitrust scrutiny.

Management Council too is an unincorporated association. It was formed by NFL clubs, through the processes of the Constitution and Bylaws, for the purposes of engaging in collective bargaining negotiations with

the NFLPA and then administering and enforcing the terms of the resultant agreement. Similar to the NFL, Management Council has Articles of Association and Bylaws which govern and direct its conduct.

The first NFL-NFLPA collective bargaining agreement was executed in 1968. While that agreement does not reference the Management Council, the cover of the 1970 agreement specifically declares it to be between Management Council and the NFLPA. It thus appears likely that Management Council was formed around this time for the purposes which it continues to serve to this day.

When not negotiating a new collective bargaining agreement, Management Council is responsible for the day-to-day enforcement of the existing one. It represents the NFL and its clubs in the dozens of grievances filed each year by players, acts as the prosecutor for the league's personal conduct, illegal substances, and performance-enhancing drug policies, and reviews player contracts for compliance with salary cap and other rules. Essentially any issue that touches on the player-club relationship is within Management Council's purview.

Management Council's Legal Influence

Some organizations are sufficiently prominent that their formal names get abbreviated in professional conversation. Law firms with lengthy multi-name titles frequently get shortened to just the first name in their title. One may also hear a lawyer discussing a stint at "Justice," meaning the United States Department of Justice. Like Beyonce and Madonna before her, shorthand popularly used names evidence notoriety and prestige.

In the somewhat insular world of sports and the law, "Management Council" has developed a comparable reputation. The shorthand phrase is frequently used both in discussions about goings on in the NFL and the careers of attorneys who have come from its ranks.

Indeed, Management Council's alumni are formidable. For years, its alumni have regularly moved on to work as in-house counsel or salary cap experts for clubs in the NFL. Many have gone on to become prominent attorneys working in other sports leagues, at law firms, private businesses, or in the government. Management Council's internship program has similarly included top talent and is among the most sought after in sports.

Management Council's relationship to the Sports Lawyers Association (SLA) is also important. The SLA is the preeminent organization attorneys working in the sports industry and those that aspire to. Dennis Curran, a Management Council attorney from 1980 until a recent retirement, was a long-time SLA Board Member and fostered a culture through which many Management Council attorneys attended the annual SLA Conference, spreading their influence and legal positions. Curran was replaced as Management Council General Counsel by Larry Ferazani, a former FBI Special Agent and state and federal prosecutor.

Lastly, Management Council is very much intertwined with the law firms of Akin Gump Strauss Hauer & Feld LLP and Covington & Burling LLP. Akin Gump, led by Partner Dan Nash, has been the NFL's chief labor and employment counsel for decades. Covington & Burling has been the NFL's chief outside counsel for about 70 years, particularly on player-related antitrust matters. Former Commissioner Paul Tagliabue worked there as did current NFL General Counsel Jeff Pash. Many interns, summer associates, and practicing attorneys have gone from one of these firms to Management Council or vice versa. The result has been a virtuous cycle of highly capable attorneys well-trained on the legal documents and positions important to professional sports leagues and teams.

While Major League Baseball has a Labor Relations Department (formerly known as the Player Relations Committee), that performs much the same role as Management Council, it lacks the heft, focus, and gravitas of Management Council. The NFL significantly outpaces the other leagues both in terms of revenue and profit. It stands to reason then that it would have personnel to match, both in terms of quantity and specificity. Simply put, Management Council has unrivaled reach, capability, and influence in the sports legal community.

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Ten Legal Trends for Brands to Watch When Investing in Sports Marketing

By Daniel Render, of Katten Muchin Rosenman LLP

The recent ANA Advertising Law 1-Day Conference, hosted in Katten's New York office, included a panel about current legal trends in sports marketing featuring myself as Sports and Sports Facilities Partner at the firm and Executive Vice President, Business Affairs, and Chief Legal Officer of BSE Global Jeff Gewirtz. BSE Global owns the Brooklyn Nets, the New York Liberty and Barclays Center.

Throughout the discussion, Jeff and I examined how sponsorships of and partnerships with sports leagues, teams and events continue to evolve, as well as the key legal issues that should be considered by brands investing in sports, on the one hand, and leagues, teams, and venues, on the other hand. We noted the following key considerations in particular:

Understanding Different Perspectives: To ensure that all parties' needs and expectations are met and that a deal is finalized in an efficient manner, it's crucial to understand both the brand and league/team/venue perspectives when negotiating sports marketing deals.

Business-Back Opportunities: "Business-back opportunities" are a significant motivator for brands to associate with sports venues. These opportunities may include, for example, the opportunity to serve a brand's beverages, have its IT systems used or have its credit cards be marketed as the preferred mode of transaction for a league/team or at a venue.

Community Engagement: Sports sponsorship is not just about advertising — it's also about fostering local community ties and support. A brand's chief marketing officer may encounter challenges when relying solely on marketing campaigns generated by ad agencies to organically create the goodwill associated with the sponsorship of a professional sports team that has a prolific track record and has fostered a lot of local pride. For example, if a regional bank wants to highlight community ties, having connections with a local team can be an excellent way to organically highlight its standing in the local community. In bigger markets, associating with one of the marquee teams or venues can also show the prestige of a brand.

