SPORTS LITIGATION ALERT

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Cases

Court: Assumption of Risk Doctrine Does Not Apply to Delivery Driver in Sports Law Case

By Nicole Bryson, J.D. and Jeff Birren, Senior Writer

Brandon Hankey was a delivery driver for a wholesale food company. In 2019, he was making a delivery of pies to a local school to be served as part of the annual Thanksgiving fundraiser. Upon his arrival, staff instructed Hankey to take the pallets with the pies into the school's athletic facility. The facility contained an ice rink, and students were skating. Within minutes, a flying puck stuck Hankey on his head. As a result, Hankey sued the School District for negligence. The District filed a motion for summary judgment, claiming that Hankey assumed the risk of being hit on the head by an errant puck. The trial court denied the motion. The School District appealed to no avail, as the

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Appellate Division Court unanimously affirmed the trial court decision. *Hankey v. Ogdensburg City Sch. Dist*., Supreme Court of New York, Appellate Division, Third Department, CV-23-1970, 2025 N.Y. App. Div. LEXIS 252 *; 2025 NY Slip Op 00253 ** (1-16-2025).

The Injury As Described in the Complaint

Hankey sued on January 22, 2021. Hankey and his wife, Amanda Hankey, each alleged a single count of negligence against the District, *Brandon M. Hankey and Amanda R. Hankey v. Ogdensburg City School District*, St. Lawrence County Clerk, Index Number EFCV-21-159129. Hankey was a delivery driver for Sysco. On November 20, 2019, Hankey arrived at Ogdensburg Free Academy to deliver the pies. A "maintenance worker" (identified later as Paul Pratt) directed Hankey to the delivery location for the "Golden Dome," an indoor athletic facility. Students were using the ice rink, but no one warned Hankey about the possible risk of injury. While unloading the pies, Hankey "was violently and unexpectedly struck on the head with an errant puck from one of the students on the rink, equipped with a hockey stick and puck." The blow "caused Hankey to fall injured to the floor." Ms. Hankey repeated the allegations, and claimed "loss of services, loss of society, loss of consortium and guidance, loss of companionship and loss of support" of her husband.

Additional Facts From Hankey' Second Deposition

Hankey was deposed for a second time on July 29, 2022. The deposition was attached to the District's motion for summary judgment via an affidavit filed by Robert R. Lawyer III, counsel for the District. The following is taken from that deposition. On November 20, 2019, Pratt instructed Hankey where to park the Sysco truck. Pratt opened the facility's door for Hankey and told him to enter into the Dome. Hankey entered with two pallets stacked with pies. Pratt then told Hankey to procced about fifteen feet. Hankey then began to unload the pallets. He did not see students playing ice hockey. He was still unloading the pies and talking to Pratt between five and seven minutes later when he was hit by the puck. After the injury he finished unloading the pies, put the pallets back on the truck, and returned to Sysco. He did not return to work for Sysco after that date due to the injury caused by the puck. Hankey was unable to work for six months and lost insurance coverage. He filed a worker's compensation claim against Sysco, but he no longer receives benefits.

Hankey still had head pain and dizziness, and his neck is always stiff. Hankey alleged other physical problems, including tingling and numbness in both hands, pain in his left leg, loss of sleep, short-term memory loss. Due to the Covid-19 pandemic, he did not have any treatment between June 2020 and his second deposition.

Pratt's Deposition

Pratt was deposed on July 29, 2022. The transcript was also an exhibit to the summary judgment motion. He testified that he was a "laborer" for Defendant Ogdensburg City School District. According to Pratt, the rink has a plexiglass covering that is five feet at the goal ends, with netting that reaches to the ceiling. The incident took place along the sides of the rink, where the plexiglass is only 3.5 feet high, and there is no netting. Hankey was busy scanning the pies when Pratt heard a noise and ducked. He then saw Hankey, suddenly with a red face, pointing to his right ear, and saying "ouch." Pratt did not see the injury, having ducked, but he "knew" Hankey was hit.

Summary Judgment Motion

The District moved for summary judgment on all claims on July 12, 2023. It seemed perfunctory. Counsel Lawyer filed a six-page affidavit with eleven exhibits. His statement of facts had eight numbered paragraphs. The "Discussion" section had eighteen numbered paragraphs. According to Lawyer, the Golden Dome "is much the same as it is in most hockey rinks." A gym class was in session at the time of the incident.

The substitute teacher in charge that day was Ms. Sparrow. She told the class to "not take slap shots at the goal" and the students "generally listened to her." According her affidavit, the students "were required to wear protective gear, including helmets and gloves." The students were always under Sparrow's supervision. She did not witness the injury, nor was she aware of it.

The "Discussion" section further argued that any duty was discharged because it was owed to the students, not bystanders, citing two cases. In *Smero v. City of Saratoga Springs*, 160 A.D. 3d 1169, 1171 (3d Dept. 2018), the plaintiff was a spectator at a youth hockey game. *Smero* applied the assumption of risk doctrine to an injured spectator. The other case cited in this section was *Spaulding v. Chenago Valley Cent. Sch. Dist.,* 890 N.Y.S. 2d 162, (3d Dept. 2009), lv denied 14 N.Y. 3d 707 (2010). In that case, Spaulding was participating in a gym class when he was injured. *Spaulding* also applied the assumption of risk doctrine when affirming the grant of summary judgment. The trial court was not impressed and remained unpersuaded.

"In this case, no one can find that the delivery man was himself attending a sporting activity but rather walking through an area of a gym class which was being supervised by a teacher who had broken down her class into three separate factions, three separate activities." The District's cited cases "both" involved "bystanders or people who put themselves voluntarily in the purview, in the ambit of the sporting activity that was ongoing. In this case, we cannot say the same thing of Mr. Hankey."

The District further asserted that Sparrow discharged her duty of supervision to the students, but the Court found there was a triable issue of fact as to whether the District breached the duty of care for the "protection of others who were invited on to the property." The District, and Sparrow's affidavit, stressed the duty of care to the students, while virtually ignoring the duty owed to Hankey, who had nothing to do with the gym class. Both Lawyer and Sparrow were silent as to any warning given to Hankey. The Court denied the motion from the bench on September 22, 2023, and issued a written Order on October 6, 2023. Undeterred, the District appealed to the New York Supreme Court, Appellate Division.

