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Cases

The Oakley v. MSG War Continues

By Jeff Birren, Senior Writer

Charles Oakley and James Dolan are classic "don't invite 'ems." Oakley once played for the New York Knicks. The Dolan family owns Madison Square Garden ("MSG"), and Dolan is its CEO. MSG owns the Knicks and Rangers, and Dolan is the CEO/operator of both teams. On February 8, 2017, Oakley intended to see a Knicks game at MSG, but it was not to be. Instead, he was ejected and arrested. NBA Commissioner Adam Silver called the situation "beyond disheartening" (NBA Communications, Official Release (2-17-2017). Oakley later sued Dolan and MSG for the manner in which he was treated. Recently, both sides sought protective orders. Dolan fought to be absolved from sitting through a deposition as befitting an "apex witness." The Court gave each side something

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and sent the parties back to discovery. *Oakley v. MSG Networks, Inc.*, S.D. N.Y., Case No. 17-cv-6903 (RJS) (11-21-2024).

Some Background

Dolan's father, Charles Dolan, was the prime force behind Cablevision. Along the way, Cablevision acquired numerous assets, including MSG. The Dolan family later sold Cablevision while retaining MSG. Born to wealth, James Dolan has been described as having "a volcanic temper and a born-on-third-base makeup, and as a hapless owner." Early on it was "his alcoholism and his abuse of cocaine and pot that forced him into treatment at the Hazelden clinic" ("James Dolan, Unplugged," Ian O'Connor, ESPN (12-17-18).

Oakley played in the NBA from 1985 through 2004, including with the Knicks from 1988 to 1998. He was known for his rebounding and defensive prowess. His behavior at the Knicks-Clippers game on February 8, 2017, certainly attracted attention. He was approached by security guards and informed that his presence was no longer an option. Oakley objected and seemingly placed his hands on one of the guards. He was escorted out of MSG and arrested. Criminal charges were filed, and Oakley entered into a plea deal. He was not happy.

Oakley filed a lawsuit on September 12, 2017 against Dolan and MSG. Oakley is represented by Wigdor, LLP., and Petrillo Klein & Boxer, LLP. Douglas Widor is represented by the Law Offices of Steven Ross. (Surely there is a story there.) Meanwhile, Dolan doubled up. In his "individual capacity" Dolan is represented by Walden Macht Haran & Williams; Gibson, Dunn & Crutcher; and King & Spaulding. In his "professional capacity" Dolan added Ropes & Gray. The same cast represent MSG Networks, Inc, MSG Garden Company, and MSG Sports & Entertainment, LLC.

Limited Case History

When the District Court ruled on the dueling discovery motions, it stated: "[t]he Court assumes the parties' familiarity with the factual background and procedural history of this case as summarized in the September 10 Order. (*See* Doc. No. 181 at 2-3)." The following summarizes that Order. After Oakley sued both Dolan and MSG, the defendants filed a motion to dismiss the claims. The District Court granted the motion on February 19, 2019, (Doc. No. 68). The Second Circuit affirmed the Court's ruling with respect to all but Oakley's assault and battery claims. *Oakley v. Dolan*, 833 F. App'x 896, 902 (2d Cir. 2020); *Oakley v. Dolan*, 980 F.3d 279, 284 (2d Cir. 2020).

Back in the District Court, the parties resumed their wranglings. Oakley sought to file a second amended complaint in an effort to add new claims. (Doc. 106). The defendants moved for summary judgment. (Doc. 102). The Court granted the motion in favor of the defendants and denied Oakley's motion as futile. (Doc 212). The Second Circuit "vacated the Court's grant of summary judgment and remanded the case for, among other things, reconsideration of Oakley's motion to amend." *See Oakley v. Dolan*, No. 21-2939, 2023 WL 3263618, at *3 (2d Cir. May 5, 2023).

The District Court granted Oakley's motion to file an amended complaint against MSG that "alleged new facts" in support of the claims against the MSG defendants, but denied the motion insofar as it sought to add Dolan as a defendant, since "an amendment adding a new defendant without substituting a previous, improperly named defendant does not relate back under" Rule 15(c)(1)(C), making new claims against Dolan time-barred. (Doc. No. 158.) MSG answered the amended Complaint on May 2, 2024 (Doc 166).

The "parties commenced discovery on the only remaining claims in the case: Oakley's assault and battery claims against the MSG defendants." The September 10, 2024 Order was based on Dolan's insistence that Oakley "has failed to meet his burden to show that Mr. Dolan has unique knowledge that other witnesses are incapable of conveying." The Court told Dolan that he "misunderstand[s] which party bears

the burden here. It is the *defendants* who must show that Dolan 'has nothing to contribute' to this litigation." (Order, at 5, (emphasis in the original)). The Court spent a page and a half explaining why this was not true. "At the most basic level, Dolan was an eyewitness to the removal of Oakley and can provide personal observations as to Oakley's behavior that evening and the force used to remove him." Therefore, MSG's efforts to shield Dolan were denied.

November 20, 2024, Discovery Ruling

The Court was confronted with four discovery disputes. MSG filed a motion for reconsideration, asking the Court to change its mind and relieve Dolan of the obligation from being deposed. Alternatively, Dolan desired an order that the scope of the deposition be limited, and that if he had to be deposed, it should occur "after the depositions of all other MSG employees have been concluded." Oakley moved to maintain the redactions on exhibits "that MSG submitted." MSG and the non-party NBA moved to maintain redactions in exhibits submitted by Oakley.

Motion For Reconsideration

The "standard" for granting reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decision or data that the court overlooked." A "motion for reconsideration 'is not a vehicle for relitigating old issues presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple. Analytical Survs., Inc. v. Tonga Partners, L.P. 684 F.3d 36, 52 (2nd Cir. 2012).'" The earlier referenced motion insisted that Dolan was not a necessary witness to the reasonableness of force used against Oakley. MSG again sought to protect Dolan as an "apex witness, and that "newly discovered evidence suggests that the deposition is intended to harass Dolan." However, the Court found that none of this "met the 'strict' standard" for reconsideration.

A. Relevance

Dolan's counsel presented "no new legal authority and instead selectively quoted from" a prior Order, but, as pointed out, the same paragraph "explained that Oakley's allegation concerning Dolan's hand gestures" could support Oakley's inference that Dolan "instructed or encouraged the use …of excessive force." There was no inconsistency between the two orders, and the prior order "was based on the untimeliness of Oakley's request," not on relevance grounds. The Court never held, or even suggested,

that Dolan did not have relevant knowledge and could not be deposed.

The Court gave Dolan's army of attorneys a lesson in civil procedure. "After all, it is a fundamental principle that '[e]vidence is relevant if (a) it has any tendency to make a fact more or less probable that it would be without the evidence, and (b) the fact is of consequence in determining the action. Fed. R. Evid. 401). It is-well-established that the 'basic standard of relevance … is a liberal one,' Daubert v. Merrell Dow Pharms., Inc., 509 U. S. 579, 587, 223 S. Ct. 2786." It "imposes a low bar… in a discovery dispute." Dolan's lawyers knew the law long before filing the motion.

Oakley was "entitled to depose Dolan regarding the instructions he gave to MSG security guards on the evening of the incident" There are multiple ways to interpret the events that transpired. Which side was the aggressor? Which party used greater force than necessary? If "Dolan instructed the security guards to use force against Oakley regardless of Oakley's behavior" that would "undermine the allegation that Oakley instigated the altercation." Finally, if Dolan did so instruct the security guards, that possibly could lead to punitive damages. The Court did not rule that it had made an error in allowing Dolan to be deposed.

B. "Apex-Witness Doctrine"

Dolan is the apex of the MSG world, but that does not excuse him from complying with elementary civil procedure. His array of lawyers "provides no controlling decisions that the Court overlooked." Instead, its argument "mischaracterizes the Court's prior ruling, which was not based on Dolan's 'generalized knowledge of the incident in question,' as MSG claims." Dolan was present that night. He saw the incident and was "alleged to have witnessed Oakley's belligerent behavior." The cited case had no application as Dolan "had a courtside seat to the action" and "is alleged to have been a participant in the conduct at issue." This concept "is plainly inapplicable here."

C. Harassment Concerns.

MSG insisted that there was "newly discovered evidence" to substantiate the notion that Oakley sought to depose "Dolan simply to harass him." Two of the offered exhibits were publicly available newspaper articles that predated the discovery dispute. Because these articles "could have been found by due diligence prior to the Court's ruling, the Court may not consider them on a motion for reconsideration. Space Hunters, Inc. v. United States, 500 F. App'x 76, 81 (2nd Cir. 2012)."

The next several exhibits were emails sent to Oakley that encouraged him to go after Dolan. MSG failed to offer any "evidence to suggest that Oakley responded to or endorsed these messages. Nor do the messages, which all date from months before the present discovery dispute, indicate that Oakley's intent in deposing Dolan was solely to harass him." Lastly, MSG pointed to statements of one of Oakley's counsel gave to the New York Post that he looked forward to deposing Dolan. The Court stated one of these statements "was an accurate characterization of the September 10 Order" and the other "merely reflects" a "belief that deposing Dolan will be beneficial to Oakley's case." This material, according to the Court, "does not resemble the circumstances" that led to protective orders to prevent harassment. As a result, the Court denied the motion for reconsideration.

Motion for Protective Order

MSG also filed a motion for protective order as an "alternative" argument, made "for the first time." It sought to limit the topics that could be addressed at Dolan's deposition, appoint a special master to oversee the deposition, and have Dolan be deposed only after all of the other MSG employees were deposed. Dolan "carries the burden of proof to show that good cause exists" for such an order. Fed. R. Civ. Pro. 26(c) requires "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." This requirement was missing. The Court expected Oakley's counsel to "comply with their ethical obligations," and Dolan was free to return to court if the deposition violates "permitted conduct." (Fed. R. Civ. P. 30(d)(3)(A)).

The sequence of depositions "is at the discretion of the trial judge." Courts "have routinely ordered that CEOs and corporate officers be deposed after other employees." The depositions of MSG personnel will "narrow the scope" of Dolan's deposition. The Court was "unmoved" by the request to appoint a special master, "which the Court regards as an unwarranted extravagance to which the parties are not entitled." The Court expected counsel to behave consistent with the rules,

and "will have little patience for lawyers who use the discovery process as a sport for purposes unrelated to the development of evidence."

To Seal or Not to Seal

Both parties, and the NBA, filed motions to seal records previously submitted to the Court. Judge Richard Sullivan quoted the Second Circuit: "[t]he common law right of public access to judicial documents is firmly rooted in our nation's history. Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 110 (2nd Cir. 2006.)" There is a "presumption of access" to judicial documents, but that begs the question of what is a "judicial document." It is a "document that has been placed before the court by the parties" and is both "relevant to the performance of judicial duties" and "useful in the judicial process. Mirliss v. Greer, 952 F.3d 51, 59 (2nd Cir. 2020.)" Once that is established, the court must determine the weight of the presumption, and balance the factors that disfavor disclosure, such as the "privacy interests of those resisting disclosure."

MSG filed eight exhibits in its motion for reconsideration. Three contain redacted material. Oakley moved to maintain those redactions, including telephone numbers and irrelevant messages, according to Oakley. The Court viewed the unredacted exhibits and agreed "that the redactions obscure personal identifiable information as well as brief references to a private" matter that had "no bearing on any material issues in dispute in this case." The records were "judicial documents," but Oakley's "privacy interests" as well of those he corresponded with "via text" outweighed the usual presumption for open access. The Court granted Oakley's motion to maintain the redactions.

In opposing MSG's reconsideration motion to preclude Dolan's deposition, Oakley submitted a letter that included quotations from two NBA security guards. They indicated that Dolan ordered Oakley to be removed from MSG. Oakley originally filed a sealed version of the document but then sought to file an unredacted version. Both MSG and the NBA opposed public access to Oakley's letter that was based on the NBA reports.

This was "clearly a judicial document… Therefore, the presumption of public access applies, and the burden falls on MSG and the NBA to overcome that presumption." MSG argued that Oakley was using the material "as a vehicle to disparage MSG, the NBA, and Mr. Dolan, including in the tabloid press." The Court noted that Oakley included two quotes to "refute MSG's repeated assertions that Dolan did not order Oakley's removal." Supposedly, Dolan was merely "one of thousands of eyewitnesses to the events" and should therefore not suffer the indignity of being deposed, although he had the unchallenged power to have Oakley removed. The two lines were relevant to determine resolution of MSG's motion for reconsideration. They "are therefore material to 'the exercise of Article III judicial power' and of value to those monitoring the federal courts. Mirliss, 952, F.3d at 59."

MSG and the NBA tried another approach. Releasing these reports "may make witnesses 'reluctant to supply statements to the NBA during investigations.'" The Court "is not persuaded that publicly filing the two sentences … which simply relay the preliminary fact findings of the NBA will chill" future NBA investigations. However, the Court redacted the names of the two individuals involved in making that report. They were not affiliated with any party, were not accused of any wrongdoing, and did not ask to be involved in the litigation. Their privacy interests outweighed the presumption of public access "at this stage of the litigation."

In the end, Dolan had to submit to a deposition, but only after his employees were deposed. Oakley's personal records remained sealed. Oakley's letter quoting the NBA's preliminary findings that contradicted Dolan were to become part of the public record, though the names of the NBA's investigator were to remain sealed for the timing being. Everybody wins something, everybody losses something, and lawyers profit.

But It Ain't Over

The pretrial skirmishes continued. This is merely one of 24 Orders in this case from November 1, 2024, through February 10, 2025. Oakley sought to depose former head of MSG security, Frank Benedetto. Benedetto was fired the day after the game. Benedetto resisted, sought to limit the scope of the deposition, and opposed producing documents unrelated to the game in question. The Court ordered Benedetto to appear for a deposition, but limited the questioning to the specific game, and, because Benedetto had produced documents related to the game, nothing else would require production. (Order, 1-15-2025). Oakley then filed a motion for clarification or reconsideration. It was denied. (Order,

1-27-2025). MSG's reasons for terminating Benedetto were off-limits.

That same day, MSG sought to change the location of Dolan's deposition in a highly redacted letter. Counsel asserted it would be "irresponsible from a security standpoint to expose this prominent CEO to an unfamiliar" location as Dolan "is a prominent figure." If the deposition had to go forward, Dolan's security squad should first sweep the room and then be present during the entire deposition. Counsel also went back to the well to complain about possible irrelevant questions, supposedly because Oakley had just produced articles concerning public comments Dolan made about other people. MSG's counsel opined that it had been "eminently reasonable." It requested that Dolan's deposition take place at MSG's office and threatened that if Oakley's counsel strayed from the allowed topics, it would "promptly 'move to terminate the deposition.'" Oakley opposed this attempt to disrupt this last effort to disrupt the deposition.

The Court rejected the request the same day at the bottom of the letter. "The law in this district is clear: [T]he party noticing the deposition usually has the right to choose the location. Viera v. United States, No. 18-cv-9270 (KHP), 2019 WL 6683556, at *2 (S.D.N.Y. Dec. 6, 2019) (internal quotation marks omitted)." No good cause was shown to alter the location or procedures. (Order, 1-27-2025).

The deposition apparently went forward, presumably without dire incident, because Oakley sought to reopen the deposition. That was denied. (Order, 2-7-2025).

Editorial

Oakley was an excellent NBA player, including his years with the Knicks. Whatever he did that night, the public now knows that the NBA's preliminary report indicated that Dolan ordered Oakley to be removed from MSG. MSG counsel knows the law. Consequently, the near hysteria concerning the deposition must come from elsewhere. Dolan retains his "apex" birthright, but for all of the legal resources he committed to avoiding being deposed, the Federal Rules of Civil Procedure thwarted his desire. It is a tale for tabloids. Dollars do not mean sense, but money may buy motions.

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The Split Between a Coach and a Team's Boosters Can Be a Messy Divorce

By Gary Chester, Senior Writer

Fans of college sports recognize that the relationship between a head coach and a school's boosters can resemble a rocky marriage: when the team succeeds, the relationship seems blissful; when the team fails and the boosters want a new coach, it can resemble a bitter divorce.

A New Jersey case involving a frustrated high school baseball coach and a difficult booster club illustrates just how messy the split between coaches and high school boosters can be. In *Illiano v. Wayne Hills Board of Education*, 2024 U.S. Dist. LEXIS 28389 (D. N.J. February 20, 2024), the marriage between the coach and the boosters was on the rocks after just two months.

The Facts

The Wayne Hills High School (WHHS) baseball team was a program in flux, having employed five different managers from 2011 to 2017. Coming off an 11-16 season, WHHS hired an experienced New Jersey baseball coach, Scott Illiano, in November 2017. Illiano took the job even though he had learned that the team faced several issues, such as a miniscule budget of about $3,500 and a lack of assistant coaches—the team had two paid assistants while five "were required for proper supervision" of the student-athletes.