Complexity of Sponsorship Alliances: Brands should understand the unique legal issues associated with different types of sponsorship alliances, which can range from global (such as the Olympic Games) to local/regional (local professional sports teams). For venues, naming rights sponsors are typically the most important source of sponsorship revenue – when a venue is being built and developed, the naming rights sponsor is usually the first sponsor in the door. For naming rights sponsors, category exclusivity is paramount, including protecting against "ambush marketing" and other forms of exclusivity infringement. Meanwhile, teams/venues seek to preserve flexibility to splice and dice categories and sponsorship inventory among as many sponsors as possible to increase revenue opportunities. The complexity of these considerations is intensified when the ownership and control of a venue differs from the owner of the team(s) playing in that venue, since those owners then have diverging sets of sponsors and economic incentives.

Note that there is an important distinction between sponsorship alliances and direct athlete endorsement alliances. Despite their affiliations with leagues, athletes typically have autonomy in terms of deals with brands related to, for example, patches, manufacturers' logos, and footwear, as well as profit from those associations.

Clear Agreements: For sports leagues/teams/venues, clear drafting of the exclusivity provisions and related exceptions is needed to avoid unintentionally inhibiting future revenue generation opportunities. The level of specificity in sponsorship agreements has increased significantly over the past five to 10 years as leagues/teams/venues have become hyper-focused on revenue maximization opportunities, especially for complex categories such as water, alcoholic beverages and credit cards that can be, and often are, subdivided and negotiated. In addition to the importance of the agreement's language itself, an agreement helps set the parties' expectations for relationships that are often set up to last a long time over different management regimes. If a league/team/venue sells a category to one sponsor and is not careful with the legal language in the agreement, even if on lucrative terms, it could unduly inhibit their ability to generate revenue in the future.

Category Exclusivity and Exclusivity Exceptions: Agreements not only need to clarify what's included in

a particular category, but they should also specify what does not fall within that category. It can be helpful to also include examples of third parties that inhabit those exceptions. Clear drafting gives the team/venue the ability to continue to sell sponsorships to other sponsors with a clear understanding of the rules of the road.

As an example, if a sponsor receives the right to be a venue's exclusive credit card provider, does this include debit cards, and how does this relate to a venue's ability to accept different forms of payment within the venue? Teams/venues need to retain the ability to explain to fans, in a factual manner, that other forms of payment are accepted without that being confused as an attempt to undercut the official credit card sponsor's exclusivity protections. In scenarios where a new sponsor's category might overlap with a preexisting sponsor's category, the new sponsor would typically be informed about this overlap. Then, the existing sponsorship agreement would be carved out as a permitted exception to exclusivity granted to the new sponsor.

Brand Perception: When negotiating category exclusivity, it's important to also consider brand perception and how the public understands the brand's meaning. In many instances, it's important to appreciate how the brand presents itself and how it's understood, particularly when it comes to exclusivity restrictions. For legal practitioners, understanding the business of the brand and that of the league/team/venue is paramount.

Changes in League Rules: All sponsorships of professional sports teams are subject to compliance with the applicable league's rules. Agreements should address how unanticipated changes in league rules that affect the sponsorship will be handled. This typically involves the team agreeing to provide equivalent replacement benefits, refunds or even termination rights if those changes result in limitations on the sponsor's ability to receive full anticipated value for its sponsorship fees. In instances where originally contemplated benefits cannot be provided, teams/vendors prefer to offer replacement benefits as the remedy as much as possible. However, brands may consider seeking termination rights in instances where the sponsor is not able to receive the fundamental sponsorship benefits it bargained for, such as when a key aspect of its sponsorship category becomes prohibited.

Morals Clauses: Sponsors typically seek to include morals clauses to protect the sponsor's reputation. Leagues/teams/venues usually resist providing these provisions or at least seek to limit their potential impact, given the high-profile nature of teams and their players.

Force Majeure and "Most Favored Nation" Clauses: These clauses have gained importance in the wake of COVID-19. Force majeure clauses dictate the parties' respective rights if circumstances outside of their control result in sponsorship benefits not being provided to the sponsor, which occurs most commonly if games are lost or played without fans due to natural disasters, epidemics or labor stoppages. Similar to changes in league rules, remedies typically involve the team/arena agreeing to provide equivalent replacement benefits, refunds or even termination rights if a force majeure event limits the sponsor's ability to receive full anticipated value for its sponsorship fees. Again, in instances where originally contemplated benefits cannot be provided, teams/vendors prefer to provide replacement benefits as the remedy as much as possible. Brands often attempt to stop paying sponsorship fees during force majeure events, while teams/venues seek to receive continued payments and will then "true up" as needed after the force majeure event ceases.

Daniel Render represents a wide range of clients in the professional sports and technology industries, including National Basketball Association, National Hockey League, National Football League, Major League Soccer, Major League Baseball, United Soccer League and NBA G-League teams, arenas and stadiums, investors, and sponsors. Daniel counsels clients on a variety of transactional matters, including acquisitions and sales, debt and equity financings, media rights agreements, sponsorship agreements (including naming rights agreements), ticketing agreements, retail merchandising agreements, concessions agreements, and coach and management employment agreements.