Appellate Court Decision

The appeal was based on the same grounds as their unsuccessful summary judgment motion: that Hankey assumed the risk of injury, and the District did not breach any duty of care owed to Hankey. The Appellate Division Court affirmed the lower court's order denying Defendants Motion for Summary Judgment, but went even further than the trial court.

The Assumption of Risk Doctrine Does Not Apply

The Appellate Division Court summarily rejected the defense invocation of the assumption of risk doctrine.

SPORTS LAW EXPERT

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Irwin A. Kishner

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That doctrine applies when an individual voluntarily participates in an activity with known inherent risks. *See Custodi v Town of Amherst,* 20 NY3d 83, 88, [2012]; *accord Grady v Chenango Val. Cent. Sch. Dist.,* 40 NY 3d 89, 95, [2023]. In the context of sports, this doctrine generally protects schools, coaches, and event organizers from liability for injuries sustained during play. While the primary assumption of risk doctrine extends to spectators and bystanders of such activities, according to *Smero,* any such engagement must still have been consenting and voluntary.

"Hankey was not observing a sporting event either actively or passively at the time of the subject incident." Rather, he was working on delivering pies for his employer. The District's employee, Pratt, directed Hankey exactly where to place his delivery, near midice, resulting in the injury. Hankey did not voluntarily place himself in harm's way of the hockey class or errant puck and thus, cannot be a spectator or bystander under the assumption of risk doctrine. That defense failed as a matter of law.

Foreseeability

In sports injury cases where the assumption of risk defense is applied, courts often find that the injury was the result of spontaneous and unpredictable events inherent in the sport. While Hankey's injury was the result of a spontaneous event, it was not unpredictable, distinguishing it from cases involving purely accidental injuries during play, *(compare Spaulding v Chenango Val. Cent. School Dist., and Bellinger v. Ballston Spa. Cent. Sch. Dist.,* 871 N.Y.S. 2d 432 [3d Dept. 2008], lv denied, 879 N.Y.S. 2d 50 [20009]).

In Hankey's case, Sparrow anticipated the specific conduct that led to his injury and instructed students against engaging in it. Sparrow instructed the students practicing hockey skills that day on "permissible behavior, such as stick handling, passing, light shots on goal and impermissible activities, i.e. slapshots, and she did not want to hear anything hit off the boards… [in the past], she had seen pucks go out of the rink from slapshots or hitting off goal posts." Thus, the risk was actually foreseen. The fact that the exact type of accident was anticipated, but not adequately prevented, further supports Hankey's claim of negligence against the District.

Distinguishing from Spontaneous Accidents During Play

In contrast to cases where an injury results from the ordinary and unpredictable nature of a sport, Hankey's injury arose from specific conduct that had been identified as dangerous beforehand. This case does not involve a situation where an individual was injured due to the unpredictable nature of a fast-moving game, but rather a scenario where known risks were ignored. The presence of prior warnings by Sparrow indicate the District had notice of the risk and yet failed to take reasonable steps to prevent harm, unlike in the cases of *Spaulding* and *Bellinger*.

Significant Triable issues of Fact Remain Regarding the District's Breach of Duty

Overruling the supreme court's holding, the Appellate Division Court held the duty to be imposed in the instant case was not a question of fact but a legal issue for the courts to resolve, *see Eiseman v State of New York*, 70 NY2d 175, 187 [1987).

"Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property" (*D'Amico v Christie,* 71 NY2d 76, 85 [1987], citing *Basso v Miller,* 40 N.Y. 2d 233, [1976]; *see Goga v Binghamton City School Dist.,* 754 N.Y.S.2d 739 [3d *Dept 2003])*. That duty can include "a duty to control the conduct of [*7] third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico v Christie,* 71 N.Y. 2d at 85; *see Lathers v Denero,* 63 N.Y.S. 3d 147 [3d Dept 2017]*; Pendulik v East Hampton Union Free School Dist.,* 792 N.Y. 2d 587 [2d Dept 2005]; *Morbillo v Board of Educ. of Mt. Sinai School Dist.*, 703 N.Y.S. 2d 241 [2d Dept 2000]).

The District had a duty to maintain safety which extended to controlling students' actions and implementing adequate protective measures. Defendant, via its agents, Pratt and Sparrow, was aware of the pie delivery and the presence of a gym class engaging in hockey skills, among other activities at the time.

The Appellate Division Court decision went further than the lower court and highlighted the following specific failures on Defendant's part that support Hankey's claim of negligence, adding that "defendant's own submissions reveal triable issues of fact as to whether it breached that duty," including:

Unloading in an unsafe location: Pratt escorted Hankey into the facility and instructed him exactly where to deliver the pies near mid-ice "where the plexiglass was lowest and there was no netting." Whether the selection of the area near mid-ice exposed Hankey to an unreasonable risk could constitute a failure to exercise reasonable care, requiring jury consideration.

Failure to Monitor or Instruct Students Properly: Sparrow made no effort to further instruct her students or increase monitoring of the students practicing in hockey skills even though she was aware Hankey was present delivering the pies. Whether school personnel adequately monitored the activities in the facility and provided adequate instruction to the students to prevent foreseeable injuries to guests on the premises is a triable issue of fact.

Inadequate Barriers and Safety Precautions: The only evidence regarding safety features were in the form of estimates from Pratt. The absence of adequate protective measures, including barriers to prevent errant objects, such as the puck in this case, could be deemed negligent making it a triable issue for the jury. Ultimately, a jury must determine whether the District's negligence directly contributed to Hankey's injury. There is a significant difference between inherent risks in sports and preventable dangers created by inadequate supervision and safety measures.

Conclusions

The District now faces trial on the negligence causes of action, shorn of one defense and the ability to introduce its supporting evidence. Hankey could hardly have asked more from a witness employed by the District than he gained from Pratt's deposition, especially because the supposedly supervising Sparrow "testified that she was not paying much attention to Hankey," nor was she aware that Hankey had been hit. It would appear that this case is now about how much the District may owe Hankey for his injuries.