To address these concerns, Richard Portfido, the athletic director, and Superintendent Mark Toback told Illiano that he could fundraise. Portfido suggested that the coach coordinate with the booster club to raise funds for additional assistants and the purchase of essential equipment. Two months after Illiano was hired, he met with the booster club to pitch a 12-month plan to rejuvenate the baseball program.

Almost immediately after the meeting, Illiano experienced problems with the equipment-purchasing process and the booster club's failure to follow its own

by-laws and state law. The boosters allegedly undermined Illiano's authority. The second amended complaint alleges that the booster club violated Wayne Board of Education (BOE) policies, executive orders issued by Governor Phil Murphy, and regulations promulgated by the New Jersey State Interscholastic Athletic Association. Alleged violations include: serving alcohol at a team banquet; delaying the purchase of equipment; rigging booster club elections; giving $100 gift cards to WHHS players; ignoring requests to pay assistant coaches; and holding mass gatherings during the COVID-19 pandemic.

The booster club was suspended in 2019 and again in 2020 after Illiano complained to Portfido. Each suspension was short-lived however, because the BOE lifted them. Thereafter, the boosters and members of the BOE allegedly retaliated against the coach by: (1) claiming he took monetary kickbacks, (2) accusing him of trying to improperly influence booster club elections, and (3) misrepresenting the contents of a book he wrote in 2011.

On January 19, 2021, WHHS terminated Illiano's employment. Eleven months later, he filed a complaint in state court asserting these eight counts: (1) violation of 42 U.S.C. §1983; (2) violation of the New Jersey Conscientious Employee Protection Act (CEPA); (3) wrongful termination; (4) First Amendment Retaliation; (5) civil conspiracy; (6) tortious interference with economic advantage; (7) portraying the plaintiff in a false light; and (8) defamation. The named defendants were the BOE, the Wayne Hills Booster Club, BOE member Michael Bubba, three booster club officers, and three school officials or employees.

The Motion to Dismiss

On January 10, 2022, the defendants removed the action to U.S. District Court in Newark, where motions to dismiss the complaint were heard by Judge Susan Wigenton. The court dismissed the claims brought against one individual defendant and then considered the CEPA claim against the BOE and others. The defendants argued that because Illiano failed to report the alleged misconduct to his employer, he did not allege a prima facie CEPA claim.

To state a claim under the CEPA, a plaintiff must allege that: (1) he reasonably believed defendants were violating a law, rule, or public policy; (2) he performed a whistleblowing activity as defined by N.J. Stat. Ann. § 34:19-3; (3) an adverse employment action was taken against him; and (4) a causal relationship exists between the whistleblowing activity and the adverse employment action. The statute defines "employer" as: "[A]ny individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent…"

The court denied the motion because Illiano adequately pleaded that the Club and some of its members acted as agents for the BOE and retaliated against him.

The BOE's motion to dismiss the third count (wrongful termination) was denied because the BOE allegedly failed to comply with its own policies governing boosters and "its own decision to terminate Plaintiff for blowing the whistle on that alleged dereliction of duty, is undoubtedly a violation of a clear mandate of public policy."

The court denied the motion filed by the school's principal and assistant principal on the fourth count (First Amendment retaliation). The plaintiff sufficiently alleged that they terminated him in part due to his complaints of misconduct and a book he wrote in 2011—both of which are protected speech.

To state a claim for tortious interference with prospective economic advantage against a member of the BOE and two other individuals in count six, Illiano needed to allege that: (1) he had reasonable economic expectations; (2) there was intentional interference by the defendants; (3) he probably would have realized the economic advantages absent the interference; and (4) the interference caused the damage. Though acts committed within the scope of employment with the BOE are protected, the court denied the motion because the alleged facts suggest that the acts were outside the scope of employment.

The court dismissed the seventh count (false light) as to the named board member because the one-year statute of limitations had expired. Dismissal was granted to three booster club defendants as to their comments regarding the plaintiff's book because they were not made public; however, the defendants' motion was denied as to their alleged intentional and offensive statements that Illiano had received kickbacks and interfered in the Club's election. Judge Wigenton denied

the defendants' motions to dismiss the defamation claim on similar grounds.

Finally, the court ruled that the fifth count (civil conspiracy) could proceed against four individual boosters. To state a claim for conspiracy under New Jersey law, a plaintiff must plead these elements: (1) a combination of two or more persons; (2) a real agreement or confederation with a common design; (3) the existence of an unlawful purpose, and (4) proof of special damages. The plaintiff has adequately alleged that defendant Michael Bubba, while acting outside his employment with the BOE, conspired with three other defendants to tortiously interfere with Illiano's employment.

The Epilogue

Illiano turned his team's fortunes around, leading Wayne Hills to winning seasons in 2018, 2019, and 2020. He was replaced by Rob Carcich, who reportedly moved on after three seasons. Ironically, Illiano is reportedly working with a business that organizes fundraisers for interscholastic sports teams. Needless to say, the Wayne Hills High School baseball team is not listed on the business' website as a client.

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Washington State University's Denial of Coach's Religious Exemption Request Against Receiving Covid-19 Vaccination Valid by District Court

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

On October 18, 2021, Washington State University (WSU) terminated its then head football coach, Nick Rolovich, '*for cause.*' The reason, or c*ause,* was because Coach Rolovich failed to comply with Governor Jay Inslee's executive order mandating that all state employees be vaccinated against the Covid-19 virus. This termination came despite Coach Rolovich's request for a religious exemption to receiving the Covid-19 vaccine, which he sought based on his Catholic beliefs. At the time of his firing, Coach Rolovich, was the highest-paid state employee in the state of Washington, with an annual salary of approximately $3.2 million and because he was fired *'for cause,'* he was not entitled to the balance due under the term of his contract, an amount that equated to approximately $9 million.

Being a red-blooded American, and not happy with being fired from his position as head coach and the lofty salary that goes along with it, Rolovich filed a federal lawsuit in the U.S. District Court, Eastern District of Washington, claiming that WSU had violated his rights per Title VII of the Civil Rights Act of 1964, the state of Washington's Law Against Discrimination, and that the employment contract he had with the University was breached.[1]

In ruling on WSU's Motion for Summary Judgment, however, the District Court found that there was no genuine dispute as to any material facts within the "voluminous record" to support any of Coach Rolovich's alleged claims.[2] The Court, in analyzing Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 which provides, in part, that "it shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion . . . or national origin. . . ." determined that all Title VII claims are determined in accordance with a burden-shifting framework wherein an employee must first establish a prima facia case of failure to accommodate, and then if successful, the burden shifts to the employer to show "it was nonetheless justified in not accommodating the employee's religious beliefs or practices.[3] An employee must establish his or her failure-to-accommodate claim by alleging the following: (1) that the employee had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) that the employee informed his employer of the belief and conflict and (3) "the employer threatened him with or subjected him to discriminatory treatment, including discharge, because of his inability to fulfill the job requirements."[4]

1 Case 2:22-cv-00319-TOR.

2 Case 2:22-cv-00319-TOR EFC no. 135 filed 01/06/2025.

3 *Bolden-Hardge v. Off. of California State Controller*, 63 F.4th 1215, 1222 (9th Cir. 2023).

4 *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993).

Once such is established, the employer, to rebut its employee's claim, must allege as an affirmative defense "that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." [5] Undue hardship must be determined per the particular facts of a case and may result if there is "more than a de minimis cost to the employer . . . [or] more than a de minimis impact on coworkers."[6]

In this case, the District Court found that the record did not support Coach Rolovich's claim for religious exemption to the Covid-19 vaccination for two reasons. First, because he "frequently expressed secular concerns about the vaccine to friends, family members and coworkers and that in thousands of pages of discovery, he never invokes a religious reason for not wanting to be vaccinated."[7] Second, because WSU proved that it would endure undue hardship by showing that Coach Rolovich's request to be unvaccinated would result in increased travel costs for the athletic department, would harm both recruitment and fundraising efforts, all the while damaging the University's reputation and increasing the risk of exposure to COVID-19 to student athletes, the coaching staff, the athletic department, the media and the public on the whole. Therefore, by proving that Coach Rolovich's unvaccinated status would materially increase the risk of spreading COVID-19 to others, the District Court determined that WSU is entitled to summary judgment as to all claims.

Outside of the law, additionally, what did not help Coach Rolovich's request for an exemption due to his Catholic beliefs, is that the Catholic Church had no prohibition on its members receiving the vaccine and Pope Francis, together with the U.S. Conference of Catholic Bishops, stated unequivocally, that all Covid-19 vaccines are morally acceptable and that Catholics have a duty, responsibility or obligation to be vaccinated.[8] In the end, Coach Rolovich should have been a team player, done what was right by the University, and most importantly, done what was right by the student-athletes the University entrusted him with during the time of a global pandemic.

5 *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999).

6 *Id.*

7 Case 2:22-cv-00319-TOR EFC no. 135 filed 01/06/2025 at page 5.

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FIFA's New Interim Rules in Light of Diarra: Termination Without Just Cause

By Charlotte Smith, Partner, and Adam Melling, Associate, in the Employment & Sport teams at Walker Morris

On 4 October 2024, the European Court of Justice ('CJEU') handed down a critical preliminary ruling – the *Diarra* ruling – on several provisions governing the termination of a playing contract without 'just cause' in FIFA's Regulations on the Status and Transfer of Players ('RSTP').

In response, FIFA commenced an ongoing global consultation on the challenged rules. In the interim, mindful that January brought the first major transfer window following the ruling, FIFA made temporary rule changes effective 1 January 2025.

In *Diarra*, the CJEU considered the relevant provisions of the RSTP to be in breach of specific EU laws, namely, the person's right to freedom of movement and the prohibition on anti-competitive agreements. Importantly, deviating from these EU laws is (broadly speaking) permissible when it is necessary to meet legitimate objectives.

The CJEU considered that FIFA has a legitimate objective of ensuring the regularity of club competitions, which requires maintaining a certain degree of player stability at clubs. The relevant provisions sought to do this by essentially deterring players and clubs from terminating their contracts without just cause.

Where FIFA came unstuck, though, was in showing the necessity of their rules to meet that objective. In other words, whether the rules were a proportionate means of achieving their objective. FIFA's interim measures seek to take on board several of the CJEU's comments and those of other stakeholders while acknowledging the need for more consultation before issuing the final amendments to the regulatory framework.

The following is a summary of the key temporary changes:

Rule in Issue	Previous position	New interim position
The compensation payable by a player to their former club in the event of termination without just cause.	Compensation was calculated with due consideration for the law of the country concerned (which governs the player-club employment relationship), the specificity of the sport, and any other objective criteria.[1]	Compensation is calculated by taking into account the damage suffered (to put the individual in the position they would have been in had the contract been performed correctly), considering the individual facts and circumstances of each case, and giving due consideration to the law of the country concerned.

Rule in Issue	Previous position	New interim position
Circumstances in which the player's new club is jointly and severally liable with the player for such compensation (this means the former club could sue either the player or the new club for the full amount of the compensation payable).	The new club was automatically liable (regardless of whether they encouraged the player to unlawfully terminate their contract, albeit there had been a small number of departures from this in exceptional circumstances).	The new club will only assume such liability if the former club can prove that the new club induced the unlawful termination (i.e., reversed burden of proof).

Rule in Issue	Previous position	New interim position
Circumstances in which authorities can impose sporting sanctions, including a transfer ban on a prospective new club that induces a player to breach the contract.	The new club was presumed to have induced the breach of contract unless it could prove that it had not done so.	The former club must prove that the new club induced the breach of contract (i.e., reversed burden of proof).

Rule in Issue	Previous position	New interim position
Rules regarding issuing the International Transfer Certification ('ITC'), which is required to enable a player to register with a new club under a different national association.	The national association of the former club was able to withhold the ITC where, in essence, there was a dispute over the termination of the playing contract.	The former club's national association cannot reject issuing the ITC (and if they don't issue it within the now-shorter period of 72 hours following the ITC request, the new club's national association can register the player anyway).

Definition of just cause

The interim regulatory framework now also includes a description of the term 'just cause', which seeks to codify the existing position in FIFA and CAS case law: 'In general, just cause shall exist in any circumstance in which a party can no longer reasonably and in good faith expect to continue a contractual relationship.'

Comment on the temporary changes to the termination without just cause provisions:

The temporary measures are not the finished product, and many more months of consultation is expected.

The reversed burdens of proof regarding possible liability and sanctions on the player's new club align with the CJEU's comments and will likely receive

approval from most stakeholders. The key battleground will likely be over the calculation of compensation in the event of termination without just cause.

1. Calculation of compensation

The temporary measures no longer refer to various non-exhaustive factors to consider in calculating compensation (see footnote [1]) – which were criticised by the CJEU – and instead, row back to focusing on the damage suffered by the injured party.

However, case law has recognised the difficulty of quantifying the loss a player causes to their club for termination without just cause. Accordingly, FIFA's commentary on the RSTP (currently based on the old provisions) summarised the general method adopted by its Dispute Resolution Chamber ('DRC') to estimate the loss caused to the club. The method includes variations of the now-omitted factors in making that calculation. Since FIFA acknowledges that the DRC's approach stems from the difficulty of quantifying loss, it remains to be seen how the DRC will interpret the amended provisions.

The new provisions also require clubs to calculate compensation 'having regard to each case's individual facts and circumstances.' While there's no longer an express requirement to give due consideration for 'the specificity of sport, and any other objective criteria' (including those listed in footnote [1]), the new wording is still broad enough to capture any criterion the judging body considers relevant.

The CJEU in *Diarra* was critical of the RSTP for its lack of precision and referring to general concepts like 'specificity of sport,' both of which made it difficult for anyone to be sure as to how the DRC would calculate compensation (and therefore for parties to verify whether they had done it correctly). Stakeholders can level similar concerns at the imprecise reference to 'having regard to … facts and circumstances.' However, reaching an agreement on what to include in the final-form RSTP on this is likely to be a key sticking point between stakeholders, so this broad placeholder remains for now.

Separately, the CJEU in *Diarra* criticised the fact that the RSTP calculation only required 'due consideration' for the law of the country concerned. It noted that FIFA acknowledges parties hardly ever apply such laws, whereas the CJEU expected 'actual compliance' with the law in force in the country governing the player-club relationship. FIFA's temporary rules don't address this criticism – they still only require 'due consideration,' and the explanatory note accompanying the temporary measures puts the onus on the party seeking to rely on the laws of the country concerned to prove its relevance, content and effect.

2. Definition of just cause

For completeness, the broad 'definition' inserted overlooks the need for just cause to attach to a (sufficiently serious) breach of contract by the other party. On the face of it, it opens the door to premature termination of a contract for reasons unrelated to the other party's conduct. For example, a club in financial difficulties might argue that it can no longer reasonably and in good faith be expected to continue a contractual relationship with a costly player to save the club's long-term future.

Similarly, a player who wishes to terminate their contract because they're away from their family and want to return home permanently for personal reasons may take the position that this meets the just cause test.

It's clear from FIFA's commentary on the RSTP and the existing case law it sought to codify that this was not the intention. The outcome of the full consultation will show how the RSTP will look in its final form.

Footnotes:

[1] The RSTP previously listed the following as other objective criteria: remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a certain period.

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Appeals Court Dismisses Athletes' Claim that University Breached a Contract When It Failed to Renew Their Scholarships

A North Carolina state appeals court has affirmed the ruling of a lower court for defendant Lenoir-Rhyne University in a case where student-athletes and a team manager for the women's basketball team alleged that the school violated its contractual obligation to the students when it declined to renew their scholarships.

In sum, the appeals court agreed that "the plain language of the Grant-in-Aid (GIA) contracts limited the scholarships to one academic year, subject to renewal. The defendants were not obligated to automatically renew the scholarships after that year."

The plaintiffs in the case were Laney Fox, Nakia Hooks, Ashley Woodroffe, Michaela Dixon, Sydney Wilson, Tamerah Brown, Kennedy Weigt, and Korbin Tipton (plaintiffs-athletes), who were recruited to play women's basketball at Lenoir-Rhyne. In addition, Fatou Sall, who became the women's basketball team manager while attending Lenoir-Rhyne and remained the team manager until November 2020, was also a plaintiff.

The aforementioned plaintiffs executed National Letters of Intent (NLI) to commit to the women's basketball team, as well as GIAs to receive their athletic scholarships to Lenoir-Rhyne.

"Each GIA stated the scholarship was for a one-year period, and acknowledged this one-year limitation was according to the NCAA and Lenoir-Rhyne policies," wrote the court. "These scholarships could not be reduced or cancelled during the one-year period apart from four exceptions that were specified in the GIAs. At the end of the academic year, according to the NCAA student-athlete handbook, the financial aid office was to notify the student-athlete of their award for the coming year. If the financial aid award was reduced or cancelled, the student-athlete would have the right to a hearing before the Athletics Appeal Committee upon a written request for appeal. Lenoir-Rhyne was required to comply with these regulations and policies to remain a member of Division II of the NCAA. Plaintiffs-athletes signed renewal GIAs each academic year when their scholarships were renewed."