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Plethora of Questions Remain as *House v. NCAA* Decision Impacts College Athletics

By Nicholas P. Smith, PhD

There are more questions than answers that remain after the NCAA and Power Five Conferences (SEC, ACC, Big Ten, Big 12, and Pac-12) agreed to a settlement last month in the class action lawsuit of *House v. NCAA* case.

One of the biggest developments from the settlement was the requirement that a revenue sharing plan between Division I student athletes and their respective universities be created, which would allow universities to directly pay their student athletes. Revenue sharing between student athletes and member institutions will pave the way for a colossal change in college sports in many areas, but notably with regard to scholarships.

Scholarship limits may be altered or eliminated in the future. An important decision looms. Currently, the scholarship limits for college football remain at 85 student athletes, while basketball is limited to 13 scholarships, baseball to 11.7, and ice hockey to 18. The settlement may cap that at a certain number.

A large portion of the billions of dollars that athletic programs generate will be split and distributed for student athletes. The NCAA national office will pay the damages of $2.8 billion out over the course of the next ten years by scaling down the funds it distributes to Division I schools on an annual basis. According to Kristi Dosh, an attorney and an adjunct professor at the University of Florida, the NCAA is paying $1.1 billion of the $2.8 billion for past damages with the Power Five Conferences covering 1.65 billion and $990 million coming from the other 27 Division I conferences.

Moving forward, the power conferences have agreed tentatively to a forward-looking revenue sharing structure, which would give schools the power to allocate a $20 million payout on disbursements directly to athletes. This number could grow larger as school revenue grow in the future. This ruling will make sure that Division I athletes would not give up their rights to file future antitrust claims against the NCAA.

House v. NCAA was filed in June 2020 by Grant House, a swimmer at Arizona State University, and Sedona Prince, a current TCU women's basketball player. This case was granted class-action certification by US District Court Judge Claudia Wilken, which expanded the reach to any Division I student athlete that started play in 2016. The former athletes, who played from June 15, 2016 to November 3, 2023, were covered in this settlement. The complaint of *House v. NCAA* will also sought back pay for Division I student athletes who were barred from earning Name, Image, and Likeness (NIL) money prior to the NCAA changing its policy in 2021. One question remains in that some athletes may have not played between June 2016 and November 2023 and may not be covered in the settlement.

Antitrust violations and potential tax issues exist as well as, since this ruling may also impact unionization and collective bargaining. Also the pending outcome of *Johnson v NCAA* will have labor and tax repercussions if student athletes are deemed as employees. Dr. Sam Ehrlich, a professor at Boise State University stated that, "this is a big moment, but it's not like we have reached the finish line. … This is still going to be ongoing litigation for several years."

References

Auerbach, N., & Williams, J. (2024, May 20). How the House v. NCAA settlement could reshape college sports: What you need to know. *The Athletic & The New York Times*. Retrieved **https://www.nytimes.com/athletic/5506457/2024/05/20/ncaa-settlement-house-lawsuit-college-sports/**

Chen, D. W., Fortin, J., & Betts, A. (2024, May 26). Settlement on athlete pay sends shockwaves across the N.C.A.A. *The New York Times*, A-29.

Dosh, K. (2024, May 24). 10 things to know about the NCAA's House settlement. *Forbes.com*. Retrieved **https://www.forbes.com/sites/kristidosh/2024/05/24/10-things-to-know-about-the-ncaas-house-settlement/?sh=6ecde2995cb1**

Emerson, S. (2024, May 19). Feel-Good walk-on tales may be thing of the past. *The Athletic & The New York Times*, A-30.

Murphy, D. & Thamel, P. (2024, May 20). Looking ahead to this week's House v. NCAA settlement votes. ESPN. Retrieved **https://www.espn.com/college-sports/story/_/id/40182310/looking-ahead-week-house-v-ncaa-settlement-votes**

Nicholas P. Smith, PhD teaches sport law at Florida International University in the Department of Counseling, Recreation, and School Psychology. Dr. Smith's research interests focused primarily on the legal aspects of the business of sport and sport security. This includes considerations on the impact of sport terrorism on the field of sport management. His efforts in research also include volunteer motivations and risk perceptions in sport mega events.

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NFL General Counsel Pash's Retirement Continues Changing Of The Guard

By Christopher Deubert, Senior Writer

It was recently reported that NFL General Counsel Jeff Pash is planning to retire. Pash's retirement is part of the inevitable and ongoing trend of legal titans from the most important era in sports law moving on.

Off The Field Contests

Between 1970 and 1996, players in the NFL and NBA engaged in extensive litigation against those leagues and their teams. The NHL was more of a bystander to the major cases, while MLB's anomalous antitrust exemption (affirmed by the Supreme Court in *Flood v. Kuhn* in 1972), protected it from the issues being litigated in the other cases.