This is the other side of the case. Hankey had not received treatment in the three years prior to his second deposition, nor seen a doctor of any kind. Even in the first year following his injury his medical visits and treatments were infrequent, at best. Damages in personal injury cases can be related to the costs of actual treatment for the injury. That appears to be a very small number.

Athletic facilities need to be aware that the law that may cover participants and spectators is not the same law that applies to everyone else. This is the better social policy. The District's logic would place the cost of loss on the innocent, but not those charged with supervising the facilities.

Counsel should read precedent carefully to make sure that it actually applies. No doubt the District's insurance carrier paid for a motion and appeal that although filed with enthusiasm, was based on inapposite case law. This case should have been settled years ago. Hankey went at least three years without getting treatment. His special damages were not increasing, but the legal costs and fees were. Once Hankey returned to the labor force, it was time to settle. Nevertheless, the case continues.

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Zamboni Driver's Discrimination Lawsuit Against Arena Can Continue

By Anna Christine Zorn

In *Sobotka v. Olympia Ent., Inc.*, the Michigan Court of Appeals addressed a wrongful termination action brought on by Plaintiff Albert Sobotka, against his employer, Defendant Olympia Entertainment, Inc. Olympia Entertainment manages Little Ceasars Arena (the "Arena") in Detroit, Michigan, home of the Detroit Red Wings of the National Hockey League (NHL). Plaintiff was a longtime Zamboni driver at the arena and was terminated following an incident in which he urinated into the Zamboni ice-pit. Plaintiff claims the incident was a result of his prostate condition and that the firing was a discriminatory action based on both his age and disability.

Facts

In late January 2022, while in a meeting, Plaintiff's supervisor told Plaintiff something along the lines of "you're old." Days later, after completing an ice-resurfacing and parking the Zamboni in the garage, Plaintiff urinated into what is known as a "snow pit." Unbeknownst to Plaintiff, one of his ice-crew members witnessed the incident as the doorway into the garage was open. Even though Plaintiff's back was to the door, it was clear to the witness what had taken

place. The witness reported the incident to the Arena's Human Resources (HR) department. Two days later, Plaintiff was questioned about the incident by HR and his direct supervisor. Plaintiff openly admitted to urinating into the ice pit. Not only that, Plaintiff admitted that it was a "common practice" among the ice-crew staff. As a result, Plaintiff was suspended for a week while HR conducted an investigation. Later during the investigation, Plaintiff disclosed to HR that his doctor had diagnosed him with an undisclosed prostate issue. Following a nearly two-week investigation, Plaintiff was terminated. Plaintiff's supervisor, as well as two higher level supervisors, all agreed that immediate termination was the correct course of action. The Arena immediately hired a replacement from another area of the company who was 29 years younger than Plaintiff.

Two months after his termination, Plaintiff filed a claim of age discrimination and a claim of disability discrimination against Defendant. In turn, Defendant moved for summary judgement for both claims. The two questions most relevant are: 1) Was the reason for Plaintiff's termination (urinating at work in an open space) pretextual? and 2) Was Plaintiff's prostate issue a disability upon which Defendant based their termination?

Age Discrimination Claim

To succeed on an age discrimination claim, a plaintiff must prove that (1) they were a member of a protected class, (2) they were subjected to an adverse employment action, (3) they were qualified for the job, and (4) the job was subsequently given to another person under circumstances giving rise to an inference of unlawful discrimination. The defendant then must provide a legitimate, nondiscriminatory reason for the termination. If they are able to do so, the plaintiff can then rebut by showing the provided reason was merely pretextual. This is where Plaintiff rests his argument in this case. It is undisputed that Plaintiff is a protected class member due to his age and he faced an adverse employment action (termination). Plaintiff was qualified for the job given his 50+ years of experience with the organization and the hired replacement was 29 years younger than Plaintiff. Defendant argues the only reason for Plaintiff's termination was the urination incident and the disputed "you're old" statements were not a factor in the decision. These age related statements were not made in the presence of the ultimate decision maker for Plaintiff's termination, therefore there was no direct evidence of any age-related animus toward Plaintiff. However, there was evidence that Plaintiff's supervisor, who made the "you're old" comment, shared his opinion with the ultimate decision-maker. Therefore, a jury could reasonably infer that Plaintiff's termination was in part influenced by the supervisor's opinion, and in turn Plaintiff's age. In a summary judgement motion, the moving party need only show there is a question of material fact. Here, there is clearly a question of fact regarding the weight of the "you're old" statements that should be left for a jury to decide.

Disability Discrimination Claim

In Michigan, an employee can claim disability discrimination by showing (1) the employer knew of the employee's disability, (2) the employer perceived the disability as substantially limiting the employee's ability to perform life activities, and (3) the employer believed the disability to be unrelated to the employee's ability to perform their work duties.

Here, Defendant argues that the second element cannot be met. Although Plaintiff disclosed to HR during the investigation that he was diagnosed with a "prostate issue," Plaintiff fails to provide further evidence that Defendant regarded this issue as limiting their abilities to perform life activities. No further details were provided to Defendant regarding the "prostate issue" or its effects on the Plaintiff. As such, Defendant lacked sufficient information to conclude that Plaintiff was disabled, and that said disability led to the incident at hand. Therefore, Plaintiff's speculation is insufficient to prove disability discrimination.

Conclusion

Plaintiff failed to establish sufficient facts to prove disability discrimination, however, a question of fact still remains as to the age discrimination claim. In a summary judgement motion, a court must view the facts the light most favorable to the plaintiff, and Plaintiff claimed the "you're old" statements were a relevant factor in his terminations. Therefore, it must be left to a jury to determine whether the statements in fact affected Plaintiff's termination. As a result, the court granted Defendant's summary judgment motion related to Plaintiff's claim of disability discrimination, but

denied Defendant's motion regarding Plaintiff's claim of age discrimination.