Plaintiffs Fox, Hooks, Woodroffe, and Tipton all claimed that they were "orally promised a four-year scholarship, automatic renewal of a yearly contract, or to play basketball for four years during their recruitments by Coach Cam Sealy, the previous women's basketball coach, or Coach Grahm Smith, the current women's basketball coach. They received their scholarships for the 2020-2021 academic year but were given the choice to opt out of the basketball season due to COVID-19 without any change in their scholarship status; only plaintiff-Fox opted out of the 2020-2021 basketball season starting in November 2020. Plaintiffs also assert the Lenoir-Rhyne student-handbook's provision regarding freedom of expression for students was incorporated into the GIA contract."

Meanwhile, Sall "orally agreed to be the women's basketball team manager after attending a job fair at Lenoir-Rhyne. She did not receive any financial scholarship for her work as the basketball team manager. There was no written contract to be the manager, and each semester the coaches would ask plaintiff Sall if she was available to be the manager that semester. There was no set term agreed upon; it was a season-by-season position."

Racial Tensions

"During the height of COVID-19 in the 2020-2021 basketball season, there were racial tensions within the basketball team that caused the coaches and some administrative personnel to hold a meeting with the team. The team agreed to limit their team communication to only basketball-related and team goal-oriented discussions. Plaintiff Fox organized a 'Symposium' for the basketball team and other university administrators to discuss racial prejudice, and later organized a second symposium, 'The Talk,' open to the entire university, to further discuss racial prejudice. Plaintiff Fox alleges the coaches sought to 'retaliate' against her and other African American teammates after these events."

The plaintiffs claimed in their affidavits that they "were forced off the basketball team at the end of the 2020-2021 basketball season. Plaintiff Fox had a meeting with the coaches in which the coaches told her she did not fit into the culture of the team and that she would not be welcomed back onto the team for the 2021-2022 basketball season. The coaches offered to still give plaintiff Fox her full scholarship for the

2021-2022 basketball season. Plaintiff Fox ultimately entered the transfer portal to leave Lenoir-Rhyne. Although plaintiffs Dixon, Weigt, Hooks, Wilson, and Brown attested they were forced off the basketball team for the 2021-2022 basketball season, the affidavits of Coach Smith and Kim Pate, the V.P. of Athletics, attested the players planned to and did enter the transfer portal for the 2021-2022 basketball season."

Plaintiff Sall attested in an affidavit that she was "involuntarily separated from the team." During her deposition, she admitted she sent Coach Smith a text that stated, "If it isn't already obvious, I will not be working with you guys this semester. Hope you guys have a great season."

Fox later published social media images with statements and an "Open Letter to Lenoir-Rhyne" in which she made claims that she and other teammates were forced off the basketball team due to racism and retaliation. In response, Lenoir-Rhyne's president, Frederick Whitt, published a letter to the Lenoir-Rhyne community in which he stated the following:

> *"Yesterday, a former student-athlete posted a number of false claims on social media, including that she was dismissed from the women's basketball team for speaking out against racism and advocating for social justice. Lenoir-Rhyne flatly disagrees with this student's version of events. Her dismissal from the basketball team was a legitimate coaching decision, and suggestions to the contrary are simply false."*

Fox also published a recording to social media of her meeting with the basketball coaches in which they told her she would no longer be on the basketball team.

The plaintiffs sued Lenoir-Rhyne, as well as co-defendants Grahm Smith, and Frederick Whitt in the summer of 2021, alleging the following: breach of contract, negligent misrepresentation, tortious interference with contractual rights, tortious interference with prospective economic advantage, and libel per se or alternatively libel subject to two interpretations.

The defendants filed a motion to dismiss, which the trial court granted, in part, leaving only the following remaining claims against Lenoir-Rhyne and Whitt: the breach of contract claim and the claim for libel subject to two interpretations. After discovery, the defendants filed a motion for summary judgment on the remaining claims against Lenoir-Rhyne and Whitt. After reviewing the parties' affidavits, depositions, interrogatories, financial documents, contractual documents, and all exhibits presented, the trial court ultimately granted summary judgment to defendants. The plaintiffs appealed.

In considering the appeal, the panel wrote that "looking to the GIA contracts signed by plaintiffs-athletes, and to the NLI signed by plaintiffs Fox, Hooks, Woodroffe, Dixon, Brown, Weigt, and Tipton, the contractual language is nearly identical in each NLI and GIA. All parties agree these written contracts were valid, existing contracts, and only dispute the contractual terms and whether the parties breached these terms. The GIA contracts plainly state the scholarship award is 'for one academic year.' The record also includes GIA 'renewal' contracts, electronically signed by the plaintiffs-athletes, that specify one academic year for the scholarship and include conditions for the renewal of the scholarship. Based upon the evidence in the record, and recognizing any oral promises made in contradiction to the written contracts are not received, there is no genuine issue of material fact that the scholarship was limited to one year and subject to renewal with new contracts each academic year."

Further, the plaintiffs also argue that the defendants could only cancel the GIA if the listed four conditions in the GIA apply. The original GIA contracts signed by the plaintiffs state the following:

> *"Upon the recommendation of the Head Coach and approval from the Director of Athletics, an Athletics Grant-in-Aid may be reduced or canceled during the period of the award by the institutional financial aid authority per NCAA*

Bylaw 15.6.4.1 if any of the following situations occur: (a) you render yourself ineligible for intercollegiate competition; (b) you fraudulently misrepresent, as defined in the Student-Athlete Handbook, any information on an application, Letter of Intent or financial aid agreement; (c) you engage in serious misconduct warranting substantial disciplinary penalty through the institution's regular student disciplinary authority; or (d) you voluntarily withdraw from the sport at any time for personal reasons."

The panel continued, noting that the "plain language within the contract dispels plaintiffs' argument. It plainly states 'during the period of the award.' Apart from those terms within the GIA, plaintiffs point to no contractual provision that limits defendants' ability to renew or cancel the scholarship after completion of the academic year. Defendants admit they removed plaintiff Fox from the basketball team after the 2020-2021 academic year. But defendants also state, in affidavits and through evidence of a renewal contract, that they awarded a scholarship to plaintiff Fox for the 2021-2022 academic year despite removing her from the basketball team.

"Plaintiff Fox admitted during her deposition that she entered the transfer portal to leave Lenoir-Rhyne. The NCAA Division II manual, section 15.5.5.1, and the Student-Athlete handbook, by which parties admit they were contractually bound, state defendants must let the student-athlete know 'whether the grant has been renewed or not renewed for the ensuing academic year.' Apart from the limitations during the academic period year, plaintiffs point to no requirement for the institutions to automatically renew grants once the academic year completes. The evidence in the record demonstrates the only obligation listed is to notify the student-athlete of the institution's decision, but there is no obligation to renew the grant. Accordingly, based upon the record before us, plaintiffs fail to demonstrate a genuine issue of material fact as to any breach of contract of the GIA terms by defendants.

"The remaining plaintiffs-athletes argue in their conclusory affidavits that they were forced off the basketball team. Whereas, defendants argue these plaintiffs-athletes were not removed from the team, but instead chose to enter the 'transfer portal' to transfer to different institutions. The evidence in the record, including their own statements within their depositions, demonstrates the plaintiffs-athletes entered the transfer portal at the completion of the 2020-2021 academic year. Each cancellation of a renewal GIA stated that the student 'indicated intent to transfer during the next academic year.'

"This evidence suggests plaintiffs-athletes' contracts were completed for the 2020-2021 academic year and that each one chose to transfer from Lenoir-Rhyne. These decisions were made during the time frame that Lenoir-Rhyne could determine whether to renew or cancel the GIA. Further the Student-Athlete handbook provided an appeals process for student-athletes who did not receive a renewal of their GIAs. There is no indication in the record that plaintiffs appealed their GIAs. This is likely because the evidence in the record demonstrates plaintiffs entered the transfer portal to transfer to a different institution prior to any non-renewal of their GIAs. Accordingly, plaintiffs-athletes fail to demonstrate a genuine issue of material fact for the breach of contract claim against defendants."

Similarly, the claim of Sall, the former team manager of the women's basketball team, that she had "a contract with defendants and that they breached the contract" failed. That's because Sall admitted "texting Coach Smith that she would 'not be working with [the team] this semester.'" Accordingly, there is no genuine issue of material fact of a breach of contract claim against defendants because Sall admittedly quit working as the team manager. "Because plaintiff Sall fails to demonstrate defendants breached any alleged contract, we do not consider the validity of the alleged oral contract," the panel wrote.

Fox v. Lenoir-Rhyne Univ.; Ct. App. N. C.; No. COA24-16; 12/3/24

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Articles

San Jose State University Volleyball Controversy: Legal Examination of Transgender Athlete Participation

Justin B. Kozubal, Ph.D. and Michael S. Carroll, Ph.D.

In 2024, a group of volleyball players filed a lawsuit in the U.S. District Court for the District of Colorado alleging that the inclusion of a transgender athlete on the San Jose State University (SJSU) women's volleyball team violated the principles of fairness and the integrity of women's sports. The plaintiffs, consisting of both SJSU volleyball team members and other current or former Mountain West players, sought various remedies, including vacating SJSU's wins in the Mountain West Conference and declaring the athlete ineligible for participation in conference tournaments. This legal review examines the claims raised, the relevant legal frameworks, and the broader implications for collegiate athletics.

Background

The controversy began in August 2024 when the SJSU women's volleyball team began their season, participating in the Fullerton Invitational in Southern California. In September, Southern Utah University forfeited their match against SJSU, reportedly in protest of the inclusion of a transgender athlete on the team, Blaire Fleming (Inside Higher Ed, 2024). Public awareness of Fleming's transgender status intensified in October 2024, leading to heightened media attention and internal team discussions (Inside Higher Ed, 2024).

Brooke Slusser, a co-captain on the team and Fleming's roommate, stated that she was unaware of Fleming's transgender status until it was publicly disclosed. Slusser noted that the university advised team members not to discuss the matter, referring to it as "the elephant in the room" (Inside Higher Ed, 2024). Additional media reports revealed that the decision to include Fleming caused fractures within the team, including the departure of several players and growing frustrations among others (Inside Higher Ed, 2024).

In October 2024, tensions were further compounded by forfeitures from other universities, including Boise State University and the University of Nevada, Reno, citing safety concerns and competitive fairness (Inside Higher Ed, 2024). These forfeitures brought national attention to the case, sparking debates about the role of inclusion in collegiate sports.

The issue escalated when the team's associate head coach, Melissa Batie-Smoose, filed a Title IX complaint alleging that the inclusion of Fleming prioritized one individual's rights over those of the entire team. Shortly after filing the complaint, Batie-Smoose was removed from her position, a decision she claimed was retaliatory. University officials denied any connection between her complaint and termination, citing unrelated performance issues instead (Inside Higher Ed, 2024).

Key Allegations

3. **Violation of Title IX Protections:** The plaintiffs argued that SJSU's actions undermined the equal opportunities for cisgender female athletes that Title IX is intended to protect. They alleged that including a transgender athlete created competitive imbalances and compromised safety during gameplay.
4. **Retaliation Against a Whistleblower:** The lawsuit claimed that Batie-Smoose's termination was a direct consequence of her Title IX complaint. It argued that her dismissal was intended to silence dissent and avoid further scrutiny of SJSU's policies.
5. **Impact on Team Dynamics:** Team members reportedly expressed frustration over the university's prioritization of one player over the collective concerns of the team, leading to fractures within the group and the departure of several players.

Defense Arguments

1. **Compliance with NCAA Guidelines:** SJSU's legal team maintained that the inclusion of the

transgender athlete adheres to NCAA policies, which permits transgender women to compete in women's sports after meeting specific hormone therapy requirements.

2. **No Adverse Employment Action:** Regarding the Title IX retaliation claim, the university contended that Batie-Smoose's termination was unrelated to her complaint and was based on other professional considerations.
3. **Broader Inclusion Goals:** The defense also emphasized the importance of fostering an inclusive environment in collegiate athletics, aligning with the NCAA's commitment to diversity and equity.

Relevant Context

The NCAA's policy on transgender athletes was a focal point of national debate. Current guidelines required transgender women to complete a year of testosterone suppression therapy to compete in women's sports. Critics argued that these measures did not fully address physiological advantages, while advocates stressed the importance of inclusion and equal opportunity. This case represented a pivotal moment in the evolving landscape of collegiate sports regulations.

The 10th U.S. Circuit Court of Appeals upheld a prior decision allowing Blaire Fleming to participate in the Mountain West Conference tournament (Associated Press, 2024). The court emphasized that the plaintiffs delayed their legal challenge, filing less than two weeks before the tournament despite knowing about Fleming's participation since at least September 2024. The court also noted that the plaintiffs did not demonstrate clear entitlement to relief, although their claims raised substantial questions warranting further consideration (Associated Press, 2024). SJSU and Mountain West Conference officials reaffirmed their adherence to NCAA rules, highlighting that Fleming's participation was fully compliant (ABC News, 2024).

Legal Claims

1. **Title IX Violations:** Plaintiffs alleged that SJSU's actions disproportionately affected cisgender female athletes and undermined the foundational principles of Title IX.

1. **Retaliation Under Title IX:** Batie-Smoose's dismissal was claimed to constitute unlawful retaliation for engaging in protected activity (filing a Title IX complaint).

1. **Negligence and Breach of Duty:** The lawsuit accused SJSU of failing to safeguard the interests of its athletes, both in terms of competitive fairness and physical safety.

Relief Sought: The plaintiffs sought

- A court order declaring the transgender athlete ineligible for the Mountain West Conference tournament.
- An injunction vacating SJSU's wins for the 2024 season.
- Reinstatement and damages for Batie-Smoose.
- Additional compensatory and punitive damages, along with attorney's fees.

Current Status:

As of December 2024, the SJSU volleyball team's season concluded with a loss to Colorado State University in the Mountain West Conference championship on November 30, 2024. Blaire Fleming, the transgender athlete, played a pivotal role, contributing significantly to the team's performance. The controversy led to heightened security measures and fractures within the team dynamics.

Mountain West Conference Commissioner Gloria Nevarez addressed the issue publicly, stating, "It breaks my heart because they're human beings, young people, student-athletes on both sides of this issue that are getting a lot of national negative attention" (Nevarez, 2024). She emphasized the emotional toll on all athletes involved and reaffirmed the conference's commitment to NCAA policies on inclusion.

On December 17, 2024, during a Senate Judiciary Committee hearing, U.S. Senators Josh Hawley (R-Mo.) and John Kennedy (R-La.) questioned NCAA President Charlie Baker regarding the participation of transgender athletes in collegiate sports and its implications for fairness, safety, and compliance with federal laws (Sports Business Journal, 2024; Newsweek, 2024a).

Senators' Position

Senator Hawley raised concerns about the impact of transgender athletes' participation on the fairness of women's sports. He emphasized testimonies from female athletes, such as Riley Gaines, who described feeling uncomfortable sharing locker rooms with transgender athletes, citing it as a violation of privacy (Newsweek, 2024a). Hawley argued that the NCAA's current policies insufficiently protect cisgender female athletes and demanded clarification on the organization's position regarding access to gender-specific facilities (Sports Business Journal, 2024). He also called for more comprehensive policies to ensure competitive equity in women's sports.

Similarly, Senator Kennedy supported Hawley's concerns, stressing the need for clear NCAA guidelines to address the safety and competitive fairness of all athletes (Sports Business Journal, 2024). Both senators underscored that the perspectives of cisgender female athletes must be prioritized in the policy-making process (Newsweek, 2024a).

NCAA President Baker's Position

In response, President Baker defended the NCAA's policies, emphasizing their compliance with Title IX, which prohibits sex-based discrimination in federally funded educational programs. He acknowledged the complexity of balancing inclusivity with fairness in collegiate sports. Baker highlighted that the NCAA provides separate male and female facilities at championship events and single-person, gender-neutral options when needed to address privacy concerns (Newsweek, 2024b).

Baker further noted that fewer than ten transgender athletes currently compete in NCAA sports, suggesting that while the issue is significant, its scope remains limited (Sports Business Journal, 2024). He assured the committee that the NCAA continually reviews its policies to adapt to evolving legal standards and societal values. However, he refrained from commenting on past decisions made before his tenure as president (Newsweek, 2024b).

Legal and Policy Implications

This hearing highlights the legal and ethical complexities surrounding the inclusion of transgender athletes in sports. The NCAA must navigate federal anti-discrimination laws, such as Title IX, while addressing concerns about competitive equity and safety. The absence of a unified national policy further complicates this landscape, leading to divergent approaches across states and institutions (Sports Business Journal, 2024; Newsweek, 2024a). The debate underscores the need for transparent, legally sound policies that uphold inclusivity without compromising fairness.