Specifically, beginning in the 1970s, players began to challenge the leagues' restraints on player movement. The leagues had implemented various rules which restricted the ability of players to negotiate with and play for the club of their choice. For example, the NFL utilized the Rozelle Rule, named for NFL Commissioner Pete Rozelle, a unilaterally imposed rule whereby players could sign with other teams upon the expiration of their contract, subject to the Commissioner awarding players to the club which the player had left. The Rule had a chilling effect on player movement, as only four players changed clubs between 1963 and 1973. Restrictive uniform player contracts and player drafts were also subjects of legal challenge.

Integral to the players' legal efforts was the growing status of their players unions, specifically the NFL Players Association (NFLPA) and National Basketball Players Association (NBPA). The unions set out to collectively bargain changes to these rules. They often did so in conjunction with lawsuits against the leagues.

The thrust of the players' arguments was that the leagues' policies violated antitrust law. They argued that it was illegal for the teams – competitors in a labor market for the players' services – to come together and agree upon rules which restrained player choice and wages in that market. After some initial losses, the leagues' arguments evolved to seek protection from the judicially created non-statutory labor exemption. The non-statutory labor exemption protects employers' rules from antitrust scrutiny so long as they are collectively bargained with the employees' union. The exemption recognizes that antitrust law generally must be subordinate to the goal of promoting peaceful and stable labor relations through collective bargaining.

Various intricacies of the non-statutory labor exemption, including most notably when it expired, were litigated during this time. The issues were generally resolved with the NFL's settlement of the *White* litigation in 1993, NBA players' loss in the *Williams* case in 1995, and the Supreme Court's decision in Brown in 1996.

The litigation and eventual resolution of these legal issues provided a stable base for labor relations in professional sports today that is welcomingly almost boring.

Through all these cases, the attorneys on both sides were largely the same. And it is these attorneys that represent the battle-hardened core combatants of sports law history.

The League's Legal Lineup

Pash was one of these lawyers. After graduating from Harvard University and then Harvard Law School, Pash joined the prestigious law firm of Covington & Burling LLP in 1980. Covington represented the NFL in all the above-referenced cases, as it had been the league's primary outside counsel since the 1950s (and still is today).

Yet Pash was not the architect of the leagues' legal strategy – that fell to Covington Partner Paul Tagliabue. Tagliabue was the NFL's chief outside counsel before becoming its Commissioner in 1989. Tagliabue retired from the NFL in 2006 and returned to Covington, where he worked on a variety of interesting matters befitting his stature and expertise. Nonetheless, Tagliabue, at age 83, has understandably also now retired from legal practice.

On the NBA side, the league was regularly represented by the law firm of Proskauer Rose LLP. David Stern was a Proskauer attorney defending the league and its teams in a variety of litigation before joining the league in-house in 1978 and becoming its Commissioner in 1984. Stern passed away in 2020.

Stern's partner in defending the NBA at Proskauer was Jeffrey Mishkin. Stern later hired Mishkin as the

league's Chief Legal Officer in 1993. Mishkin returned to private practice in 2000 at the law firm of Skadden, Arps, Slate, Meagher & Flom LLP, another firm with a long history of representing sports leagues.

Indeed, Bill Daly, the current NHL's Deputy Commissioner, got his career started at Skadden in 1990 and was involved in representing the NFL in the *White* litigation. Daly has been working with NHL Commissioner Gary Bettman since 1996. Bettman took that role after a stint as General Counsel of the NBA and beginning his career at Proskauer in 1977. Daly has long-been considered the NHL Commissioner-in-waiting, but that title may now belong to Jessica Berman, another former Proskauer attorney who was a longtime NHL attorney and is currently Commissioner of the NWSL.

To tie all that together, Daly was needed at the NHL in 1996 because Pash, who had had left Covington to become the NHL's General Counsel in 1993, had accepted Tagliabue's offer to move over to the NFL.

Going back to Mishkin, he retired from Skadden in 2022 and is now a prominent arbitrator in the sports industry, having recently presided over an arbitration concerning a dispute between the Arizona Cardinals and their former Vice President Terry McDonough.

The Players' Bench

In all of the major litigations, the players were represented by the same attorneys at the same firm – James Quinn, Jeffrey Kessler, Bruce Meyer and David Feher of Weil, Gotshal & Manges. Quinn was at the forefront of the players' rights movement and trained a generation of lawyers to continue the fight. Quinn retired from Weil Gotshal in 2017 and is now a mediator. Kessler left Weil Gotshal in 2003 and eventually ended up at Winston & Strawn, where he continues to be the preeminent players' side attorney. Feher went with him while Meyer stayed at Weil Gotshal. Kessler is age 70 and, whenever he decides to hang it up, will likely turn over the sports practice to Feher and David Greenspan. For his part, Meyer eventually left Weil Gotshal to work at the NHLPA and MLBPA, and recently survived a challenge to his position as the baseball union's top attorney.

Who's Next?

Pash is now set to follow Tagliabue, Stern, Mishkin, and Quinn out of the legal limelight. While internal candidates are likely to be considered to replace him at the NFL (for example NFL Management Council General Counsel Larry Ferazani), most likely so will attorneys from Covington, Proskauer, and Skadden. It has worked in the past.