Anna is a 3L at the University of Illinois-Chicago. She can be reached at azorn3@uic.edu

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Court Denies Bid to Halt Stadium Construction

By Michael G. McLendon

Background

The case, *Ben-Oni v. Wood*, is between Plaintiff Josiah Malchiel Israel Ben-Oni, representing himself against Defendants Jonathan Luke Wood, and the Associated Students Incorporated ("ASI") of the University of California Sacramento. This case is still ongoing. Plaintiff argues that the ASI is violating students' constitutional rights through their petition process and raising fees to build a stadium for the school (*Ben-Oni v. Wood*, n.d., p.2). Plaintiff requests a preliminary injunction to stop the stadium construction and is seeking a temporary restraining order ("TRO") on the defendant. The primary complaint is that the ASI violates Plaintiff's First and Fourteenth Amendment rights by not following the correct process to seek approval to increase ASI fees (*Ben-Oni v. Wood*, n.d., p.1). Most recently, the court decided this request for a TRO and injunction to stop construction is DENIED (Ben-Oni v. Wood, n.d., p.5).

"The legal framework of this case contains federal civil rights statutes 42 U.S.C. § 1983 (case text, 2024, p.1)." This statute allows individuals to sue for constitutional violations committed by people acting under state law. "The plaintiff, Ben-Oni, alleged that the defendant, Wood, acting in an official capacity, violated students' constitutional rights. The rights in question were freedom of speech in the First Amendment and equal protection in the Fourteenth Amendment." (*Ben-Oni v. Wood*, n.d., p.1).

Plaintiff had four separate claims and/or requests to the court, which consisted of the following:

5. ASI to not impose increasing fees;

5. The fee increase was approved by depriving students of their rights to democratic participation in governance under the First Amendment and Fourteenth Amendment;

5. Stop the construction of an athletic stadium at California State University Sacramento; and

5. Stop Defendants from enforcing ASI Operating Rule 200.6.

Plaintiff argued the fee increase for the Fall of 2025 ($508 increase) and the current 2023 fee increase ($96) caused a "financial burden" that will "hinder students' access to educational opportunities, compromise the quality of their academic experience and suppress student engagement" (*Ben-Oni v. Wood*, n.d., p.5). "The Plaintiff also argue[d] that ASI Operating Rule 200.6 has many stipulations that hinder to participate in petitions (ASCSUS OPERATING RULES Revised, 2024). "The Plaintiff claimed this criterion negatively impacts marginalized groups violating the First Amendment's free speech protections and the Fourteenth Amendment's Equal Protection Clause." (*Ben-Oni v. Wood*, n.d., P.2):

- This clause violates the First Amendment because it restricts people from the right to petition.
- This clause violates the 14th Amendment because it disproportionately impacts on certain groups violating equal protection (*Ben-Oni v. Wood, n.d.*, P.2).

On October 8, 2024, Plaintiff filed motions for a TRO and a preliminary injunction to halt the fee increases, stadium construction, and enforcement of ASI Operating Rule 200.6. "The court denied these motions on October 11, 2024, citing insufficient evidence to support the claims of constitutional violations." (*Ben-Oni v. Wood*, n.d., P.5).

Plaintiff then filed motions for reconsideration and electronic filing privileges. "On November 18, 2024, the court denied these motions but granted the Plaintiff's request to amend his complaint, allowing him fourteen days to file an amended version." (casetext.com, 2024, p.1). The court had to determine the constitutionality of fee increases and stadium construction. The court also had to review whether Defendants' implementation of a $508 fee increase scheduled for Fall 2025, an earlier $96 increase in Fall 2023, and the planned construction of a new athletic stadium violated Plaintiff's First and Fourteenth Amendment rights by

imposing financial burdens that could hinder students' access to education and suppress student engagement (*Ben-Oni v. Wood*, n.d., p.2). To succeed on the request for a preliminary injunction, Plaintiff must satisfy the following four conditions:

1. "Likelihood of success on the merits
2. likelihood of irreparable harm in the absence of preliminary relief
3. that the balance of equities tips in his favor
4. that an injunction is in the public interest." (*Ben-Oni v. Wood*, n.d., p.2)

Ultimately, the court decided as follows: **1) The likelihood of success on the merits were not founded.**

The court determined that the ASI does not violate the First and Fourteenth Amendments. Plaintiff claims ASI 200.6 disproportionally affects transfer, undocumented, and international students. The court determined that they could not find noteworthy evidence to prove this claim or that eligibility criteria is arbitrary. "They also found that transfer students are not considered in a protected category to leverage the Fourteenth Amendment argument." (*Ben-Oni v. Wood*, n.d., p. 3-4)

2) Likelihood of Irreparable Harm was not founded.

The court determined that Plaintiff could not show the rise in fees, construction of the stadium, or using ASI 200.6 brought immediate impacts to access of education for students. Specifically, the court ruled, "Plaintiff has not demonstrated how the Fall 2025 fee increase or the construction of the stadium immediately impacts students' access to education beyond a potential future economic harm." (*Ben-Oni v. Wood*, n.d., P.4)

3-4) Balance of Hardships and Public Interest were also not founded.

The court found that the balance of hardships, if they supported an injunction to stop fees and construction of the stadium, would not favor Plaintiff, and stopping both would create greater hardship for Defendant. "In the absence of this preliminary relief, it does not appear that the harm to Plaintiff, who has not stated a claim likely to succeed, would outweigh the hardship to Defendants, who would have to cease construction plans, potentially change programming as the result of a loss of fees, and alter a university rule. For similar reasons, it does not appear that an injunction in this instance serves the public interest." (*Ben-Oni v. Wood*, n.d., P.5)

Implications

There are no concurring or dissenting opinions associated with this case. As of February 19, 2025**,** the case remains active, with the Plaintiff expected to submit an amended complaint.

Ben-Oni v. Wood; Docket Number 2:24-cv-02769-DJC-JDP

McLendon is a student at The Citadel in Dr. Kwang-ho Park's sports law class (SMGT 555) Law.

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Wipeout: Ski Resort's Liability Waiver Leaves Injured Snowboarder Without Recourse

By Robert E. Freeman with Meredith A. Lipson, Sabrina Palazzolo and Alexander J. Amir, of Proskauer

Snowboarder John Litterer ("Litterer") faceplanted in a Colorado state appeals court which affirmed a lower court ruling that found Breckenridge Ski Resort's (the "Resort") liability waiver was enforceable and barred Litterer from recovering damages after he collided with a snowmobile while traversing the slopes. (*Litterer v. Vail Summer Resorts, Inc.,* No. 24CA0480 (Colo. App. Jan. 30, 2025)(unpublished)).