References

ABC News. (2024). Court rejects request to sideline San Jose State volleyball player on grounds she's transgender. Retrieved from https://abcnews.go.com/Sports

Associated Press. (2024). Judge rules in favor of San Jose State transgender athlete participation. Retrieved from https://apnews.com

ESPN. (2024). Volleyball players sue Mountain West over San Jose State player. Retrieved from https://www.espn.com/college-sports/story/_/id/42393427/volleyball-players-sue-mountain-west-san-jose-state-player

Fox News. (2024). Volleyball team leader 'sad' after coach's firing. Retrieved from https://www.foxnews.com/media/san-jose-state-volleyball-team-distraught-over-coachs-firing-following-lawsuit-protect-womens-sports

Inside Higher Ed. (2024). SJSU volleyball controversy sparks national debate. Retrieved from https://www.insidehighered.com/news/diversity/sex-gender/2024/12/09/volleyball-controversy-highlights-debate-over-trans-athletes#:~:text=The%20Trans%20Athletics%20Debate,women's%20500%2Dmeter%20freestyle%20championship.

NBC Bay Area. (2024). Member of SJSU women's volleyball coaching staff 'not with the team at this time'. Retrieved from https://www.nbcbayarea.com/news/sports/san-jose-state-university-member-of-womens-volleyball-coaching-staff/3697785/

Nevarez, G. (2024). Mountain West response to SJSU volleyball controversy [Press release].

New York Post. (2024). Judge makes ruling in case that decides fate. Retrieved from https://nypost.com/2024/11/25/sports/judge-makes-ruling-in-case-that-decides-fate-of-san-jose-states-transgender-volleyball-controversy/

New York Times. (2024). San Jose State volleyball's controversial season ends. Retrieved from https://www.nytimes.com/athletic/5959244/2024/12/01/san-jose-state-volleyball-mountain-west-tournament/

Newsweek. (2024a, December 17). Josh Hawley challenges NCAA president on transgender athletes in sports. *Newsweek*. Retrieved from https://www.newsweek.com/josh-hawley-ncaa-president-transgender-athletes-hearing-watch-2002344

Newsweek. (2024b, December 17). NCAA president Charlie Baker addresses transgender athlete participation at Senate hearing. *Newsweek*. Retrieved from https://www.newsweek.com/josh-hawley-ncaa-president-transgender-athletes-hearing-watch-2002344

Sports Business Journal. (2024, December 17). NCAA President Charlie Baker questioned by senators over transgender athlete participation. *Sports Business Journal*. Retrieved from https://www.sportsbusinessjournal.com/Articles/2024/12/17/ncaa-charlie-baker-

congressional-hearing-transgender-athlete-participation-josh-hawley-john-kennedy

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Update: Former Collegiate Football Stars' NIL Lawsuits for Retroactive Compensation

By Adam R. Bialek and Dara Elpren, of Wilson Elser

For many years, college athletes fought for the right to license their name, image, and likeness (NIL) while keeping their amateur status and participating in college athletics. Since the NCAA conceded and allowed payments to student athletes, litigation has shifted to those athletes who now want to receive compensation for failing to be permitted to collect such payments while they were playing collegiate sports. Following our recent article in *Sports Litigation Alert* about former collegiate student athletes filing NIL antitrust lawsuits against the NCAA and others for retroactive compensation, interesting developments have ensued in the NIL legal landscape. In this update, we cover advancements in previously discussed lawsuits, newly filed NIL lawsuits, and new NIL legislation.

Case Update: Retroactive Compensation for Ex-Michigan Football Players' NIL

After filing their lawsuit on September 10, 2024, against the National Collegiate Athletic Association (NCAA), among others (the MI Defendants), on December 12, 2024, the ex-Michigan football players (the MI Plaintiffs) asked a judge to certify their proposed student-athlete class on December 5, 2024; the MI Plaintiffs admit that it is early in the case to do so. The motion asks the judge to certify a plaintiff class, defined as follows:

> *All persons who were NCAA student athletes prior to June 15, 2016, whose image or likeness has been used in any video posted by or licensed by the NCAA, Big Ten Network, or their agents, distributors, contractors, licensees, subsidiaries, affiliates, partners, or anyone acting in concert with any of the foregoing entities or persons.*

According to the motion, "Plaintiffs' counsel has over 270 former student athletes who have joined this action," and they estimate that there will be thousands of members. The NCAA and Big Ten Network have not yet responded to the MI Plaintiffs' complaint. On December 17, 2024, the parties filed a joint stipulation to adjust deadlines, which provided the Defendants until January 13, 2025, to file responsive pleadings (the Defendants indicated that they intended to file motions to dismiss and/or to transfer venue), with a deadline to respond to the Motion for Class Certification suspended pending "resolution of Defendants' forthcoming responsive motions."

On January 13, 2025, the MI Defendants filed a Motion to Dismiss the Amended Complaint, arguing the MI Plaintiffs' claims are untimely, as much of the alleged conduct took place well over four years before the action commenced and was thus barred by the four-year statute of limitations for antitrust claims. The MI Defendants also argued that the MI Plaintiffs' claims are barred because of their participation in previous lawsuits that addressed NIL compensation, all of which have settled. In a separate filing, the MI Defendants moved to transfer venue to the United States District Court for the Southern District of New York (SDNY) to proceed alongside the earlier-filed action *Chalmers v. National Collegiate Athletic Association*, No. 1:24-cv-05008 (PAE) or, in the alternative, to stay proceedings pending the outcome of *Chalmers*, which was filed in New York federal court in July, before this case was commenced.

Case Update: Retroactive Compensation for Reggie Bush's NIL

On September 23, 2024, Reggie Bush filed suit against the University of Southern California (USC), the Pac-12

Conference (Pac-12), and the NCAA (collectively, the CA Defendants), alleging violations of the California Cartwright Act for unreasonable restraints of trade or commerce, a violation of the California Unfair Practices Act, and for unjust enrichment. The CA Defendants have since urged a Los Angeles state court to dismiss the case, arguing that Bush's claims are time-barred under the Cartwright Act's four-year statute of limitations, since Bush explicitly alleged that his injuries occurred while he was in college. The NCAA attorneys also argue that the Complaint is "legally insufficient," with "few facts" beyond Bush's football career.

Case Update: In re College Athlete NIL Litigation

As the parties in *In re College Athlete NIL Litigation* await final court approval for the proposed $2.78 billion settlement for NIL compensation, on December 5, 2024, the National College Players Association, an advocacy group made up of four politicians who are involved in drafting NIL laws in their states, released a statement objecting to the settlement. The lawmakers provided that their states' NIL laws shared several common clauses that conflict with the terms of the *House v. NCAA* settlement – including "(complying) with or enforcing any conference or NCAA rules that restrict or prohibit NIL compensation paid by athletic boosters and NIL collectives to athletes and rules that otherwise do not comply with our state's NIL law." They also emphasized that because their states were not party to the NIL class action, "the settlement does not affect our states' ability to enforce our NIL laws." However, just six days later, the lawmakers retracted their statement, admitting that the settlement "has not been deemed illegal in any way."

On December 20, 2024, the parties jointly filed a supplemental brief addressing the court's Tentative Ruling on their Joint Motion for Approval of Additional Settlement Class Communications. The parties had agreed to a revised question-and-answer document that can be published. This document was necessitated by the number of prospective student athletes who have "frequently approached NCAA member institutions with clarifying questions about the settlement." The parties have requested that the court approve a standardized communication that can be provided to prospective and current student athletes. Objectors to the settlement filed opposition to the proposed standardized communication, claiming that one of the items in the question-and-answer document was incorrect and needed to be corrected, insofar as the objectors claim that:

> *"Question No. 4 misleadingly implies that schools' discretion is currently bound by set roster sizes under NCAA rules. It is not. The Amended Settlement imposes those boundaries. This incomplete Q&A 'will surely result in confusion' among potential Class Members and must be corrected."*

The objectors believe even posing the question "Is a student athlete's roster spot guaranteed?" is itself misleading and have submitted that the proposed Q&A omits the most important information about how the Amended Settlement changes the state of play for countess student athletes.

On December 23, 2024, the court granted the Joint Motion for Approval of the Additional Settlement Class Communication, which permits the publishing of the revised Q&A.

The final settlement approval hearing for *In re College Athlete NIL Litigation* is scheduled for April 7, 2025.

On December 17, 2024, counsel in the instant three consolidated cases (*House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA*) filed a motion requesting Judge Wilken to approve more than $500 million in attorneys' fees and costs, to be paid over 10 years – the same time frame that NIL money and shared revenues are to be paid out to athletes going forward. Counsel noted that their request of 20 percent of the settlement funds in the *House* and *Hubbard* cases was reasonable in relation to the work involved, and also below the generally accepted market rate of 25 percent.

Case Update: Terrelle Pryor's NIL Suit

Following former Ohio State football player Terrelle Pryor's complaint filed on October 4, 2024, the NCAA, Learfield Communications LLC, The Ohio State University, and The Big Ten Conference, Inc. (the OH Defendants) filed motions to dismiss on January 3, 2025. In a joint motion, the OH Defendants argued that Pryor's claims are time-barred because he left college football at least 14 years ago, which is outside the Clayton Act's four-year statute of limitations for federal antitrust

claims. Further, the OH Defendants argued Pryor's claims are barred by his alleged participation in the *Alston* and *Keller* settlement releases and the *O'Bannon* judgment. Additionally, the OH Defendants argued that Pryor has not plausibly pleaded an injury since he has "nonexistent rights," "no copyright interests in games in which he played," and "no cognizable right of publicity in rebroadcasts of NCAA game footage." In the joint motion, the OH Defendants also requested oral arguments.

Individually, The Ohio State University filed a motion to dismiss for lack of subject-matter jurisdiction, arguing that Eleventh Amendment "sovereign immunity bars the Plaintiff's claims against Ohio State" since "Ohio State is a public university and instrumentality of the State of Ohio, and Plaintiff is a citizen and resident of Pennsylvania." Similarly, Learfield Communications filed its own motion to dismiss, citing immunity under both the state action doctrine and the *Noerr-Pennington* doctrine.

New Case: South Dakota NIL Lawsuit

While the *In re College Athlete NIL Litigation* settlement was pending preliminary approval before District Court Judge Wilken, on September 9, 2024, by and through the South Dakota attorney general, Marty Jackley, the State of South Dakota, and the South Dakota Board of Regents on behalf of South Dakota State University and the University of South Dakota (collectively, SD Plaintiffs) filed *The State of South Dakota et al. v. National Collegiate Athletic Association* 4:24-cv-04189 in Brookings County Circuit Court in South Dakota. The University of South Dakota and South Dakota State University are members of the Summit League Basketball Conference, which is a non–Power Four conference member of the NCAA.

The complaint claimed that the $2.78 billion proposed settlement would go primarily to student athletes from the "Power Four" conferences – the Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, and Southeastern Conference – leaving smaller schools such as those in South Dakota to face an unfair burden of the settlement's cost. Jackley argued that such smaller schools would have to collectively shell out roughly $960 million in NCAA distributions over the next 10 years to assist the deal – noting that less than 10 percent of the proceeds have been saved for female student athletes. Further, Jackley argued the proposed settlement would unlawfully rid the NCAA of its guiding principle of amateurism. In their prayer for relief, the SD Plaintiffs seek damages, declaratory relief, and injunctive relief.

On October 9, 2024, the NCAA filed its Notice of Removal under federal-question jurisdiction. The SD Plaintiffs subsequently argued for remand to state court, arguing that "the California court has already ruled that there is no common question of law or fact between the settlement approval and the NCAA's allocation model under its rules, bylaws or constitution." In response, the NCAA argued the SD Plaintiffs voluntarily chose to participate in the NCAA, and "a lawsuit seeking to undo a federal court's preliminary approval of a settlement of claims under federal law plainly belongs in federal court."

Further, the NCAA argued that Count 6 of the Complaint raises a federal issue, "namely whether the settlement meets the requirements imposed by Fed. R. Civ. P. 23 for judicial approval of the settlement." Thereafter, on November 15, 2024, SD Plaintiffs filed their Amended Complaint, removing Claim 6. On November 18, 2024, SD Plaintiffs filed their Reply Brief in Support of Motion for Remand, arguing that "Claim 6 was the only 'federal question' the NCAA identified in its response brief."

On November 13, 2024, SD Plaintiffs filed a motion to compel defendants to provide notice to South Dakota, and other affected states and their institutions of higher education, under 28 U.S.C. section 1715(b), since the "NCAA's notice facially fails to comply" with the two requirements under the statute. The State of South Dakota contacted the NCAA's counsel on October 17, 2024, stating that the notice was deficient; the NCAA did not respond within the 10-day period provided by the State of South Dakota.

On January 15, 2025, the SD Plaintiffs filed a Notice of Decision Re: Motions for Remand and Stay. In the notice, the SD Plaintiffs asked the court to take notice of the decision in *Royal Canin, Inc. v. Wullschleger*, 23-677 (U.S.), wherein the court "unanimously held that when an action is properly removed to federal court on the basis of federal-question jurisdiction, but the plaintiff then amends the complaint to omit the federal questions leaving only supplemental state-law claims, 'the federal court loses its supplemental jurisdiction over the

related state-law claims [and] [t]he case must therefore return to state court.'"

Additional NIL Updates: New Legislation

In other NIL news, on November 18, 2024, Ohio Governor Mike DeWine signed Executive Order 2024-08D, effective immediately, allowing Ohio colleges to pay student athletes for their NIL. The law provides that any post-secondary educational institution may offer compensation or compensate a student for the use of the student athlete's NIL provided that no post-secondary education shall use funds allocated by the State of Ohio. The executive order will expire if the settlement comes into "full operational effect." Despite this Order, Ohio State continues to be at the top of the list of schools benefitting from NIL deals, reportedly spending "around $20 million to keep their 2024–2025 football team intact."

Conclusion

This is a highly active time for college athlete compensation, and the impact it will have on the industry is still unknown. College sports is already showing signs that the availability of this money has reshaped recruiting dynamics, as schools and boosters are using NIL deals to entice high school athletes and transfer students. A survey conducted by the National College Players Association reported that nearly 75 percent of athletes consider NIL opportunities an important factor when choosing a school. The competition on the field is now met by competition off the field in trying to attract the top talent.

As these competitions increase, universities must contend with the litigation from prior athletes and there does not seem to be any signs that this will be slowing anytime soon. Whether legislation will help is also undetermined at this time. In the interim, it appears that the current top student athletes are benefitting from the new availability of money, and prior standouts are interested in their own gain.

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Examining the NCAA's Reversal of Its Transgender Policy in the Wake of The Administration's 'Misinterpretation of Title IX'

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

In reversing its current policy which allowed in most instances for transgender student-athletes to compete in sanctioned events based upon their gender identity, the NCAA announced on February 6, 2025, that all competition in women's sports will now be limited to those student-athletes who were assigned female at birth. This change comes in the wake of the Trump Administration's hyperbolic "Keeping Men Out of Women's Sports" executive order which states, in part, that "educational institutions and athletic associations have allowed men to compete in women's sports" and that allowing such "is demeaning, unfair, and dangerous to women and girls, and denies women and girls the equal opportunity to participate and excel in competitive sports." (https://www.whitehouse.gov/presidential-actions/2025/02/keeping-men-out-of-womens-sports/).

The Administration, in order to enforce its politically motivated mandate has threatened, through a misinterpretation of Title IX of the Education Amendments Act of 1972 (Title IX), to have the U.S. Department of Education investigate schools such as San Jose State University and the University of Pennsylvania for what it believes are "apparent Title IX violations" relating to transgender women competing in women's sports and by denying federal funding to any and all high school and college athletic programs that do not strictly adhere to its executive order.

The NCAA's position regarding transgender competition over the years, for the most part, was apolitical and based upon data and independent scientific studies regarding fairness and competitive advantages in transgender competition. Such is evidenced by the fact that in 2010, the NCAA, after commissioning reports from both the National Center for Lesbian Rights and the Women's Sports Foundation, adopted a policy that permitted transgender female athletes to compete in women's sports if that athlete met certain criteria and had undergone at least one year of testosterone

suppression treatment. In 2022, the NCAA modified it policy slightly, wherein transgender participation was determined by specific testosterone levels as allowed by the individual sport's national or international governing body or the International Olympic Committee. Throughout it all, however, the NCAA's fundamental principles regarding transgender participation was built around inclusiveness, as opposed to exclusiveness, and included language such as: "All stakeholders in NCAA athletics programs will benefit from adopting fair and inclusive practices enabling transgender student-athletes to participate on school sports teams." (NCAA Inclusion of Transgender Student-Athletes, August 2011, p. 8).

Now, with this new Executive Order in place, the NCAA Board of Governors implemented a bifurcated policy which states that regardless of sex assigned at birth or gender identity, a student-athlete may participate (practice and compete) with a men's team, while at the same time mandating that a student-athlete assigned male at birth may not compete on a women's team. (https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx). In addition, the Board instructed that its new policy was to go into effect immediately and that it would supersede any previous policies that allowed transgender athletes to compete in the sport in which they identified.