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NYU Sports Law Colloquium a Success

By Caleb Paasche

On April 5th, the NYU Sports Law Association hosted its 13th annual colloquium, featuring speakers from across the sports law industry. The colloquium consisted of three panels and a concluding keynote address, delivered this year by Jeffrey Kessler, co-executive chairman of Winston & Strawn LLP and one of the country's foremost sports attorneys.

Kicking off the panel was a discussion on Artificial Intelligence in Sports. An assembled panel of attorneys and legal experts discussed the issues in a free flowing discussion aptly moderated by Sports Business Journal's Joe Lemire. Meeka Bondy, senior counsel at Perkins Coie LLP and an expert in AI and innovative technologies, discussed what AI technologies really look like in the world of sports and some of the privacy and copyright concerns they might raise in this field. Samir Patel, innovation and technology attorney at Holland & Knight LLP, informed the audience of new technologies in this space and how they can apply to both existing and up-and-coming sports leagues. Sean Cottrell, founder and CEO of LawInSport, discussed some of AI's ethical issues and explained how AI can track and impact player performance. The panel also looked at topics such as wearable technology, sports betting, and how players' associations might react to the expansion of AI in all of these areas.

The colloquium's second panel, moderated by NYU's own Cameron Myler, a professor at the Tisch Institute for Global Sport and a four-time Olympian, was dedicated to sportswashing and sports as diplomacy. The panel began with a discussion of

sportswashing's proliferation in global sport and how to define and differentiate sportswashing, led by Sarath Ganji, founder of The Autocracy and Global Sports Initiative. Jodi Balsam, professor of law at Brooklyn Law and NBC's on-air legal analyst, discussed some recent developments concerning LIV Golf, Saudi Arabia being named the host of the 2034 World Cup, and other specific projects. Maureen Weston, professor of law at Pepperdine School of law, covered international law and the potential complications sportswashing can raise. Elliot Peters, partner at Keker, Van Nest & Peters LLP, drawing upon his own experience litigating against LIV Golf, took the audience through some of the ethics of sportswashing including lessons on client selection and what attorneys can and should do to prevent sportswashing. Whether sportswashing can be tamed was a particular focus for this panel, as the answers will impact sports around the globe for years to come.

The day's final panel examined NCAA Conference Realignment, bringing together distinguished experts who have worked on media deals, school movement, and more. Moderated by Robert Boland, longtime sports law attorney and Professor of Sports Law at Seton Hall, the panel commenced with a discussion of the legal considerations for universities as they switch conferences. Drew Tulumello, partner and co-head of the Complex Commercial Litigation practice at Weil, Gotshal, and Manges LLP talked through his experience representing schools as they look to move conferences and how those moves impact critical business considerations like the school's share of a media deal. Michael McCann, the Director of the Sports and Entertainment Law Institute at the University of New Hampshire, discussed the professionalization of college athletics and how it has impacted conferences, students, and broadcasting deals. Benjamin McGovern, Partner at Holland & Knight LLP, talked about the potential legal issues facing conferences charged with antitrust violations and how those compare to the legal considerations of schools.

Finally, the colloquium concluded with a conversation between Kevin Bruton, instructor at NYU's Tisch Institute of Global Sport and Columbia University's former Associate Athletic Director of Compliance, and Jeffrey Kessler, Co-Executive Chairman of Winston & Strawn LLP. As one of the foremost sports attorneys in the country, Mr. Kessler's address focused on his experience in college athletics, a space he is prominent in given his 9-0 victory in the Supreme Court representing college athletes in NCAA v. Alston, a decision that opened the door for NIL sponsorships after the Supreme Court ruled that NCAA member schools were in violation of the Sherman Antitrust Act by agreeing to limit athlete compensation for academic-related costs. Mr. Kessler discussed whether the myriad pieces of congressional legislation purporting to regulate NIL deals had a chance of passing (not likely, according to Mr. Kessler) or could be particularly workable. The talk also focused on the fairness of college athletics, and while there will always be huge discrepancies between schools, that NIL can be structured in a way that is still fundamentally fair and may even improve competitive parity between schools. Athlete unionization was one final relevant topic, with Mr. Kessler looking at whether unionization could be a prominent trend going forward and how schools might work to prevent student-athlete unions that would threaten their fundamental model of sports. Mr. Kessler's address was a fitting end to a day of lively discussion which surely opened the audience's minds to potential legal issues throughout the sports world.

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Wallace Brings Real-World Experience to an Exemplary Sports Law Practice

Whether it is servicing his professional sports clients at Thompson Coburn or supporting the industry as a long-time board member and former president of the Sports Lawyers Association, lawyer **Robert (Bob) Wallace** is a powerful asset to the sports law industry.

Chairman of the firm's Sports Law practice group, Wallace represents teams, prospective buyers of sports teams, companies interested in sports marketing and civic and government entities facing team relocation or facility issues.

He also assists players, coaches and executives with contract negotiations and separation agreements, and served as an NFL-approved hearing officer for violations of the league's drug and conduct policies.

Wallace has cultivated more than 30 years of experience in both the St. Louis business community and the national sports arena through his past executive and legal work for the Philadelphia Eagles and the St. Louis Football Cardinals.

During his career, Wallace became one of the highest-ranking African-American club executives in the National Football League. Thus, is voice on DEI matters carries significant weight in the sports industry.