The background of the case began when Litterer purchased a season pass (an "Epic Pass") at the Resort, owned by Vail Summit Resorts, Inc. ("VSRI"), for the 2020-2021 ski season. In December 2020, after

Litterer turned his snowboard onto a trail that was approved for snowmobile traffic, he collided with a snowmobile driven by VSRI employee Dwight McClure ("McClure," collectively with VSRI, "Defendants"). McClure claims that he "saw movement above him in the trees" moments before the collision. He attempted to move the snowmobile to the edge of the road to avoid colliding into Litterer, who said he "had no time to make any moves" in the "one second" before the collision. In May 2022, Litterer filed a complaint in Colorado state court against Defendants, lodging a litany of claims including negligence, negligence per se, extreme and outrageous conduct, willful and wanton conduct, and reckless endangerment.

At the lower court level, Defendants moved to dismiss on various grounds. Defendants were mostly successful, as the court ruled that the Colorado Premises Liability Act preempted Litterer's claims pertaining to negligence and extreme and outrageous conduct, and that Litterer's claims for willful and wanton conduct and reckless endangerment were not cognizable causes of action in Colorado. However, the trial court did permit a premises liability claim to proceed against VSRI and allowed Litterer to amend his complaint. The court also allowed a negligence per se and related tort claims against McClure to proceed. Nevertheless, Litterer's run was soon over after Defendants later moved for summary judgment, asserting that Litterer's remaining claims were barred by three liability waivers executed by Litterer. The lower court held that that the exculpatory language related to Litterer's Epic Pass for the 2020-2021 ski season validly barred Litterer's claim for negligence, negligence per se and premises liability. Furthermore, the court found that Litterer's purchase of another Epic Pass for the 2022-2023 season contained an enforceable release of all his prior claims against the Defendants. The lower court also found that Defendants' conduct was insufficient as a matter of law to support a claim for extreme and outrageous conduct.

On appeal, Litterer principally argued that the trial court erred by granting summary judgment on the negligence per se claim based on the Colorado Supreme Court's recent *Miller* decision that held "ski resorts cannot use signed waivers to absolve itself of liability for per se negligence based on violations of statutory duties imposed by ski safety laws, as allowing ski resorts to escape liability from negligence claims based on violations of such laws ultimately frustrates lawmakers' intent." The Three Point Shot newsletter previously covered this decision in detail (*do a 180 to that article now and then jump back here!*). However, because the appellate court here concluded that Litterer's claims were barred by the liability waivers and releases contained in the Epic Pass he purchased for the 2022-2023 season, it declined to even go down that trail.

The Epic Pass Litterer purchased online for the 2022-2023 ski season contained the following relevant provisions:

"WARNING: PLEASE READ CAREFULLY BEFORE SIGNING! THIS IS A RELEASE OF LIABILITY WAIVER OF CERTAIN LEGAL RIGHTS INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION.

In consideration for allowing the Participant to participate in the Activity [defined to include snowboarding], I FURTHER RELEASE AND GIVE UP ANY AND ALL CLAIMS AND RIGHTS THAT I MAY NOW HAVE AGAINST ANY RELEASED PARTY AND UNDERSTAND THIS RELEASES ALL CLAIMS, INCLUDING THOSE OF WHICH I AM NOT AWARE, THOSE NOT MENTIONED IN THIS RELEASE AND THOSE RESULTING FROM ANYTHING WHICH HAS HAPPENED UP TO NOW."

The Court noted that "the 2022 online waiver defined 'Released Party' to include 'Vail Resorts, Inc., The Vail Corporation, . . . each of their affiliated companies and subsidiaries, the resort owner/operator, [and] all their res[pective] . . . affiliates, agents, employees, representatives, assignees, officers, directors, and shareholders' and released those parties from all liability for 'any injury' arising 'in whole or in part' from Litterer's participation in snowboarding, among other activities."

Litterer's counterarguments all hit the slush: (i) he did not assent to the 2022 online waiver, (ii) it is unconscionable and therefore unenforceable and (iii) it cannot bar his claims. Emphasizing Colorado's policy of freedom of contract and using basic contract formation principles, the Court deemed that there was mutual assent by Litterer and VSRI in entering into the agreement. Litterer failed to develop an argument as to unconscionability "beyond a conclusory allegation that he is penalized by its enforcement," so the Court

did not address this point. Finally, the Court found that the 2022 wavier unambiguously released "any and all claims" by Litterer against Defendants up to that point of time. As explained by the Court, while the 2020 Epic Pass waiver he signed before his accident sought to limit future negligence claims against Defendants, the 2022 Epic Pass waiver and liability release required that Litterer release any and all claims against VSRI and its employees, including claims from past events (such as the vested claims stemming from his 2020 snowboarding accident). The Court ultimately affirmed the lower court's finding that Litterer's purchase, acceptance, and use of the 2022 Epic Pass was sufficient conduct to demonstrate his assent to the terms of the 2022 waiver such that a valid contract was formed.

While we previously wrote that the Colorado Supreme Court's *Miller* decision was a "potentially landmark decision for future ski-related tort cases" in Colorado, we'll have to wait to see the applicability of this precedent to other applicable state recreational statutes. In the meantime, skiers and snowboarders should perhaps read the terms of ski passes before purchase and definitely ski safely out on the slopes.

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Articles

Alleging 'Antitrust Injury,' Potential Class Action Lawsuit Filed Against Pro Tennis Governing Bodies

By Alex M. Bulte and Ryan M. Rodenberg

On March 18, 2025, a dozen professional tennis players and a non-union group called the Professional Tennis Players Association (PTPA) filed a 163-page complaint in federal court against the four leading tennis governing bodies in the world. Describing professional tennis players as "stuck in a rigged game," the new lawsuit alleges a conspiracy among the defendants "because a cartel of tour organizers and tournament operators have conspired to avoid competition amongst themselves and to shut out outside tournaments, affording them complete control over the players' pay and working conditions" (p. 1). The plaintiffs allege nine distinct claims for relief and, among other things, are seeking an injunction, monetary damages, disgorgement of profits, restitution, and attorneys' fees. The plaintiffs have also demanded a jury trial.