NCAA president Charlie Baker said in a statement regarding the Board of Governors' decision, "The NCAA is an organization made up of 1,100 colleges and universities in all 50 states that collectively enroll more than 530,000 student-athletes. We strongly believe that clear, consistent, and uniform eligibility standards would best serve today's student-athletes instead of a patchwork of conflicting state laws and court decisions. To that end, President Trump's order provides a clear, national standard." (https://www.npr.org/2025/02/07/). President Baker went on to state that "The updated policy . . . follows through on the NCAA's constitutional commitment to deliver intercollegiate athletics competition and to protect, support and enhance the mental and physical health of student-athletes. This national standard brings much needed clarity as we modernize college sports for today's student-athletes." (https://www.npr.org/2025/02/07/).

It should be noted that while the NCAA is capitulating to the political whims of the new administration, President Baker recently testified at a congressional hearing in December 2024 that even though the topic of transgender athletes competing at the college level has become a hot-button political issue, that there were fewer than 10 transgender student-athletes across all three NCAA divisions, or less than .0000188% of the over 530,000 student-athletes competing throughout its member institutions.

Many argue that banning transgender athletes in women's supports amounts to outright discrimination and targets a very small segment of the student-athlete population. Others, however, believe that transgender women, regardless of the science, have an unfair competitive advantage. Whatever your position, however, college athletic administrators need to be aware that there will likely be several legal challenges to the Administration's Executive Order and that if it is enjoined or otherwise invalidated, the NCAA may soon be revising its transgender participation policy once again to be more in line with its long-standing policy of inclusion rather than exclusion and its belief that all women are good enough to compete.

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Wrestling Fanatics: Referee Clears Gym, Legal Controversy Ensues

Dr. John Wendt

To say that Iowa High School Wrestling competition is "intense" is an understatement. The Iowa High School Athletic Association (IHSAA) describes Iowa as "Wrestling's Home and Heartbeat."[8] The ISHAA goes on to say, "At the center of our state's vibrant history, culture, and passion for sports, Iowa reigns as one of the nation's leaders in high school wrestling. Decades of championships and community support back the tradition of producing national and Olympic champions. The high school season of folkstyle wrestling culminates with the consistently sold-out state championships at Wells Fargo Arena in downtown Des

8 Iowa High School Athletic Association, *Wrestling*, IHSAA (2025), https://www.iahsaa.org/wrestling/ (last visited Jan 18, 2025).

Moines."[9] And that intensity was on full display on the January 9, 2025, contest between the top ranked Southeast Polk High School and number four ranked Ankeny High School which was held at Ankeny in front of a boisterous and packed house.[10]

One reporter emphasized the intensity of this competition, "If you have never been to a wrestling dual in Iowa, the fans on both sides of the mat – or sitting together on one if that is the preferred layout – are always involved, always yelling and always really believing they are not getting the benefit of the calls…Having covered many, many duals and tournaments over the years, the most interesting part of the wrestling community in Iowa is the actual passion they have for the sport as a whole. While some might wonder if the action outside the gym was just as intense, my guess is that fans from both sides probably came together to 'team up' in support against what was being called on the mats."[11]

In the 113-pound category Southeast Polk's Nico DeSalvo won a 19-7 major decision over Ankeny's Ben Walsh giving Southeast Polk a 34-0 lead, but then both wrestlers then proceeded to shove each other while they were shaking hands.[12] Both DeSalvo and Walsh were penalized one team point for flagrant misconduct. Frank Allen, a former wrestling referee and alumnus of Southeast Polk who was at the match said, "That was kind of the match that lit the fuse."[13] Video shows Southeast Polk's coach Jake Agnitsch approaching the scorer's table a number of times with Ankeny spectators booing. The Southeast Polk junior varsity and non-participating wrestlers had gathered on the floor close to the mat and were cheering raucously. And a short time later, the referee asked those athletes to move from the floor to the bleachers.

Spectators became more agitated before the 120-pound category as officials met at the scorer's table. Following a discussion with the referee the public address announcer Tom Urban read a statement calling for everyone to be respectful and warned the spectators that contestants needed to be treated with respect. That statement was met with sarcastic cheers by portions of the crowd.[14] Urban also warned that if the conditions did not improve the spectators would be asked to leave. When the conditions did not change, Urban announced, "Ladies and gentlemen, we ask that you please leave the gym immediately…Please calmly and quietly leave."[15] The entire stands were emptied; all parents, spectators and fans were asked to leave after that class. Cheerleaders sat idly. After about 20 minutes the final ten wrestlers competed in a nearly empty gym.

Former referee Allen said also that removing all spectators was unjustified: "I do not think that either team or either fan base, did anything wrong, not to the extent that they that they should have cleared out a gym…It's a bad look for wrestling, the sport, and it's a bad look for the officiating... there was no winners last night."[16] Former longtime Ankeny coach Dave Ewing said that he had never seen a mass ejection before: "Ten wrestlers didn't have their parents or good friends or any fans in the stands to watch them wrestle, and it was after about a 20-minute delay. Those are tough circumstances to try to compete under…It's a heated rivalry, and it got a little bit chippy in some of the matches… The referee was under a lot of pressure, and the situation got to a point where the administration had to get involved and try to resolve things and be reminded of sportsmanship and how important that is."[17]

9 *Id.*

10 Iowa High School Athletic Association, *Wrestling: 2025 Dual Team Rankings, Jan. 2*, IHSAA (Jan. 2, 2025), https://www.iahsaa.org/wrestling-2025-dual-team-rankings-jan-2/ (last visited Jan 18, 2025).

11 Dana Becker, *Southeast Polk-Ankeny Wrestling Dual Gets out of Hand, Entire Gym Ejected*, High School On SI (2025), https://www.si.com/high-school/iowa/southeast-polk-ankeny-wrestling-dual-gets-out-of-hand-entire-gym-ejected-01jh8976tdce (last visited Jan 18, 2025).

12 Central Iowa Sports Network, *CIML BOYS WRESTLING: SE Polk @ Ankeny*, (2025), https://www.youtube.com/watch?v=xAtOomdvr4o (last visited Jan 19, 2025).

13 Meghan MacPherson & Caleb Geer, *High School Wrestling Drama: Ankeny, Southeast Polk Wrestling Fans Ousted as Tensions Rise*, weareiowa.com (2025), https://www.weareiowa.com/article/sports/local-sports/fans-ejected-southeast-polk-ankeny-wrestling-dual/524-0d76d10f-d913-46ae-8161-dc9973ff5e7b (last visited Jan 18, 2025).

14 Dan Holm, *No. 1 S.E. Polk Completes Dominant Win over Ankeny Matmen before Empty Gym*, (2025), https://ankenyfanatic.com/2025/01/10/no-1-s-e-polk-completes-dominant-win-over-ankeny-matmen-before-empty-gym/ (last visited Jan 18, 2025).

15 MacPherson and Geer, *supra* note 6.

16 *Id.*

17 Staff Writers Coach & A.D., *Iowa Wrestling Official Kicks out Fans during Dual Meet*, Coach and Athletic Director (2025), https://coachad.com/news/iowa-wrestling-official-kicks-out-fans-during-dual-meet/ (last visited Jan 18, 2025).

Ankeny coach Jack Wignall blamed the referee and the overall lack and quality of referees: "The flagrant misconduct calls should not have been made, and it wasn't even administered right…The whole thing was not handled correctly."[18] Wignall went on to say, "I really don't think it got out of hand, but I can only imagine how flustered (the referee) must have been to think that that was his only option…I really feel bad for him, and I feel bad for the fans and the kids whose parents couldn't be in the gym to watch them wrestle. It was really just a crazy situation that got overblown. I hope it's a learning moment for the coaches' association." Finally, about the fan removal Wignall said, "It was his call, but I think it sheds a light on our referee shortage…The Iowa High School Athletic Association talks all the time about how they have to cancel events because we don't have enough referees. I don't know why we didn't have a better ref there – and I'm not calling him out – but what I am saying is that he was in over his head. You can't have a somewhat inexperienced referee for a CIML dual like that. It just sheds that light that nobody else was available to do that…[19]

Southeast Polk and Ankeny released a joint statement the following day saying, "We recognize that the events that transpired at last night's wrestling meet between Southeast Polk and Ankeny High School do not align with the values of sportsmanship and respect expected from all participants and spectators in the CIML. Both teams are working together as we move forward to foster a positive and respectful environment."[20] The ISHAA said that the director of officials and wrestling administrator was unavailable for comments and offered no clarification for the mass ejection. [21]

We have seen from the Covid years what it is like to compete in an empty arena.[22] Fan involvement is fun, maybe even necessary. However, there are also boundaries for acceptable fan behavior that don't cross over the line into referee or athlete abuse. There have been times, especially in soccer where referees have order fans to leave the area or games to be played in closed stadia.[23] It was unfortunate for everyone that the Southeast Polk – Ankeny competition concluded in an empty gym.

The National Federation of State High School Associations (NFHS) writes the playing rules for high school sports. Their goal is "to ensure that all students have an opportunity to enjoy healthy participation, achievement and good sportsmanship in education-based activities."[24] According to the NFHS Wrestling Case Book & Officials Manual, Section 12(4) "Conduct by a spectator that becomes abusive or interferes with the orderly progress of the match must be corrected by the referee...Wrestling will not be resumed until the offender has been removed."[25] According to Section 36.7(2) of the IHSAA Handbook "Sportsmanship. It is the clear obligation of member and associate member schools to ensure that their contestants, coaches, and spectators in all interscholastic competitions practice the highest principles of sportsmanship, conduct, and ethics of competition."[26] And finally, specifically dealing with public conduct on school premises the ISHAA Handbook very clearly states, "School sponsored or approved activities are an important part of the school

18 Holm, *supra* note 7.

19 *Id.*

20 Eli McKown, *Fans Removed from Gym during High School Boys Wrestling Dual between Southeast Polk, Ankeny*, The Des Moines Register (2025), https://www.desmoinesregister.com/story/sports/high-school/2025/01/10/southeast-polk-vs-ankeny-wrestling-dual-fans-asked-to-leave-empty-gym/77593458007/ (last visited Jan 18, 2025).

21 Staff Writers Coach & A.D., *supra* note 10.

22 Michael Hardy, *The Hushed Spectacle of Soccer Matches in Empty Stadiums*, (2020), https://www.wired.com/story/soccer-empty-stadiums/ (last visited Jan 20, 2025). *See also*, Calli McMurray, *How Playing in Empty Stadiums Affects Athletes*, (2021), https://www.brainfacts.org:443/thinking-sensing-and-behaving/thinking-and-awareness/2021/how-playing-in-empty-stadiums-affects-athletes-072621 (last visited Jan 20, 2025).

23 Associated Press, *Genoa Home Match against Juventus to Be Played without Fans after Crowd Trouble at Derby*, (2024), https://www.sportsnet.ca/serie-a/article/genoa-home-match-against-juventus-to-be-played-without-fans-after-crowd-trouble-at-derby/ (last visited Jan 20, 2025). *See also*, Associated Press, *Udinese to Play Home Game Minus Fans Following Racist Abuse Aimed at Opposing Player*, (2024), https://www.cbc.ca/sports/soccer/udinese-fans-barred-game-monza-italy-racial-abuse-1.7092074 (last visited Jan 20, 2025).

24 National Federation of State High School Associations, *About Us*, (2025), https://www.nfhs.org/who-we-are/aboutus (last visited Jan 18, 2025).

25 National Federation of State High School Associations, *2023-24 Wrestling Case Book & Officials Manual*, (2023), https://cdn1.sportngin.com/attachments/document/1d79-3089840/NFHS-WR-Casebook.pdf.

26 Iowa High School Athletic Association, *IHSAA Handbook*, (2024), https://www.iahsaa.org/wp-content/uploads/2024/11/2024-25-IHSAA-Handbook-FINAL.pdf (last visited Jan 18, 2025).

program and offer students the opportunity to participate in a variety of activities not offered during the regular school day. School sponsored or approved activities are provided for the enjoyment and opportunity for involvement they afford the students. Spectators will not be allowed to interfere with the enjoyment of the students participating, other spectators, or with the performance of employees and officials supervising the school sponsored or approved activity…"[27] And to show how serious the IHSAA takes this issue, the Handbook goes on to say, "If the spectator disobeys the school official or district's order, law enforcement authorities may be contacted and asked to remove the spectator. If a spectator has been notified of exclusion and thereafter attends a sponsored or approved activity, the spectator shall be advised that his/her attendance will result in prosecution. The school district may obtain a court order for permanent exclusion from future school sponsored activities."[28]

On January 9, 2025, Southeast Polk won all 14 matches, and the final score was Southeast Polk 60, Ankeny minus-1 due to Ankeny's penalty in the 113-pound category.[29] Was that the result that coaches wanted? Was that "an opportunity to enjoy healthy participation, achievement and good sportsmanship in education-based activities"? Is that how student-athletes will remember that night? Did the referee handle the situation properly? While these teams are not scheduled to meet again during the regular season, they could possibly face each other during the road to the State Championships. The question is, "Do they want the same scenario?"

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Three Years In, Flores' Discrimination Case Against NFL Is Stagnant And Diminished

By Christopher R. Deubert, Senior Writer

During the week of March 24, 2025, the United States Court of Appeals for the Second Circuit will hear oral argument on the NFL's position that the entirety of the racial discrimination lawsuit filed by coach Brian Flores should be compelled to arbitration. The Second Circuit previously rejected Flores' request to reconsider a lower court's decision to send a part of his case to an arbitration, which is now underway. Consequently, in the three years since it was initially filed, Flores' case has made **no meaningful progress**, and has now been hurt by comments from multiple players.

Flores Kicks Off

Flores filed his lawsuit in February 2022 after he was terminated as the head coach of the Miami Dolphins and was not hired for the same position with the New York Giants, Denver Broncos, or Houston Texans. Flores seeks to represent a class of Black coaches and executives he contends were similarly discriminated against and has been joined in his action by two other Black coaches, Steve Wilks and Ray Horton. Their inclusion brought in claims against their former employers, the Arizona Cardinals and Tennessee Titans.

Flores has had a successful stint as defensive coordinator for the Minnesota Vikings since 2023 and **interviewed** (unsuccessfully) for the head coaching positions with the New York Jets, Chicago Bears and Jacksonville Jaguars this offseason.

The Court Penalizes Flores for a False Start

In March 2023, the United States District Court for the Southern District of New York issued a decision **largely granting** the NFL's motion to compel the action to arbitration. The court determined that the coaches' claims related to their respective employment with the Dolphins, Cardinals, and Titans must be arbitrated pursuant to the arbitration provisions in the coaches' contracts with those clubs. She also ruled that the arbitration agreements cover the coaches' claims against the NFL.

On the other hand, the court ruled that the arbitration provisions do not cover the claims against the Broncos, Giants, and Texans because the coaches had no contracts with them.

The court rejected Flores' claims that the arbitration provisions in his contract were unenforceable because they provided NFL Commissioner Roger Goodell the authority to hear the dispute. Instead, the court reasoned, if Goodell administered the arbitration

27 *Id.* at 77.

28 *Id.*

29 Becker, *supra* note 4.

in a biased manner, then Flores could come into court and request the arbitration decision be vacated. But the court would not prejudge the fairness of the proceedings agreed to by Flores in his contract.

In July 2023, the Court denied dueling motions for reconsideration of the Court's initial order.

The Case Runs an Option Route

The NFL appealed the portions of the court's order denying its motion to compel arbitration to the Second Circuit. Flores, on the other hand, had no right to an appeal at this stage of the proceedings and both the district court and the Second Circuit denied his request to consider one.

The result was a bifurcation of proceedings.

In a September 24, 2024 letter to the Second Circuit, the NFL informed the court that **Goodell had designated Peter Harvey**, the former Attorney General of New Jersey, as the arbitrator for the portion of the case compelled to arbitration.

The NFL's decision to appoint Harvey as the arbitrator is consistent with the NFL's past practice. To avoid allegations of bias from undermining the enforceability of the arbitration proceedings, Goodell has regularly appointed a neutral or near-neutral arbitrator to hear high-profile disputes. Indeed, Goodell had **previously tagged** Harvey to hear the NFL's appeal of an initial disciplinary decision involving Cleveland Browns quarterback DeShaun Watson before that case settled.

The NFL's arbitration process does not sit well with a dozen law professors with expertise in arbitration law, who filed a brief urging the Second Circuit to consider more broadly the potential impact of upholding the NFL's process through which any employment-related claims brought by NFL club employees are to be decided in an arbitration presided over by the Commissioner. **The professors argued** that permitting Goodell to serve as arbitrator "is unconscionable and contrary to the norms of fundamental fairness" and would incentivize employers across the country to employ a similar dispute resolution process. Nevertheless, courts have demonstrated a **long-standing deference** to the authority of Commissioners to resolve disputes in their leagues.

If the NFL prevails at the Second Circuit, the claims against the Broncos, Giants and Texans will be moved to arbitration. If it loses, then those claims will be remanded to the district court for further proceedings.

New Players Emerge

Lost in the legal wrangling over the appropriate forum for adjudicating the case is one of the substantive questions to be answered – was Flores' race a motivating factor in his termination by the Dolphins?