Question: What led to you gravitating to sports law?

Answer: A number of factors. Interest and opportunity are probably the two most important, however. I grew up playing sports, but when you are a backup running back at Yale, you realize that there is not a professional playing option on your horizon. And as a high school student, I had a family friend that was able to help me a get an opportunity working at the St. Louis Football Cardinals training camp. This experience opened up my eyes to other career options in sports. I was able to work as an intern in the NFL (I was the first NFL intern even before Roger Goodell) during the summer after my second year in law school, and then got a job at a law firm in St. Louis that represented the Football Cardinals.

Q: Were there mentors along the way and who were they?

A: Yes, there have been several. My first bosses, Tom Guilfoil, senior partner at Guilfoil Petzall and Shoemake and St. Louis Football Cardinals owner William Bidwill. Tom taught me how to practice law, and Bill the business of football. They gave me great responsibility as a young lawyer, from negotiating player contracts to arguing before the 8th Circuit Court of Appeals. They introduced me in league circles and let me grow. Also. Charles Harris who was Athletic Director at Arizona State and University of Pennsylvania whose professionalism and ability to solve problems helped me develop those skills. And John Shaw who was President of the St. Louis Rams whose intelligence was breathtaking and thought process strategic. He taught me to try and think at least two steps ahead.

Q: How would you describe your practice?

A: It is a law practice that focuses on representing people and entities that have sports interests, ranging from facility management to negotiating contracts for individuals and companies in the sports space. We try and stay on the cutting edges of what is going on in the fast-changing sports world and are paying close attention to the college space. Our Intellectual Property group touches the sports space, as does our real estate and public finance group. We advise corporate client in sports sponsorship and assist our corporate clients with their immigration needs and issues. Because we are a full-service law firm, we handle litigation for clients, including those with sports connections. Practice in the dispute resolution space both as a litigant representative and as an arbitrator/mediator.

Q: What's the best part about being a sports lawyer?

A: The subject matter and the passion that follows it. Working on exciting issues with driven people. Being part of a team or organization, or helping an individual reach his or her goals. Being part of a team sports organization gives you the opportunity to experience the highs that come with winning (and the lows of losing). There is nothing like gamedays!

Q: What trends are you watching closely in 2024 and why?

A: The college space. NIL, transfer portals and what is the next iteration of the college conferences. Will it finally end up being only two super conferences? Will Congress address these college athletic issues? Will the recent growth of women's basketball and the NWSL continue? With the pushback against diversity, equity, and inclusion, will the progress that's been made be turned back?

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Nixon Peabody Expands Sports and Entertainment Capabilities With Counsel Hire

Nixon Peabody LLP has announced that sports and entertainment attorney **Nicoleas Mayne** has joined the international law firm's **Corporate** practice as counsel. As a member of the firm's **Entertainment** and **Sports & Stadiums** teams, Mayne's arrival "bolsters Nixon Peabody's sports and entertainment capabilities."

Mayne represents "some of the most prominent global creators, in addition to talent-backed consumer

product ventures, sports teams, entertainment and sports venues, apparel companies, talent agents and managers, athletic departments, collegiate athletic NIL companies, sports and entertainment industry sponsors, investors, and other stakeholders. He is well-versed in structuring a wide variety of deals, including licenses of talent NIL and other intellectual property, venture and private equity investor agreements, brand deals, venue-related sponsorship, signage, and vendor agreements. He also has deep experience with contractor, consulting and employment agreements, as well as manufacturing, distribution, and supply agreements, and M&A transactions." In addition, Mayne was previously a licensed agent for National Hockey League (NHL) players.

"Nic brings his background as a former sports agent to the table when helping clients navigate a broad range of legal and business matters," said **Ellie Heisler**, a Nixon Peabody Corporate partner who leads the firm's Entertainment team and co-leads its **Esports & Gaming** team. "He has his finger squarely on the pulse of emerging issues impacting professional and college athletes, content creators, and businesses at the intersection of entertainment and media."

Nixon Peabody partner **Sonia Nayak**, leader of the firm's **Sports & Stadiums** team added that "sports have the unique capacity to drive economic development and cultural capital, and we are fortunate to advise clients on a diverse range of matters in both collegiate and professional sports. We're always looking to enhance our capabilities with top-tier talent. Nic will be a strong asset and we look forward to introducing him to our clients."

Prior to attending law school, Mayne founded a marketing agency serving sports industry clients, digital media content creators, and business owners in a variety of professional services and trades. "His understanding of marketing and advertising objectives combined with experience working with talent, NIL licenses, talent-focused businesses, and sports and entertainment market issues informs his advice to clients operating in those spaces, whether as a primary business line or as sponsors, investors, or other stakeholders," according to the firm's press release.

Mayne earned his JD from Harvard Law School and his BA from The Master's University, *summa cum laude*.

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With New Hire, Royer Cooper Cohen Braunfeld Announces New Gaming & Sports Practice

Royer Cooper Cohen Braunfeld LLC (RCCB) has announced the hire of sports lawyer Evan Davis in conjunction with the launch of a new Gaming & Sports practice.