The complaint's introduction—a subsection spanning the first ten substantive pages—outlines the key allegations described in detail throughout the document filed by attorney James W. Quinn and other lawyers from the Weil, Gotshal & Manges LLP law firm in the U.S. District Court for the Southern District of New York. First, the plaintiffs allege "price fixing and other restrictions on players' earnings" (p. 3). Second, the complaint describes alleged "restraints on competition among tournaments" (p. 6). Third, the plaintiffs describe alleged "abusive investigations and discipline imposed on players" (p. 7).

Overview of the Parties

The plaintiffs include twelve current and former professional tennis players and the PTPA (p.10). Among them are Vasek Pospisil, Reilly Opelka, and Nick Kyrgios—all of whom have reached high ATP rankings and are known for advocating player rights and greater transparency (pp. 10-12). The PTPA, a nonprofit organization, joins the suit to push for systemic reform on behalf of both male and female players (pp. 32-35). Notably, two of the sport's biggest stars—Novak Djokovic (a PTPA co-founder) and Carlos Alcaraz—are not plaintiffs in this case. In fact, Alcaraz was publicly critical of certain portions of the lawsuit.

The named defendants are the ATP Tour, WTA Tour, International Tennis Federation (ITF), and International Tennis Integrity Agency (ITIA)—four governing bodies that the plaintiffs allege to collectively control nearly every aspect of professional tennis (pp. 12-14). These organizations are accused of coordinating to limit competition, suppress player compensation, and impose restrictive schedules, rules, and disciplinary systems (pp. 1-9). While they exert global influence,

the four Grand Slam tournaments consisting of the Australian Open, Roland Garros, Wimbledon, and the US Open are not named specifically as defendants in this case (p. 13). The complaint alleges that the defendants operate as a cartel that undermines fairness and player autonomy.

Specific Legal Claims

The plaintiffs devote extensive time positing how the defendants' "imposition of illegal restraints, web of anticompetitive agreements, and exercise of monopsony power" have resulted in extensive antitrust injuries as part of interstate trade and commerce (p. 113). Accordingly, all but one of the plaintiffs' claims for relief are spawned from the federal Sherman Act. The first four claims are alleged to be violations of Section 1 of the Sherman Act: (i) unreasonable restraint of trade—price fixing; (ii) unreasonable restraint of trade—group boycott/refusal to deal conspiracy; (iii) unreasonable restraint of trade—market allocation; and (iv) unreasonable restraint of trade—output restriction.

The next four claims all allegedly derive from Section 2 of the Sherman Act: (i) monopolization of the professional men's tennis market; (ii) monopolization of the professional women's tennis market; (iii) conspiracy to monopsonize the professional men's tennis market; and (iv) conspiracy to monopsonize the professional men's tennis market. Beyond the eight antitrust-specific claims, the plaintiffs also added a claim "[u]nder common law principles of unjust enrichment" (p. 155). Claiming that the defendants "have been unjustly enriched as a result of the unlawful conduct detailed herein," the complaint spends several paragraphs alleging how the ATP, WTA, and ITF and certain tournament co-conspirators have mandated certain NIL rights to be turned over to the tours for "lower compensation than they otherwise would have been able to offer their professional services in a free market (p. 155-156).

The plaintiffs also spend considerable time positioning the complaint as a class action under Federal Rule of Civil Procedure 23. The six male plaintiffs are proposed to represent the 'ATP Class' as representative of "[a]ll current, former, and future tennis players who compete in, or competed in, any ATP-sanctioned tennis tournament between the date of the Complaint through the date of final judgment in this matter" (p. 106). Similarly, the half-dozen female plaintiffs are characterized as representing the 'WTA Class' inclusive of "[a]ll current, former, and future tennis players who compete in, or competed in, any WTA-sanctioned tennis tournament between the date of the Complaint through the date of final judgment in this matter" (p. 107). The plaintiffs collectively also seek to establish an 'ITF Class' of players who competed in ITF-sanctioned tournaments "including, but not limited to, the Grand Slams" (p. 106). The newly-filed complaint then details who the proposed classes meet the requisite numerosity, commonality, typicality, adequacy of representation, and superiority prongs of class actions suits.

Key Components of the Complaint

The complaint alleges that the ATP, WTA, ITF, and ITIA operate as a coordinated cartel that suppresses competition, player earnings, and independent opportunities within professional tennis. One of the central claims involves alleged prize money suppression. Plaintiffs assert that defendants engage in horizontal price-fixing by jointly setting prize money levels across events, limiting player compensation, and eliminating upward pressure on payouts that would otherwise occur in a competitive market (p. 40).

A second major allegation focuses on alleged restrictions on independent tournament play. The complaint states that players face penalties—including the loss of ranking points and potential suspensions—for choosing to compete in non-sanctioned or unaffiliated events (pp. 59-65). These restrictions allegedly apply regardless of personal circumstances such as injury, mental health, or family matters, discouraging participation in alternative circuits and reducing player autonomy (p. 65). Players are also allegedly required to obtain written approvals to participate in certain exhibitions or leagues, reinforcing the tours' control over athlete schedules (pp. 66-67).

The plaintiffs also highlight alleged limitations related to rankings. ATP and WTA ranking points are only awarded at sanctioned events, meaning tournaments such as those on the UTR Pro Tennis Tour are excluded. The complaint argues this system coerces players into the incumbent tours by linking rankings directly to tour loyalty, thereby deterring innovation and preventing competition from new event organizers (pp. 73-82). Finally, the complaint outlines alleged

overreach by the ITIA, including mandatory arbitration waivers, lack of due process protections during investigations, and the collection of personal data without adequate safeguards (pp. 83–89).

Immediate Next Steps

Within days of the complaint being filed, the acrimonious nature of the dispute resulted in an exchange of letters filed with the court. Plaintiff attorney James W. Quinn submitted a three-page letter to the judge pursuant to Federal Rule of Civil Procedure 23(d) for the purpose of protecting plaintiffs "against efforts by Defendants to intimidate, coerce, or threaten them for participating in the suit" (p. 1). The letter was accompanied by a signed declaration describing an alleged incident on March 19, 2025 at a top-flight professional tennis tournament in Miami. Four days later, Bradley I. Ruskin, an attorney representing the ATP, responded with a three-page letter in opposition, positing that the "ATP has not made any false or misleading statements, violated any players' rights, or interfered with the administration of the case. Plaintiffs prematurely filed a poorly investigated complaint, based largely on unreliable hearsay, and no relief beyond the status quo is needed" (p. 1). The dueling letters will be evaluated during a courtroom hearing on April 11, 2025.