Some potential witnesses have seemingly lined up against Flores' case. Flores coached the Dolphins from 2019 through 2022. His most important draft pick was quarterback **Tua Tagovailoa,** with the fifth overall pick in the 2020 NFL Draft. Nevertheless, after Flores' departure, Tagovailoa **described him** as a "terrible person" who repeatedly told him that he "suck[ed]." Consequently, it seems likely that Tagovailoa believes Flores' termination was related to his performance, not his race.

Similarly, Ryan Fitzpatrick, a journeyman quarterback who played for the Dolphins in 2019 and 2020, **said** Flores had become a "dictator" by the end of his tenure with the club and that he "broke" Tagovailoa. Fitzpatrick thus may also be a helpful witness for the Dolphins' version of events.

Should the NFL lose at the Second Circuit, it may desire to try to resolve the cases rather than have to litigate such sensitive issues in a public court. If it wins, it may feel confident in asserting its defenses in the private arbitration. Either way, Flores has spent three years fighting procedural battles, only to see his claims weaken in the meantime.

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Circumventing the NCAA Transfer Portal: A Case Study on Xavier Lucas

By Joseph M. Ricco IV

Former Wisconsin football player Xavier Lucas has sparked a legal and NCAA compliance debate after transferring to the University of Miami without entering the transfer portal. His decision challenges existing transfer policies and could set a new precedent in college athletics. The move, arranged by his attorney Darren Heitner, bypassed traditional procedures and led to

accusations of tampering from Wisconsin and the Big Ten Conference. The case centers on whether Lucas' two-year Name, Image, and Likeness (NIL) agreement with Wisconsin is legally binding. Wisconsin argues the contract remains in effect, while Lucas' representation claims the school failed to follow NCAA transfer rules. This article explains how Lucas was able to transfer without entering the portal, examines the legal arguments from both sides, and features expert insight on what this case could mean for future transfer disputes and NIL enforcement.

Lucas' Transfer and Legal Argument

Wisconsin cornerback Xavier Lucas sought to transfer after his freshman season but encountered resistance when the school refused to enter his name into the NCAA transfer portal. Lucas, a former four-star recruit from American Heritage High School in Florida, appeared in 12 games for the Badgers in 2024, recording 18 tackles, two tackles for loss, a sack, and an interception. Despite showing promise in his first college season, he decided to leave the program and return closer to home. However, Wisconsin did not process his transfer request within the required two-business-day window, blocking his entry into the portal. With his path restricted, Lucas and his attorney, Darren Heitner, pursued an alternative route. Lucas withdrew from Wisconsin entirely, applied to Miami as a regular student, and enrolled without officially entering the portal. Since NCAA rules do not prevent a student-athlete from unenrolling at one institution and enrolling at another, this allowed Lucas to complete his transfer while avoiding the restrictions of the portal system.

Lucas' legal team argues that Wisconsin had no valid reason to block his transfer request, making their refusal a violation of NCAA bylaws. Heitner contends that since Lucas was not bound by an active contract and had received no compensation under Wisconsin's Name, Image, and Likeness deal, he was free to leave without financial or legal obligations. Additionally, Lucas' camp maintains that there was no impermissible contact with Miami's football program before his transfer, as he independently chose to enroll at the university. They view this as a necessary workaround in response to Wisconsin's failure to follow NCAA procedures, rather than an attempt to exploit a loophole.

Wisconsin's Argument and Tampering Allegations

Wisconsin maintains that Lucas' transfer was not a simple case of a player leaving for another school but a direct violation of contractual agreements and NCAA rules. The university argues that Lucas signed a binding two-year Name, Image, and Likeness agreement on December 2, 2024, which included financial compensation contingent on the pending *House v. NCAA* settlement. Wisconsin contends that this agreement remained in effect and that Lucas was obligated to honor it. By requesting a transfer after signing the deal, the university claims he acted inconsistently with the agreement's intent, which justified the school's refusal to enter his name into the transfer portal. Furthermore, Wisconsin alleges that Miami engaged in impermissible contact with Lucas before he was officially eligible to communicate with other programs, violating NCAA tampering rules.

The Big Ten Conference issued a statement supporting Wisconsin, reinforcing the claim that Lucas' agreement should be upheld as enforceable. The conference also expressed concern about tampering, calling Miami's alleged involvement "troubling" and stating that it undermined ongoing efforts to regulate NIL and transfer activity. Wisconsin has not ruled out pursuing legal action against Miami, and with no clear precedent on the enforceability of revenue-sharing agreements, the case could become a key test of how schools handle NIL contracts moving forward.

Expert Opinion

To gain further insight into the legal and NCAA compliance issues surrounding Lucas' transfer, Dr. B. David Ridpath, a professor of sports business at Ohio University and an expert in NCAA governance, was interviewed for this article. Ridpath, who has extensively studied college athletics regulation, views Lucas' transfer as a direct challenge to the existing system. He explained that while the transfer portal was designed to streamline the process, players are not required to use it. "If college athletes are truly students first, they should be able to transfer as a regular student, and there is no reason to enter the portal if they do not want to," Ridpath said. He noted that Lucas' case exposes the limitations of the portal system, as NCAA rules do not mandate its use for eligibility. While the

portal allows coaches and programs to track available players, Ridpath emphasized that Lucas' ability to enroll at Miami without it reinforces the idea that the system is not legally binding.

Ridpath was also critical of Wisconsin's efforts to enforce Lucas' Name, Image, and Likeness agreement. He argued that the school's stance contradicts its classification of players as student-athletes rather than employees. "You cannot say they are a student and then try to enforce employment agreements," Ridpath said. He explained that Wisconsin cannot claim Lucas was contractually bound while simultaneously maintaining that he was not an employee. Furthermore, he pointed out that the agreement was contingent on the pending *House v. NCAA* settlement, which has yet to be finalized. Without an active revenue-sharing system in place, he believes Wisconsin does not have a strong case for enforcing the contract. He suggested that until college athletes gain full employee status with collective bargaining rights, similar disputes will continue to emerge.

Regarding Wisconsin's tampering accusations, Ridpath questioned their legitimacy and the NCAA's ability to regulate such claims. He argued that the concept of tampering is inconsistent when applied to student-athletes who are not considered employees. "You cannot tamper with a non-employee student," he said, comparing the situation to academic recruitment, where universities openly pursue top students from other institutions. He believes that if schools want to prevent unrestricted player movement, they will need to negotiate enforceable contracts through collective bargaining rather than relying on outdated NCAA rules. As college athletics continues to evolve, Ridpath sees cases like Lucas' as evidence that NIL policies and transfer regulations are still in flux, with legal challenges likely to play a growing role in shaping future policy.

Up Next: *House v. NCAA*

The Xavier Lucas case highlights the growing legal challenges surrounding Name, Image, and Likeness agreements, transfer policies, and player rights in college athletics. His decision to bypass the portal exposed a potential loophole in NCAA rules, while Wisconsin's response raised questions about the enforceability of revenue-sharing agreements. As the *House v. NCAA* settlement awaits final approval, this case serves as an early test of how schools will handle NIL contracts and player mobility in a changing system. If Lucas' transfer stands without penalty, other athletes may follow a similar path, forcing schools and conferences to reconsider how they regulate transfers. On the other hand, if Wisconsin or the NCAA successfully challenges the move, it could prompt stricter enforcement of NIL contracts and tampering rules. With *House v. NCAA* set to reshape how athletes are compensated, cases like this will likely shape future policies, with schools, athletes, and legal experts closely watching how governance adapts to the shifting landscape.

Joseph Ricco is a junior at the University of Texas at Austin, double majoring in sport management and government. He has experience in recruiting operations with Texas Football, training camp operations with the Kansas City Chiefs, and football analytics with Pro Football Focus. He has also published work on sports law topics, including salary cap, NIL, and CBAs. Joseph plans to attend law school and pursue a career in football operations, player personnel, or administration.

References

Bachar, Z. (2025, January 19). Xavier Lucas joins Miami after Wisconsin refused to enter him in CFB Transfer Portal. Bleacher Report. https://bleacherreport.com/articles/10151285-xavier-lucas-joins-miami-after-wisconsin-refused-to-enter-him-in-cfb-transfer-portal

Jeyarajah, S. (2025, January 19). Why Wisconsin DB Xavier Lucas' transfer to Miami triggered tampering accusations, potential legal battle. CBSSports.com. https://www.cbssports.com/college-football/news/why-wisconsin-db-xavier-lucas-transfer-to-miami-triggered-tampering-accusations-potential-legal-battle/

\Kenney, B. (2025, February 6). New College athletics structure to eliminate conflicts like Wisconsin vs. Xavier Lucas. USA Today. https://badgerswire.usatoday.com/story/sports/college/badgers/football/2025/02/06/wisconsin-football-xavier-lucas-update-new-structure/78291891007/

Lichtenstein, A. (2025, January 22). Is Miami at risk for NCAA, legal punishment for taking transfer Xavier Lucas?. Opelika-Auburn News. https://oanow.com/sports/college/is-miami-at-risk-for-ncaa-legal-punishment-for-taking-transfer-xavier-lucas/article_c362809f-a78e-5760-b8a3-8c49707c75c7.html

McPherson, J. (2025, January 19). Wisconsin, big ten release statements calling out Miami regarding Xavier Lucas Transfer. Miami Herald. https://www.miamiherald.com/sports/college/acc/university-of-miami/article298779388.html

Temple, J. (2025, January 18). Wisconsin alleges Miami had impermissible contact with CB Xavier Lucas. The New York Times. https://www.nytimes.com/athletic/6071080/2025/01/18/xavier-lucas-transfer-portal-miami-wisconsin/

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Lawsuit Challenges California Law that 'Allows Boys to Play on Girls' Sports Teams

Two female high school athletes from California, K.S. and T.S., along with their families, and the Save Girls' Sports association, have filed an amended federal lawsuit against the State of California, Riverside Unified School District, and school officials.

The lawsuit challenges AB 1266, the California law that "requires schools to allow biological males to compete in girls' sports and use female bathrooms," according to the plaintiffs.

"This law conflicts with federal Title IX protections, which were established to ensure fairness, safety, and equal opportunities for female students and athletes. AB 1266 undermines female athletes, forcing them to compete against biological males who hold undeniable physical advantages. This is not equality," according to Advocates for Faith & Freedom, a non-profit law firm dedicated to protecting constitutional and religious liberty in the courts

"As a result of AB 1266 and the school district's discriminatory practices, school officials removed T.S. from the girls' varsity cross-country team and replaced her with a biological male who had previously broken female cross-country records at another high school. In an effort to speak out against this unfair treatment, T.S. and K.S. wore shirts displaying the message 'Save Girls' Sports' and 'It's Common Sense. XX ≠ XY.' However, school officials then ordered them to remove or cover the messages, labeling the shirts as 'hostile' and comparing the shirts to swastikas."

The lawsuit names California Superintendent of Public Instruction Tony Thurmond and Attorney General Rob Bonta "for enforcing AB 1266, along with Riverside Unified School District officials Principal Leann Iacuone and Assistant Principal Amanda Chann, who discriminated against K.S., T.S., and members of the Save Girls' Sports Association.

Since filing the lawsuit, more than 200 students have worn the 'Save Girls' Sports' shirts on campus in solidarity with K.S. and T.S., sending a clear message to school administrators and State officials that discrimination against female athletes will not be tolerated."

Advocates attorney Julianne Fleischer stated, "The government is steamrolling over women's rights with radical policies that dismantle fairness in sports and muzzle those who dare to defend it. This is not progress; it is regression. Female athletes train, sacrifice, and compete to win—not to be sidelined by an ideology that ignores biological reality."

Attorney Robert Tyler added, "Title IX was created to protect female athletes from exactly this kind of injustice. The idea that biological males should take spots from young women is an outright betrayal of the law's intent. We applaud President Trump for taking decisive action to restore fairness and demand that California abandon this destructive agenda before it erases a generation of female athletes."

"The plaintiffs seek a federal ruling that AB 1266 violates Title IX as well as a decision holding the District accountable for violating their First Amendment rights. They demand injunctive relief to stop schools from forcing biological girls to compete with and against males, a judgment affirming sex-based protections in athletics, and compensation for damages caused by these discriminatory policies."

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Hackney Publications Creates Client Referral Program for Sports Lawyers

Hackney Publications announced today a client referral program, leveraging 25 years of editing and publishing experience in the sports law field to pair potential legal clients with sports lawyers.

Those "friends of Hackney Publications," defined as subscribers and sponsors, will receive notification when a potential legal client reaches out through Sportslawexpert.com as well as various other channels.

"Informally, we have referred clients to sports lawyers for more than a decade," said Holt Hackney, founder and CEO of HP. "We are excited to make this program a free benefit to friends of Hackney Publications."

Hackney added that the idea came about because of the sudden surge in inquiries the company has received. Among those inquiries in recent weeks:

"Hello, we are looking for an attorney to help My Daughter who is at a division one School was approved for one year of medical redshirting, but declined for the second year by the NCAA. ... Not sure if we have a case but we need to try to get her eligibility back and we are looking for an attorney to help us.

"I read the article entitled "State Supreme Court Overrules Lower Court's Decision; High School Student's Athlete's Firth Year of Eligibility Denied" in January/February 2023 publication and was hoping my family could obtain guidance on a law firm or attorney who might be able to assist in overturning a hardship denial of 5th year eligibility."

Hackney noted that "some of these leads have emerged because of the growth in Legal Issues in High School Athletics (LIHSA), one of our 25 sports law publications. Five state associations, for example, have taken subscriptions to LIHSA on behalf of their members in recent years, pushing our subscription base to more than 20,000."

HP plans to highlight the opportunity to its readers of LIHSA and other publications, connecting those seeking legal representation from qualified counsel.

About Hackney Publications

Hackney Publications is the nation's leading publisher of sports law periodicals. The company was founded by journalist Holt Hackney. Hackney began his career as a sportswriter, before taking on the then-nascent sports business beat at Financial World Magazine in the late 1980s. A few years later, Hackney started writing about the law, managing five legal newsletters for LRP Publications. In 1999, he founded Hackney Publications. Today, Hackney publishes or co-publishes 25 sports law periodicals, including **Sports Litigation Alert**, which offers a searchable archive of more than 5,000 case summaries and articles. In addition, the Alert is used in more than 100 sports law classrooms any given semester.

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NYRA and HISA Reach Settlement

The New York Racing Association, Inc. (NYRA) and the Horseracing Integrity and Safety Authority (HISA) have announced a settlement of their dispute regarding HISA's fee assessment methodology.

As a result of the settlement, NYRA will withdraw from the litigation pending in the Western District of Kentucky and HISA will withdraw the enforcement action initiated against NYRA on November 13, 2024.

"HISA's ongoing work and overall mission are critically important to the future of thoroughbred horse racing," said David O'Rourke, NYRA President & CEO. "NYRA is pleased to have reached this agreement, which resolves a narrow financial dispute and allows both parties to move forward in the best interests of the sport."

"From the start, NYRA has been an excellent partner to HISA and it is regretful that this financial issue caused a momentary hiccup in the relationship," said Lisa Lazarus, HISA Chief Executive Officer. "However, we are delighted to move forward and to resume our strong partnership grounded in the principles of horse welfare and sporting integrity."

Horseracing Integrity and Safety Authority

Subject to Federal Trade Commission oversight, the Horseracing Integrity and Safety Authority is charged with recommending and implementing uniform safety and integrity rules in Thoroughbred racing. HISA is implementing, for the first time, a national, uniform set of rules applicable to every Thoroughbred racing participant and racetrack facility. HISA is comprised of two programs: the Racetrack Safety Program, which went into effect on July 1, 2022, and the Anti-Doping and Medication Control (ADMC) Program, which went into effect on May 22, 2023.

The Racetrack Safety Program includes operational safety rules and national racetrack accreditation standards that seek to enhance equine welfare and minimize equine and jockey injury. The Program expands veterinary oversight, imposes surface maintenance and testing requirements, enhances jockey safety, regulates riding crop use and

implements voided claim rules, among other important measures.

The ADMC Program includes a centralized testing and results management process and applies uniform penalties for violations efficiently and consistently across the United States.

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NWSL Policy on Transgender Athletes Aided By FIFA And U.S. Soccer Inaction

By Christopher R. Deubert, Senior Writer

In 2021, the National Women's Soccer League (NWSL) released a **Policy on Transgender Athletes which generally permits athletes to participate in the league provided their testosterone levels are within the normal ranges of persons** designated female at birth. The policy thus theoretically permits both transgender men and transgender women to participate in the league. The league's policy stands in contrast to the policies of the global governing bodies for track and field (World Athletics) and swimming (World Aquatics), which have generally banned transgender women based on scientific research conducted in accordance with the International Olympic Committee's (IOC) framework on the issue.

The IOC's Framework

In November 2021, the IOC issued its **Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations**. The IOC's framework identified ten largely self-explanatory principles it believed organizations in charge of organizing sporting competitions, particularly at the elite level, should take into consideration in crafting eligibility policies: (1) inclusion; (2) prevention of harm; (3) non-discrimination; (4) fairness; (5) no presumption of advantage; (6) evidence-based approach; (7) primacy of health and bodily autonomy; (8) stakeholder-centered approach; (9) right to privacy; and (10) periodic reviews.