Davis "brings a wealth of experience and a sterling reputation in the gaming industry, and is known internationally for his proficiency in sports wagering," according to the firm. Prior to joining RCCB, Davis served as Vice President and Deputy General Counsel at Penn Entertainment, Inc. (formerly Penn National Gaming, Inc.) (NASDAQ: PENN), where he "navigated legal landscapes and orchestrated pivotal initiatives for the nation's largest regional gaming operator," as indicated by the firm. He served as Vice President and General Counsel at Rivers Casino Philadelphia (formerly SugarHouse Casino), where he oversaw all legal matters for the company and played a central role in the company's launch of sports wagering. Davis was also Managing Director at SeventySix Capital Sports Advisory, where he consulted for clients in the sports wagering sector, with a focus on brand development, partnerships, and corporate development. Davis's "senior in-house roles and business advisory experience have provided him with an understanding of gaming dynamics and the burgeoning landscape of sports betting expansion," the firm added.

"Focusing his practice on commercial partnerships, regulatory matters, and licensing deals, Mr. Davis will provide veteran advice on gaming regulations nationwide," announced the firm. "His experience extends to advising on strategic deal structuring to mitigate gaming regulatory risks and compliance issues and proactively addressing emerging regulatory challenges posed by new technologies in the sports wagering sphere. Moreover, Mr. Davis will provide corporate, commercial, and legal services tailored to the specialized demands of sports organizations, international companies seeking entry into the U.S. market, and a wide array of gaming-adjacent enterprises."

"We are thrilled to welcome Evan Davis to our esteemed team," remarked Neil A. Cooper, Executive Partner of RCCB. "His exceptional track record and

experience underscore our commitment to delivering unparalleled legal counsel to our clients. Evan's addition reinforces our dedication to providing innovative solutions and strategic guidance both generally and in the dynamic and fast-growing gaming and sports sectors."

Davis earned his B.A. from Duke University and his J.D. cum laude from the University of Pennsylvania Law School.

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Hackney Publications Partners with Cimarron Global Solutions to Create a New Publication Examining Sporting Events and their Impact on Communities

Hackney Publications, the nation's leading publisher of sports law publications, and Cimarron Global Solutions, renowned for their research in sport and tourism, announces the launch of a first-of-its-kind publication examining the impact of sporting events on cities, states, regions, and countries.

The publication, titled Creating Community Through Sport, will be published six times a year and will leverage Cimarron's industry thought leadership and Hackney Publications' proven editorial expertise.

In addition, the companies invite industry experts to get involved with this new industry publication and create valuable content for readers.

"I have known Dr. Jennifer Stoll, the founder of Cimarron, for more than a decade," said Holt Hackney, the CEO of Hackney Publications. "Her astute insights about the impact that sporting events can have on municipalities and communities are unparalleled in the industry. We're very excited to be able to share her observations with those in charge of evaluating the benefits of hosting such events."

Dr. Stoll, who received her Doctorate in Sport Management from Troy University, was similarly excited.

"Hackney Publications is the primary resource when it comes to legal and risk management issues that arise at sporting events," she said. "The company's publications were required reading when I was studying for my doctorate and have become even more invaluable as I progress in my professional career. We're thrilled to partner our expertise to provide a needed valuable industry resource in the sport and tourism industry."

The publication's inaugural issue is slated for release in the second quarter. Interested individuals can subscribe by visiting **Cimarron's publications page**.

For thought leaders and companies interested in contributing expert analysis, sponsorship, or advertising, please refer to the publication media kit and contact **info@cimarronglobal.com**.

Among the topics that Creating Community Through Sport will address include but are not limited to:

- Optimizing markets for sporting events
- Aligning sporting event outcomes with organizational and community objectives
- Measuring and communicating diverse outcomes of sporting events
- Leveraging social, cultural, and legacy impacts of sporting events
- Case studies in successful sporting event community impact
- Driving community development through sporting events
- Utilizing sporting events as a catalyst for access to sport participation and development

Learn more about **Cimarron Global Solutions**.

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Many Children with Symptoms of Brain injuries and Concussions Are Missing Out on Vital Checks, Study Finds

Almost a quarter of US children with symptoms of a brain injury or concussion are not checked for the condition, with younger children particularly likely to be overlooked, a new national study finds.

The peer-reviewed US research, which is published in the journal *Brain Injury*, also shows that children with symptoms or a diagnosis of a brain injury or concussion were more likely to have symptoms of depression than other youngsters. They also found it harder to make friends.

Routine checks would help ensure such children receive the care that they need, says lead researcher Priyanka Ramulu, who became interested in the topic after suffering a concussion in a car accident when she was 15.

She carried out the research while at high school in Maryland and is now studying neuroscience at Duke University.

"Head injuries from sports, car accidents, falls and other types of blows to the head can be more serious in children than in adults because their brains are still developing," says Ms Ramulu.

"Previous work has shown that symptoms, such as tiredness, headaches and difficulties with memory and concentration, can last for years, affect schooling, and increase a young person's risk of self-harm and suicide.

"Most of this research has, however, been on adults or on children being treated in clinics and there has been a lack of information about the impact of concussions and brain injuries on youngsters in the general population."