The case represents one of the most consequential challenges to the structure of the sport since the 'open' era of professional tennis started in 1968. Indeed, the lawsuit—if successful—could transform tennis governance from the low-level minor leagues to the upper-echelon Grand Slams. Upon service of the complaint, each defendant will have a short time window to draft a substantive response. Such a response will likely include a motion to dismiss the plaintiffs' complaint. In turn, the district court judge assigned to the case—Margeret M. Garnett—will then rule on whether the case can continue. Such a ruling would likely occur prior to the end of the year. Until then, multiple player plaintiffs will be actively competing in ATP and WTA tournaments while the litigation is live.

Alex M. Bulte is an Economics major at Florida State University and a member of the varsity tennis team. Ryan M. Rodenberg is a professor of sports law analytics at Florida State University.

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President Trump Issues Executive Order Signaling Continued Efforts to Close U.S. Department of Education & State of Title IX Athletics Enforcement Efforts

By Ellen J. Staurowsky, Ed.D., Senior Writer and Professor, Sports Media, Ithaca College, staurows@ithaca.edu

With the signing of an executive order entitled Improving Education Outcomes by Empowering Parents, States, and Communities on Thursday, March 20, 2025, President Trump continues to prioritize the eventual closure of the U.S. Department of Education (DOE). Whether that comes to fruition remains to be seen. According to legal experts, the shuttering of a federal agency requires Congressional action. As a practical matter, however, the DOE's work has been substantially interrupted as a result of reductions in both funding and staffing since the newly appointed U.S. Secretary of Education Linda McMahon took office.

The Department of Education has been in existence for nearly half a century having been created by President Jimmy Carter in 1979. The Department was intended to oversee national educational policy and to administer federal financial assistance programs that were designed to support vulnerable student populations around the country as a way of increasing educational access for all students. While only 14% of funding for schools comes from the federal government, and control of education is exercised at the state and local levels, the Department of Education has played a key role in distributing federal financial aid for education, conducting research and gathering data on students educated in U.S. schools that support policy decisions, and enforcing federal education laws that prohibit discrimination. More than 13 million students have been the beneficiaries of the Department of Education's work through the administration of student federal financial aid programs as distributed through grants, work-study programs, and loans (Gedeon, 2025)

Within days of Secretary McMahon taking office, nearly 50% of the 4,133 staffers working at the

Department of Education were fired. Employees who did not agree to participate in a deferred resignation program or voluntary separation incentive plan were subsequently furloughed (Office of Communication and Outreach, 2025). Subjected to the scrutiny of the newly formed Department of Government Efficiency (DOGE), efforts have been made to cut $1.6 billion in government contracts and $1.1 billion in grants, reductions that have halted research projects designed to better understand how students learn and what they need to be successful. According to Turner (2025), the layoffs at the Department of Education disproportionately targeted financial aid, civil rights, and education research teams. A decision to cut $600 million in grants to support teacher training programs focusing on diversity, equity, and inclusion (DEI), critical race theory, and anti-racism initiatives was blocked (as of this writing) by a federal judge who issued a temporary restraining order in *American Association of Colleges for Teacher Education et al., v. Linda McMahon, in her official capacity as Secretary of Education et al.* (2025) citing the grave effect the lack of funding will have on the public, including "fewer teachers for students in high-need neighborhoods, early childhood education, and special education programs" (p. 45).

Among the areas dramatically affected by the reductions is the Office for Civil Rights (OCR), whose mission has been to "ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights" including Title IX of the Education Amendments of 1972. Of the 12 OCR field offices around the country, only six remain at a time when the OCR had received the highest number of complaints in its history (n=22,687) (Lhamon, 2024). Over half of the complaints received during the 2024 fiscal year were Title IX complaints, with the number of Title IX allegations in the area of athletics surpassing all others by a wide margin with just over 7,000 (Lhamon, 2024).

Even as sweeping changes will result in investigations being dropped due to lack of resources, the OCR has aggressively pursued complaints against states and institutions that have supported the civil rights of transgender girl and women athletes. In an investigation that has been unprecedented in the brevity of its process and fact finding, the OCR found the state of Maine to be in violation of Title IX on March 19, 2025, for allowing two transgender girls to participate on girls' teams and to use girls' athletic facilities. Maine officials were given 10 days to accept a list of changes put forward by the Department of Education. Failing that, the case will be sent to the U.S. Department of Justice. In the case of the University of Pennsylvania (Penn), the institution stands accused of violating Title IX after it allowed a transgender woman to participate on its women's swim team during the 2021-2022 academic year. Relying on Trump's executive order signed in 2025 barring transgender women from competing on women's teams, the Department of Education notified Penn that $175 million dollars in federal grant funding was suspended (Scripps News Group, 2025). The state of Delaware has been challenged by Delaware State Senator Bryant Richardson regarding a transgender athlete policy despite the fact that there are no transgender athletes in the state. The complaint asked the United States Department of Justice Office for Civil Rights to terminate federal funding to the state due to violations of Title IX, the Equal Protection Clause of the 14th Amendment, and President Trump's executive order.

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NASCAR and the 23XI Racing '*Per Se* Illegal Cartel'

By Katelyn Kohler

This update expands on the initial complaint outlined in the Sports Litigation Alert article "*Analyzing Michael Jordan's 23XI Racing Antitrust Lawsuit Against NASCAR*," published on December 13, 2024, by Gigi Wood.[1]

Founded by NBA legend Michael Jordan, NASCAR driver Denny Hamlin, and their business partner Curtis Polk, 23XI Racing ("23XI") filed an amended complaint against NASCAR in February.[2] 23XI debuted in the 2021 NASCAR Cup Series with driver Bubba Wallace (No. 23), marking a historic win at Talladega where he became only the second-ever Black driver to win a NASCAR Cup Series race. The team later expanded, adding a second car, which is currently driven by Tyler Reddick (No. 45). Front Row Motorsports ("FRM"), the other plaintiff in this case, is a Tennessee-based team owned by Bob Jenkins, and fields Michael McDowell (No. 34) and Todd Gilliland (No. 38) in the Cup Series.