IOC rules and policies are generally binding on **International Sports Federations,** the global governing bodies for sports that participate in the Olympics. Further to that point, the IOC's framework tasked each sport's international federation with crafting its own policy based on the principles identified in the framework.

In response, **in June 2022**, World Aquatics, swimming and diving's international federation, **issued a policy** which effectively barred transgender women from participating in elite level women's competitions – they can only participate if they transitioned from male to female before age 12 or have undergone a minimal amount of puberty. World Aquatics' policy was informed by the work of a "Science Group," consisting of "independent experts in the fields of physiology, endocrinology, and human performance, including specialists in sex differences in human performance and in transgender medicine." The Science Group, after having reviewed "the most up-to-date scientific knowledge" on the issue, "reported that there are sex-linked biological differences in Aquatics, especially among elite athletes, that are largely the result of the substantially higher levels of testosterone to which males are exposed from puberty onwards."

In March 2023, World Athletics, the international federation for track and field, adopted a **substantially similar policy** as that of World Aquatics. The policy cited several scientific studies in support.

The American Response

The United States' representative at the IOC is the United States Olympic and Paralympic Committee (USOPC). Pursuant to federal law, the USOPC is empowered to govern American participation in the Olympics and related international events, including through certifying the national governing bodies (NGBs) for each particular sport in the United States.

In December 2022, the USOPC issued a **position statement** on transgender athlete participation in sport. Citing the IOC's framework, the USOPC said the decision on transgender participation must be based on the "guiding principles" of "science-based decisions" and "fairness." Perhaps most importantly, the USOPC said "[f]or athletes participating in sports during or after puberty," eligibility decisions should be made "on a sport-by-sport basis."

Indeed, earlier that year, **the NCAA had changed its Transgender Student-Athlete Participation Policy** such that eligibility decisions would be made

on a sport-by-sport basis according to the policy of the NGB for that sport. Consequently, for example, NCAA swimmers must comply with the World Aquatics policy.

Silence from the World of Soccer

At the time of World Aquatics' decision, FIFA, soccer's international federation, **said it would review** its transgender participation policy. In 2011, FIFA issued **gender verification regulations** but which do not set testosterone limits or address the scientific issues examined in the World Aquatics and World Athletics policies. Indeed, two-and-a-half years after it said it would review its policy, **FIFA has not issued any new guidance**. FIFA did not respond to a request for comment as to the current state of its policy review.

U.S. Soccer, the sport's American NGB, has not filled the gap. The organization has no policy on transgender participation and said it was not aware of any research concerning the participation of transgender individuals in soccer. The USOPC did not respond to a request for comment concerning the same issues.

The NWSL's Policy

In the absence of a policy from FIFA or U.S. Soccer, the NWSL is well-positioned to continue with its existing policy. That policy, which it describes as an "eligibility policy," permits "athletes designated female at birth who identify as male (transgender men)" to play in the NWSL if their testosterone levels are "within typical limits of women athletes." Additionally, the policy permits athletes transitioning from male to female (transgender women) to compete if their testosterone levels have been sufficiently low for at least 12 months prior to competition.

The NWSL's policy is thus at odds with those of World Aquatics and World Athletics. Notably, the league permits transgender women to play in the league even if they transitioned after puberty. Nevertheless, there are no known instances of a transgender woman playing or seeking to play in the NWSL.

The league has though had at least **two players who identify as non-binary**: Quinn (formerly Rebecca Quinn) who played for the Washington Spirit and Seattle Reign between 2018 and 2024; and Kumi Yokoyama of the Spirit and NJ/NY Gotham FC from 2020 to 2022. Consequently, at the 2022 Sports Lawyers Association Conference, NWSL Commissioner Jessica Berman explained that the league prefers to avoid gendered terminology and instead simply refer to the league's "players." Indeed, Berman has said that the league **will not change** its policies or values in response to any policies or proclamations from a Trump administration.

The NWSL's policy is **consistent with that of the English Football Association**, and which has reportedly enabled approximately 20 transgender women to play at the lower levels of the English soccer system.

The NWSL has nonetheless faced criticism from the transgender community and its allies. Portland Thorns goaltender Bella Bixby **has called for the league** to drop the "W" from its name, arguing that it is "non-inclusive." In addition, Quinn has **criticized the league's policy** as "problematic," apparently for relying on testosterone levels to determine eligibility.

The NWSL did not respond to a variety of questions on these issues, including whether it is aware of any research concerning the participation of transgender individuals in professional soccer, whether the NWSL considers its policy to be science-based consistent with IOC and USOPC guidance, its opinion of the World Aquatics and World Athletics policies, the status of FIFA's policy review, or any possible changes to NWSL policy.

The Potential for Conflict

The question is what happens to the NWSL policy if FIFA or U.S. Soccer adopt a policy similar to those of World Aquatics and World Athletics? U.S. Soccer is a member of and therefore subject to FIFA's rules. Next, U.S. Soccer's **Professional League Standards** require the leagues it sanctions – which includes the NWSL – to "remain in good standing with U.S. Soccer." More specifically, the Standards state that sanctioned leagues are "subject to U.S. Soccer Federation bylaws and policies." Consequently, it would seem that the NWSL would have to comply with a revised policy from FIFA or U.S. Soccer on participation by transgender individuals.

Nevertheless, there is no indication that any such policies are forthcoming. Moreover, any policy that would meaningfully restrict participation by

transgender individuals (like those of World Aquatics and World Athletics), would likely be opposed by the NWSL and by U.S. Soccer on its behalf. Given the United States' global importance in women's soccer, the absence of developments on these issues then seems unsurprising.

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More Than Play: How Law, Policy, and Politics Shape American Youth Sport

(Editor's Note: What follows is an excerpt from More Than Play: How Law, Policy, and Politics Shape American Youth Sport, published by the University of California Press and written by Dionne Koller, Professor of Law and Director of the Center for Sport and the Law at the University of Baltimore. The book can be published at https://www.ucpress.edu/books/more-than-play/paper or https://www.amazon.com/More-Than-Play-Politics-American/dp/0520399269/ref=tmm_pap_swatch_0?_encoding=UTF8&qid=)

Youth sport operates at the crossroads of the law of the child and family and the law of sport. As the previous chapters explain, these two areas are shaped by formidable assumptions that impact children's sport experience. The law assumes that sport sponsors are entitled to deference because they are the stewards of what makes the games special. Moreover, while the law assumes parents act in the best interests of their children, as explained below, the law also assumes that the interests of children are advanced by and aligned with the interests of sport sponsors. With these understandings, we can appreciate the final piece of the law and policy that greenlight our current approach. This is the preference for encouraging participation in, but generally not funding or regulating, grassroots youth sport.

To begin, as chapter 1 explains, no single entity has jurisdiction over youth sport. Therefore, just as it is difficult even to define youth sport, it is also challenging to map in full the legal and policy terrain. It is perhaps most useful to start with what, from a law and policy standpoint, grassroots youth sport is not. Broadly speaking, law and policy aimed at grassroots youth sport may target two areas: providing opportunities to participate and regulating the experience. Federal and state governments, by and large, do little of either.

Without a sports ministry or similar government agency overseeing U.S. sport, there is no federal entity charged with funding, regulating, or setting a uniform standard for youth sport. Indeed, researchers have noted that the U.S. federal government has had little interest in funding or regulating the safety of children's sport or otherwise ensuring the availability of youth sport opportunities. Moreover, while states regulate in a host of areas involving children, they too generally have no overall policy or strategy to ensure widespread, safe, developmentally appropriate grassroots youth sport participation.

This is not due to lack of power. The federal government has ample authority to regulate grassroots youth sport through, for instance, its powers under the Constitution's Commerce Clause, which permits Congress to regulate matters that affect interstate commerce, as much of youth sport does. Indeed, with this power Congress has enacted statutes instructing federal agencies to regulate a host of products aimed at children, such as toys and other children's items, television programming, and the internet. Congress could further shape sports participation in schools by also using its spending power, as it did with prohibitions on sex discrimination through Title IX, race discrimination through Title VI, and discrimination against individuals with disabilities under the Rehabilitation Act. Through this power, Congress could condition receipt of federal financial assistance on meeting minimum safety or participation goals. The federal government instead chooses to limit its youth sport efforts to collecting data, promoting participation "through public figures," and providing some grant funding.

States also may regulate youth sport through their general police and *parens patrie* powers (explained in chapter 2). In addition, both the federal government and states certainly have the authority to fund grassroots youth sports expansively (and, in the case of sport occurring in public schools, states do). As with other areas where federal and state law regulates children's experiences and products, legislatures would have strong policy justifications for setting at least some standards for the youth sport experience. As

explained below, however, the presumptive hands-off policy approach to sport generally has been applied to youth sport, revealing that, in the eyes of the law, the activity is more sport than youth.

Our Youth Sport Policy

While there is no public entity setting policy for youth sport, there is no shortage of government enthusiasm for the activity. As explained in chapter 1, high-profile federal government promotion of youth sport began in 1953, when President Dwight Eisenhower created the President's Council on Youth Fitness in response to reports of the poor state of youth physical fitness in the United States. The council was to be a "catalytic agent" focused on creating public awareness of the benefits of youth physical fitness. President Lyndon Johnson continued this effort, changing the name to the President's Council on Physical Fitness and Sports to encourage greater youth fitness through participation in sports. Subsequent administrations established the "Presidential Sports Award" to spur children's participation in physical activity, issued executive orders seeking to encourage participation in youth sport, and provided grant funding for the National Youth Sports Program. More recent presidential administrations have continued to promote awareness and involvement in youth sport to enhance physical fitness, and in 2002 President George W. Bush issued an executive order directing the Department of Health and Human Services (HHS) to "develop and coordinate" a national program to stimulate sports participation and physical fitness as well as good nutrition. The goals of the President's Council have largely been limited to promoting awareness and generating interest in sports participation. The council does not have the authority to create a youth sports structure that would ensure greater access or regulate the opportunities that are currently provided.

In addition to the work of the President's Council, other executive branch initiatives promote the benefits of youth sport. For instance, the Council of Economic Advisers issued a report in 2018 encouraging youth sport participation because of the potential it could foster for long-term positive "labor market outcomes." More recently, the HHS Office of Disease Prevention and Health Promotion, through its Healthy People 2030 program, set a national objective to "increase the proportion of children and adolescents who play sports." The report sets a target participation rate of 63.3%, which it states will generate health benefits and increase children's academic, social, and long-term economic prospects. The National Youth Sports Strategy (NYSS), released by the HHS in 2019, states that the government's goal is

> *to increase "youth engagement" with areas of sport showing lower rates of participation and otherwise support "U.S. youth sports culture" so that, ultimately, all children "have the opportunity" and "motivation" to participate.*

In addition to these executive branch efforts, members of Congress have introduced countless bills and resolutions to encourage youth sport participation. There exists a "Congressional Caucus on Youth Sports," and members of Congress have introduced numerous resolutions to endorse the benefits of youth sport. Legislation has provided grant funding for youth sport programs as part of, for instance, the war on drugs and as a strategy to assist "low-income youth." Congress has recognized "National Youth Sports Week," "Youth Sports Safety Month," and the contributions of adults who are involved in youth sport. Members of Congress have also introduced bills to provide tax incentives to enroll children in sport. In addition, Congress has supported youth sport through initiatives such as incorporating Little League baseball and granting liability protections for volunteers who serve in nonprofit and other associations, including youth sport organizations. Youth sport is even promoted through the tax code. The Internal Revenue Code grants tax-exempt status to "amateur sports organizations." Most recently, members of Congress introduced the PLAYS in Youth Sports Act, which would direct the HHS to establish a $75 million annual grant program to support and encourage youth sport participation.

States also strongly encourage participation in grassroots youth sport. As discussed more fully in chapter 7, this encouragement often comes in the form of promoting youth sport tourism. Reflecting this trend, the Illinois legislature enacted the Commission on Amateur Sports Act, establishing a state commission to ensure the "promotion, development, expansion, hosting, and fostering of amateur

sports . . . events and tournaments." The commission is charged with creating "business opportunities" and "economic development" relating to "amateur sports" and, to meet this goal, is tasked with holding "workshops, training, and conferences" to "increase youth participation in [sport]" and "support[ing] and encourag[ing] the development of sports tourism." Similarly, the Maryland legislature created the "Youth and Amateur Sports Grants Program," which offers state funding to help offset the costs of bringing "new youth and amateur sporting events to the state," as well as to "attract sports fans, participants, and tourists." Other states, such as Indiana and Florida, have also invested heavily in supporting youth sport tourism, while some encourage participation through mentoring or other programs meant to draw children into sport.

A Privatized System

The government's policy to encourage children to participate in sport has long been accompanied by a heavy reliance on the private sector to provide the opportunity, and youth sport participation has grown steadily over the past several decades. This growth has led to greater privatization, so that today, as previously explained, most youth sport programs are operated by private, not government, entities through a "pay-to-play model."

Congress endorsed a privatized approach to youth sport in 1978 through the Ted Stevens Act. Policy discussions around the statute demonstrate that sport advocates and policy makers thought of widespread grassroots youth sport participation as a key way to ensure U.S. international sporting success. At the time, the vision was to develop Olympic talent through a pyramid structure of sports settings, with the base being grassroots youth sport, so as to bring large numbers of children into the system and help the most talented to emerge and ascend.

The executive director of the USOPC lobbied Congress for federal funding, arguing that it was necessary to the development of a "successful amateur sports program" that could "provide broad-scale . . . opportunities for a maximum number of individuals at all ages and all levels of ability" and that such a program would be a "deterrent to many of our current social problems" and would help develop "the individual" and "society." However, while grassroots youth sport participation was viewed as necessary for U.S. Olympic success, Congress rejected the recommendation to fund widespread sport participation, choosing to allow the existing youth sport system—with a host of private and some public providers, including schools—to continue.

Congress instead made a gesture toward at least some coordination of grassroots youth sport and development of youth sport participation opportunities by including it in the USOPC's purposes. The statute lists among the USOPC's purposes that it must "establish national goals for amateur athletic activities," "promote and encourage physical fitness and public participation" in sports, and "assist . . . in the development of amateur athletic programs" and "foster the development of amateur athletic facilities." To achieve its objectives, the Ted Stevens Act provided that the USOPC would recognize private NGBs for each Olympic sport, and charged these entities to develop grassroots youth participation.

The legislative history of the Ted Stevens Act, both at the time Congress originally enacted it and through subsequent hearings and revisions, reinforces the notion that Congress intended the USOPC to have significant responsibility for developing grassroots youth sport. However, Congress did not provide the USOPC with the power and funding to enable it to carry out that responsibility. Although the act granted the USOPC "exclusive jurisdiction" over U.S. participation in the Olympic, Paralympic, Pan-American, and Parapan-American Games, it did not give the USOPC similar power over grassroots youth sport. Thus, youth sport that occurs outside the NGB structure, through private groups such as the AAU, are not within the USOPC's purview, and the USOPC has no authority to regulate their activities. Similarly, the USOPC does not have authority over school sports, which are left to state high school athletic associations and their member institutions. Rather, Congress tasked the USOPC with simply encouraging youth sport participation.

Accordingly, without clear direction or government funding, the USOPC has, over time, effectively limited its mission to developing elite Olympic (and later Paralympic) talent and has done relatively little to support grassroots youth sport. Congress acquiesced

to this approach by not acting on numerous pleas to provide the USOPC with adequate funding to support the effort. For example, in 1995 congressional hearings on issues in the U.S. Olympic and Paralympic Movement, then USOPC president LeRoy T. Walker testified: "The other major issue . . . which has become critical in the years since the passage of the Amateur Sports Act of 1978, is the grassroots programs and opportunities for youth across this nation. The [USOPC] has never shirked this responsibility, nor have we ignored this mandate. . . . The fact remains, however, that we cannot be all things to all people with a limit to our financial resources."

Walker went on to say that no other nation's Olympic committee faced the task of also supporting grassroots youth sport. At the same hearing, Tom McMillen, co-chair of what was then known as the President's Council on Physical Fitness and Sports, pointedly testified to the way law and policy shaped the current state of grassroots youth sport and challenged the notion that the government, in fact, took a hands-off approach to sport:

> *As a nation, we have done little more than pay lip service to grassroots sports opportunities. . . . Our government policies have helped develop and maintain an elite sports structure of significant support for the Olympic Games, professional sports monopolies, tax breaks for mega-stadiums, and antitrust exemptions for pro teams. In contrast, our government is doing next to nothing for the masses. . . . Some argue that the government should have no role in sports. . . . In fact, . . . our government has created our upside down priorities that are skewed to elite athletes.*

Little has changed since McMillen's testimony. While the federal and state governments urge children to participate in sports, policy makers have largely refrained from using public authority to build a system that would ensure such a result.

Little Regulation

In addition to a largely privatized system for furnishing youth sport participation opportunities, the federal and state governments have allowed for a heavily privatized system of youth sport regulation. This approach amounts to courts and policy makers taking the somewhat curious position that, because sport for children is so important, we cannot take significant law and policy steps to ensure the well-being of children who engage in it.