To address this, Ms Ramulu, along with Dr Varshini Varadaraj, of Johns Hopkins University in Baltimore and Dr Samir Belagaje, of Emory University in Atlanta, analysed data on 4,269 children aged 5-17 whose parents (or other responsible adult) took part in the 2020 National Health Interview Survey (NHIS), a nationally representative study.

The parents were asked if, as result of a blow or jolt to the head, the child had ever had any symptoms of a brain injury or concussion. Potential symptoms were listed as: being knocked out or losing consciousness; being dazed or left with a gap in memory; headaches, vomiting, blurred vision or changes in mood or behaviour.

They were also asked if the child had ever been checked for a concussion or brain injury and if that had led to them being diagnosed with one.

Some 8.7% of the children had had symptoms of a concussion or brain injury and 5.3% had been formally diagnosed.

Extrapolation of the results to all U.S. children aged 5-17 years suggests 4.6 million had symptoms and 2.6 million had a diagnosis in 2020.

In addition, some 23% of children with symptoms had not been checked for a concussion or brain injury (equating to around one million nationally), with younger children more likely to have missed out.

The survey also contained questions about the child's current mental and social wellbeing.

Those who'd had symptoms or diagnosis of a concussion or brain injury had 60% higher odds of symptoms of depression and twice the odds of anxiety than those without symptoms or a diagnosis.

They were also more likely to take medication to help with their concentration (70% higher odds), mental health, behaviour, or emotions and more likely to have had counselling (50% higher odds).

"We found that just over a quarter (26%) of those with anxiety or symptoms of depression were receiving therapy or medication," says Ms Ramulu. "If mental health problems are being undertreated, this could increase the risk of self-harm and suicide."

Children with symptoms and/or a diagnosis of concussion or brain injury also found it harder to make friends (57% higher odds).

While the study couldn't prove causation, the results suggest that concussions increase the risk of mental health, social and behavioural difficulties in children, say the researchers.

The study's limitations include lack of information on when the head trauma occurred and on brain injury severity. In addition, it wasn't clear if the mental health problems were specific to head trauma or if they'd occurred after other injuries and illnesses.

The authors conclude that there's an urgent need for all children to be checked for concussion and brain injury after a blow to the head.

"The routine evaluation of children who have suffered a blow to the head is vital if children are to receive the treatments and care that they need, be that medicines, mental health counselling or help with making friends," explains Ms Ramulu.

"Identifying a concussion or brain injury is also an important step in preventing a second head trauma, which can be more serious and take longer to recover from."

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News Briefs

LEAD1 Association President and CEO Tom McMillen to Step Down on September 30

LEAD1 Association has announced that President and CEO Tom McMillen, after eight plus years leading the association, will resign, effective September 30 to "pursue other opportunities." LEAD1, which represents the athletics directors of the 133-member schools of the Football Bowl Subdivision (FBS), plans to evaluate its "needs moving forward, and after that review process, will conduct a national search for the next leader of LEAD1," according to a press release. "I am immensely grateful for this opportunity to be deeply connected to one of my passions - college athletics. I want to thank all our athletic directors who have supported the LEAD1 mission during my tenure as President and CEO," McMillen said. "I would like to particularly thank Jack Swarbrick, who was instrumental in bringing me into the organization and reshaping our mission into an issues-oriented organization for FBS athletic directors and their departments. I'd also like to thank all our Board chairs during my tenure with LEAD1, including Rick George, Dan Radakovich, Heather Lyke, and Warde Manuel."

Dr. Michael Ross Named FAR at Shorter University

Dr. Michael Ross, Department Chair of the Sport Management program at Shorter University, has been named Faculty Athletics Representative (FAR) at the university. In addition to being chair, Dr. Ross also serves as a Board of Commissioners member for the Commission on Sport Management Accreditation (COSMA). He is also a Senior Writer for the Journal of NCAA Compliance. Dr. Ross earned his Bachelor of Science (B.S.) in History from Piedmont University while playing college basketball there and previously at Georgia College and State University. He earned his Master of Science (M.S.) in Kinesiology with a focus in Sport Management from the University of Georgia. He is a graduate of Troy University with a Doctor of Philosophy (Ph.D.) in Sport Management. Prior to entering higher education, Dr. Ross served as an assistant high school athletic director and worked for the Atlanta Hawks organization. In addition to these roles, he founded a youth sport development company which focuses on skill development and overall functional movement training for athletes ranging from recreation age to the professional level of sport.

Sports Law Expert Podcast Features Spencer Fane Attorney Peter Goplerud

Hackney Publications (HP) has announced that Peter Goplerud, of counsel in the Higher Education Practice Group at Spencer Fane, was interviewed earlier this month on the Sports Law Expert Podcast. The segment can be heard **here**.

Prior to sitting down for the interview, Goplerud had moderated a panel on NIL at the annual conference of the Sports Lawyers Association (SLA) in Baltimore. Goplerud has been a member of SLA's Board of Directors since 1997.

"Peter has been an influential ambassador for the sports law profession," said Holt Hackney, the CEO of Hackney Publications. "His experience in private practice and higher education, as well as his expertise in NIL, made for a great interview for our listeners."