Like athletes in other settings, children who participate in sport are highly regulated. Their eligibility and other terms of participation are determined by the particular sport provider, such as Little League baseball and Pop Warner football. Yet, whereas athletes are regulated within sport, youth sport providers are subject to relatively little external government oversight or regulation. The choice to rely primarily on the private sector to provide youth sport opportunities has, therefore, resulted in a law and policy approach that purportedly seeks to incentivize private providers to sponsor the activity by promising limited government regulation and, in many cases, at least some measure of tort immunity. Thus, the law emphasizes the supply side of youth sport: creating conditions believed necessary for youth sport sponsors to provide opportunities. The law and policy of sport is less focused on creating favorable conditions for children to participate.

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Nash, Eisenstein and Oleson Join Littler, Expanding Firm's Sports Industry Capabilities

Littler has announced the addition of three shareholders to its Washington, D.C. office. Daniel Nash, Stacey Eisenstein, and Nathan Oleson join from Akin Gump, each with a focus on labor and employment issues impacting the professional and collegiate sports industry.

"Dan, Stacey, and Nate bring a diverse practice, and their emphasis on the sports sector presents an exciting opportunity for our firm as those organizations are confronted with intricate legal challenges, particularly related to labor and employment law," said Erin Webber, Littler's managing director and president. "Their collective experience will be of significant value as we continue to grow our capabilities and deliver solutions that address our clients' evolving business challenges."

"I have known Dan, Stacey, and Nate for over 20 years, having met them when I first started practicing

in D.C, and am thrilled to be working with them again," said Josh Waxman, Littler's Washington, D.C. office managing shareholder. "With anticipated changes to labor and employment laws under the second Trump administration, the combined experience of Dan, Stacey, and Nate will be essential in guiding our clients through this period of uncertainty."

Nash, who previously served as co-chair of Akin Gump's labor and sports law practices and as a member of the firm's Management Committee, brings extensive experience representing clients in a variety of complex labor and employment matters. He has successfully handled some of the most high-profile cases involving professional and amateur athletes on behalf of sports leagues, individual teams, athletic conferences and other sports organizations at both the professional and collegiate levels. Throughout his career, Nash has been recognized as one of the preeminent lawyers in the country, described in leading publications as a "Sports Law Trailblazer," an employment law "MVP," and a "Power Player" among outside counsel in the sports industry. He previously taught sports law as an adjunct at American University Washington College of Law.

"I am pleased to join one of the most accomplished international law firms dedicated exclusively to the practice of labor and employment law," said Nash. "Littler's vast footprint, ties to Washington, and its robust resources will allow me to collaborate with colleagues throughout the U.S. and around the globe to deliver successful outcomes for our clients, as well as contribute to the firm's continued growth by expanding its reach in the sports industry. I was particularly drawn to the firm's collegial and collaborative culture, which emphasizes the interests and success of the clients above all else."

Eisenstein also has extensive experience representing professional sports leagues, teams, and employers in the sports and entertainment industries. She has handled numerous high profile and precedent setting arbitrations and federal court disputes, including those involving player discipline, the enforcement of collective bargaining agreements, and benefits disputes under the Employee Retirement Income Security Act of 1974. Eisenstein has been recognized by the National Law Journal as a trailblazer in both sports and employment law and as a top employment defense lawyer by Washingtonian. She previously taught sports law and negotiation as an adjunct professor at Georgetown University.

"Employers within the sports and entertainment sectors encounter a distinct and complex set of challenges, and we've developed a deep understanding of these issues and how to craft effective solutions," said Eisenstein. "I'm excited to bring my experience and insights in the sports sector to my new colleagues while also learning from them to strengthen our collective impact and deliver meaningful results for our clients."

Oleson defends employers in complex employment litigation, particularly cases involving wage and hour claims, discrimination, and labor-management issues. He has successfully handled numerous class and collective action cases on behalf of companies and organizations throughout the country. He has also successfully advised sports associations, professional clubs, and universities in high-profile disputes with athletes and officials related to compensation, discipline, and health and safety issues. Oleson has served as counsel in precedent-setting wage-and-hour and sports law cases. In addition to his client work, Oleson has sat on the senior editorial board for the American Bar Association's Section of Labor and Employment Law's treatise on the Fair Labor Standards Act for more than two decades.

"I'm excited to join a firm renowned worldwide for its exceptional labor and employment expertise," said Oleson. "Employers face mounting uncertainties and evolving challenges in the area of labor and employment. I look forward to finding our clients practical and creative solutions to these issues using the knowledge, dedication, and resources they have come to expect from Littler."

Nash received his J.D., magna cum laude, from University of California College of the Law, San Francisco and his B.S., cum laude, from the State University of New York College at Cortland. Eisenstein received her J.D. from the University of Pennsylvania Law School and her B.A. from Emory University. Oleson received his J.D., magna cum laude, from the Georgetown University Law Center and his B.A., cum laude, from American University.

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Aronson, Former NBA Vice President and Assistant General Counsel, Joins O'Melveny's Sports Team

O'Melveny has announced that Benjamin Aronson, former Vice President and Assistant General Counsel at the National Basketball Association, has joined the New York office as a partner in the firm's General Litigation Practice Group and Entertainment, Sports & Media Industry Group.

He will represent clients in professional and collegiate sports-related litigation and investigations, NIL matters, and consumer class actions.

A seasoned litigator and trusted strategic advisor, Aronson brings nearly 15 years of experience to O'Melveny—including nearly a decade serving as in-house counsel at the NBA. As the league's Vice President and Assistant General Counsel of Litigation & Player Matters, he oversaw all global commercial litigation and provided support and guidance to various teams' general counsel. During his tenure, Aronson managed the league's response to an array of high-stakes investigations, arbitrations, and lawsuits. He also led the liability risk management for the NBA's innovative "bubble playoffs" during the COVID-19 pandemic. Before the NBA, Aronson worked in the Litigation Department in the New York office of Debevoise & Plimpton.

Aronson earned his J.D. from Yale Law School and his A.B. from Brown University.

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NCAA Study Examines Changing Sports Betting Behaviors as well as Harassment of Athletes from Bettors; Expert Weighs In

A new NCAA survey of the gambling behaviors of more than 20,000 student-athletes has provided an in-depth view into how the quickly changing sports betting landscape in the U.S. is impacting those who play NCAA sports.

Even with the proliferation of legal sports betting in the United States since the repeal of the Professional and Amateur Sports Protection Act in 2018, similar percentages of NCAA student-athletes reported betting on sports for money in 2016, the last time a study was published, and 2024.

"The research findings are important, but not surprising," said Professor Gil Fried, Associate Dean of Academics and Accreditation at Lewis Bear Jr. College of Business at the University of West Florida for both surveys. "The same percentage of student-athletes are still betting on sports.

The Co-Editor of **Legal Issues in Sports Betting**, Dr. Fried added that the survey "shows that all the educational efforts are not really making a meaningful dent in the gambling behavior. At all levels the number of male student-athletes (at DI, DII, and DIII) who bet on one or more contests, knowing it violated NCAA rules, dropped from 24% in 2016 to 22% by 2024. The number of women who bet stayed at around 5%. While so much of the attention is spent on athletes at the DI level, the research has shown that student-athletes at the lower levels were also more frequently betting on games."

NCAA President Charlie Baker suggested that "we need to continue to focus on education and additional harm prevention techniques in this space. Most young people are exposed to gambling while they're in high school, and by the time they graduate college, some develop an unhealthy relationship with betting. We are focused on supporting student-athletes and providing them with resources to combat these behaviors."

'A More Nuanced and Concerning Story Emerges'

Research shows that when the number of men who bet frequently on sports is examined, "a more nuanced and concerning story emerges," according to the NCAA. Slight decreases were observed in the percentage of Division I men betting on sports once a month or more. However, such frequent bettors were more numerous in Division II and especially in Division III in 2024 as compared with 2016.

For example, in 2016, 12% of Division III men bet on sports once per month or more versus 17% in 2024. In the men's sports that have traditionally had the highest proportion of sports bettors over the last 20 years across divisions (baseball, basketball, football, golf, ice hockey, lacrosse and soccer), the percentage of Division III men who said they bet on sports once a month or more in 2024 grew substantially in aggregate relative to

2016. The percentages for those sports individually for Division III men ranged from 15% to more than 25%. The Division I range of such frequent sports betting among participants in those same seven men's sports was 2% to 8% in 2024.

While most forms of sports betting are against NCAA rules, the NCAA modernized penalties for wagering activities in 2023 in a commitment to reduce the stigma and get help to those in need as opposed to strictly punishing those student-athletes with a loss of eligibility.

"It remains essential that we continue to embrace and implement harm reduction strategies that lower risk and foster prevention of problem gambling," NCAA Chief Medical Officer Dr. Deena Casiero said. "We remain committed to research-backed methods of promoting healthy behaviors to support our student-athletes and to reduce the stigma associated with problem gambling."

Both men and women view gambling as a social activity, with 85% of men and 95% of women saying they are most likely to gamble with family, a romantic partner, teammates or friends outside of sports. One notable change since the previous survey in 2016 is that more men, who data show are most prone to problem gambling disorders, are gambling alone (6% in 2016 versus 15% in 2024). The primary concern about gambling alone is that problem gambling behaviors may remain unknown to the bettor's family, friends, teammates and coaches.

Most of the sports betting behaviors of student-athletes involve relatively low stakes. The largest self-reported one-day sports betting loss among NCAA athletes who ever bet on sports was less than $50 for two-thirds of men and 90% of women. However, there are more reported instances of large losses in the new data. For instance, 2% of men reported single-day losses of $500 or more in 2016, while 5% of men reported such losses in 2024.

The increase in sports betting opportunities in the U.S. correlates with the increases noted in NCAA athletes being asked for inside information. However, perhaps because of campus educational efforts, the percentage of Division I student-athletes reporting that they knowingly provided inside information remains lower in 2024 than seen when these surveys began in 2004.

The NCAA collaborates with EPIC Global Solutions to deliver the world's largest comprehensive and customized sports betting harm prevention education program. Since the **first full year of EPIC's collaboration with the NCAA in 2022**, EPIC has completed education sessions at over 260 schools and 70 conferences in 47 states. Over 75,000 student-athletes, coaches and administrators have been reached as part of the **NCAA's education efforts with EPIC**.

As for betting-related harassment, many high-profile men and women reported experiencing harassment from someone with a betting interest in their competition. Among the highest rates, 21% of Division I student-athletes in men's tennis reported experiencing harassment from bettors, while 17% of Division I men's basketball student-athletes reported such harassment.

Gambling harm education remains a key focus of the NCAA. The national office and representatives from member schools continuously work together to determine best practices for addressing the sports wagering landscape. The Association will continue to enhance and expand its offering of resources and initiatives to promote student-athlete well-being and the integrity of college athletics.

"The research will hopefully direct enforcement and educational efforts across a broader swatch of the collegiate athletic landscape," added Dr. Fried. "Ultimately, the hope is that education will make a difference. Similar to how workplace educational efforts helped to reduce sexual harassment and discrimination, the hope is that educational around sports betting will not only make a difference in collegiate athletics, but also professional sports."

To read the full study, **click this link**.

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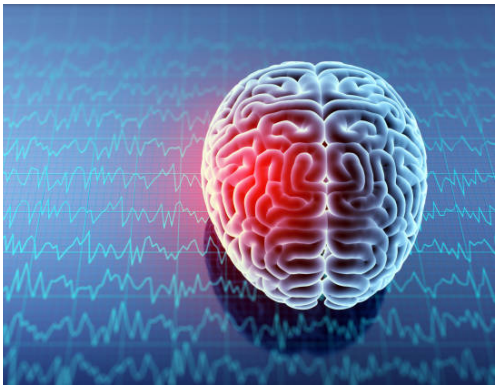
Getting Rehab Earlier Improves Concussion Outcomes, Study Suggests

People who suffer from continued symptoms of concussion should seek a referral to physical therapy as soon as possible, new research from Oregon Health & Science University suggests.



Even though most people naturally recover from concussions within four weeks, the study revealed people who delayed physical therapy had lingering deficits related to their reaction times for balance, motor function — or body movements to perform tasks — and the use of sensory information — as in sight and touch — for balance. The research **published this week** in the *Physical Therapy & Rehabilitation Journal*.

"It means they're balanced-challenged and don't react as quickly as someone with normal reaction times," said senior author Laurie King, Ph.D., PT, MCR, professor of neurology in the OHSU School of Medicine. "If you've had a concussion and you're not reacting as quickly with balance control, it's natural to avoid precarious situations."

That, in turn, could lead to people avoiding beneficial physical activities, including exercise and rehabilitation.

"We have people who come in and say they're fine," King said. "Then when we challenge them to turn their head while looking at a fixed point, they're like, 'Whoa, that makes me feel sick.'"

Earlier rehab seems to enable the brain to return a more normal state of balance, she said.

In contrast, when physical therapy is delayed, the brain may adapt to the injury by compensating for poor use of sensory information. In effect, patients become overly dependent on vision rather than relying on their vestibular system, the sensory organs in the inner ear that help maintain balance. Patients had "sloppier" balance control to compensate for delayed reaction times, King said, which may explain higher rates of re-injury after a first concussion.

"There seems to be a window of opportunity within two months," King said. "After that point, the brain compensates in a way that's not good. If vision is your strategy for maintaining balance and you're in a dark room, you're not going to function very well."

The randomized control trial included 203 people divided into an intervention group that received physical therapy a week after testing into the project, and a control group that started therapy six weeks after testing. Both groups were assessed for balance control after undergoing six weeks of rehabilitation with licensed physical therapists. Participants entered the study two to 12 weeks following their injury.

Although most people recover from concussion naturally within four weeks, an estimated 30% suffer from lingering issues — and physical therapy may be most important for that group of people.

Correctly identifying that group is the challenge, King said.

Going forward, King said the research suggests two areas of improvement for health care professionals, especially in primary care settings:

- Clearer guidelines: When primary care physicians assess patients who have suffered a concussion, they should have clearer guidelines about when to refer them to physical therapy. If a patient still has symptoms four weeks after the injury, for example, she said they should get an immediate referral to a physical therapist.
- Better tests: Teasing out each patient's symptoms currently varies by practice, so developing better standards for testing is an important goal of the research that continues at OHSU.

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News Briefs

Spencer Fane Hires Minnesota-Based Sports Lawyer

Spencer Fane LLP has announced the hire of sports lawyer Brian Schoenborn to its Corporate and Business Transactions practice group. Based in St. Cloud, Minnesota, Schoenborn has deep expertise at the intersection of business law and estate planning. In addition to counseling families and private businesses, he has notably been an owner and board member of software technology ventures, real estate development companies, community banks, and sports and entertainment entities. He also boasts experience in the niche area of sports business law and facility development. Schoenborn graduated with his bachelor's degree summa cum laude from St. Cloud University before earning his Juris Doctor cum laude at the University of Minnesota Law School.

Ethics and Business Law Faculty Member to Serve as Judge for International Sports Law Competition

University of St. Thomas Opus College of Business Professor Emeritus of Ethics and Business Law Dr. John Wendt has been selected to serve as a Judge for the **International Sports Law Arbitration Moot (SLAM).** The SLAM is a world-class competition with the aim to promote greater knowledge of the values and rules of international sports arbitration, the go-to dispute resolution mechanism in the sector. The **judges selected** are attorneys and barristers who have extensive experience as arbitrators at the Court of Arbitration for Sport. The 2025 Grand Final and award ceremony are held being held alongside the inaugural International Dispute Resolution Conference for competitors and leading lawyers, academics and executives from the sports world on April 10-11 at the Court of Arbitration for Sport in Lausanne, Switzerland.

Dr. John Wendt

Jim Solano, a Legend in the Sports Agency Industry, Dies at 81

Jim Solano, a legend in the sports agency industry, a philanthropist in the community, professor and loving family man died peacefully at his home on January 26 surrounded by family. He was 81 years old. Jim received his BS, MBA and MS in Taxation degrees from Temple University. After graduate school Jim began a five-decade career as an Associate Professor teaching accounting and taxation, initially at Temple University and later at Philadelphia College of Textiles and Science (now Thomas Jefferson University). Jim earned his CPA license in 1966 and started a CPA practice serving individuals and small businesses. Jim grew his practice steadily to include physician groups and professional athletes. Jim leveraged his relationships with professional athletes to launch a sports agency business specializing in NFL contracts for players and coaches and later to include PGA golf professionals. Jim has represented over 800 players and coaches, including 500 from the Eagles as an NFL Player Agent and was highly respected by players, coaches and front office management for his professionalism, knowledge, and experience with the game. He represented 18 of the 40 players on the Eagles 1980 Super Bowl team and 30 players and coaches on Buddy Ryan's Eagles teams from 1986 through 1990. In 2021, he was selected by client and longtime friend, Harold Carmichael to present him for his enshrinement into the Pro Football Hall of Fame in Canton, Ohio.

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