This case concerns NASCAR's alleged monopolistic practices, primarily its control over the Charter system, which guarantees entry for select teams into prestigious NASCAR events. Plaintiffs claim that NASCAR's actions stifle market competition. In a significant twist, NASCAR has countersued the two Plaintiff racing teams, accusing them of orchestrating anti-competitive conduct to force more favorable contract terms.

Amended Complaint

The amended complaint expands the initial allegations, claiming that NASCAR, under the control of the France family, has unlawfully monopolized the premier stock car racing market.

23XI and FRM allege that NASCAR's Charter system restricts competition by providing select teams with guaranteed entry into races, thus allowing them to dominate the market and stifle opportunities for other teams.

Plaintiffs argue that this lack of competition results in unjust financial arrangements that prevent teams from negotiating better terms. This, in turn, limits their ability to reinvest in their businesses and maintain a competitive edge. The complaint frames NASCAR's actions and the France family as "monopolistic bullies," suppressing teams that dare to challenge the established system.[3]

Plaintiffs argue that NASCAR leveraged its dominance to force racing teams into a restrictive 2025 Charter Agreement, since they had no other viable option for competing in premier stock car racing in the U.S. Plaintiffs stated that teams, unwilling to reveal their identities for fear of retaliation from NASCAR, alleged they felt "coerced" and "under duress," with NASCAR's tactics being as extreme as "putting a gun to their heads." One team even compared NASCAR's actions to a "communist regime."[4]

The 2025 Charter Agreement also expands the noncompete clause, barring teams from racing in any series not sanctioned by NASCAR. It includes a mandatory anticompetitive release provision, requiring teams to waive legal claims against NASCAR.[5] Plaintiffs are

1 *See* Gigi Wood, *Analyzing Michael Jordan's 23XI Racing Antitrust Lawsuit Against NASCAR*, SPORTS LITIGATION ALERT (Dec. 13, 2024), https://sportslitigationalert.com/analyzing-michael-jordans-23xi-racing-antitrust-lawsuit-against-nascar/.

2 *See* Amended Complaint, 2311 Racing LLC d/b/a 23XI Racing v. National Ass'n for Stock Car Auto Racing, LLC, No. 3:24-cv-886-KDB-SCR, at 1 (W.D.N.C. Feb. 3, 2025), ECF No. 107.

3 *See id.* at 10 ("The France family and NASCAR are monopolistic bullies. And bullies will continue to impose their will to hurt others until their targets stand up and refuse to be victims. That moment has now arrived.").

4 *See id.* at 8-9 (quoting teams who allege coercion from NASCAR).

5 *See id.* at 9 (describing NASCAR's monopsony power outlined in 2025 Charter).

the only two teams that refused to sign. Now, they are seeking a preliminary injunction to operate under the 2025 Charter without waiving antitrust claims, permanent injunctive relief to end NASCAR's exclusionary practices, and trebled monetary damages for harm caused by the 2016 and 2025 Charter Agreements.

NASCAR's Counterclaims

In response to the lawsuit, NASCAR filed a counterclaim accusing 23XI and FRM of engaging in a "*per se* illegal cartel" under Section 1 of the Sherman Act.[6] NASCAR asserts that these teams have colluded to coerce and extort the organization into renegotiating the Charter agreements by leveraging collective bargaining tactics to demand better contract terms.

NASCAR criticized Plaintiffs for acting in bad faith, pointing out that they were backed by Jeffrey Kessler, Esq., a lawyer with a history of suing sports leagues.[7] NASCAR argued that this was not the first-time Plaintiffs had tried to push their own agenda on the broader racing community. NASCAR contends it is particularly ironic that, in their effort to dismantle the Charter system, 23XI and FRM have sought to manipulate antitrust laws for their own benefit. NASCAR's language describes Plaintiffs as "trying to blow up the Charter system" and attempting to "weaponize the antitrust laws" to achieve their goals.[8] NASCAR stressed that it is an "undisputed reality" that Plaintiffs, led by Polk, intentionally violated antitrust laws by coordinating anticompetitive actions.[9]

Attorney Jeffrey Kessler, representing Plaintiffs, called NASCAR's counterclaim a "meritless distraction" designed to deflect from NASCAR's monopolistic conduct.[10] NASCAR attorney Chris Yates warned that if Plaintiffs prevail, the Charter system could be dismantled. Yates further accused the Race Team Alliance ("RTA") of operating like a "cartel" during the Charter negotiations.[11] RTA is an organization formed by a group of NASCAR teams to collectively address and negotiate issues related to the sport.[12] A subgroup of the RTA, the Team Negotiation Committee, led by Curtis Polk and others, conducted the preliminary Charter negotiations.

23XI and Polk are accused of leading a collusive effort to pressure NASCAR into agreeing to more favorable financial terms for teams, using threats like boycotts of NASCAR events, negative media campaigns, and coordinating group actions to manipulate NASCAR's media rights negotiations.[13] Instead of relying on competition among teams for sponsorships, Polk pushed for increased revenue from NASCAR's media rights. He actively participated in negotiations on behalf of the RTA. This anti-competitive strategy allegedly had a negative impact on the negotiations.

The Charter's exclusivity provisions, which have benefited both parties for over nine years, may be at risk if the court agrees with Plaintiffs' claims. The NASCAR Charter system provides significant benefits, including guaranteed entry into every Cup Series race.[14] The Charter also guarantees millions of dollars in payments to teams, even if they do not win races, through various funding sources such as the Race Purse, Year-End Point Fund, Historical Owner's Plan, and Fixed Owner's Plan. It allocates 25% of media rights revenue to teams, increasing to 40% by 2024, and reserves 36 of 40 race spots for Charter teams, thus reducing competition and making it harder for non-Charter teams to qualify.

As a result, the Charter has become an extremely valuable asset for team owners. NASCAR issued the original Charter for free, but the value has increased significantly. For instance, Spire Motorsports publicly purchased a Charter for $40 million. Taking away the Charter also removes the "goodwill provision

6 *See* NASCAR's Counterclaims Against 2311 Racing LLC d/b/a 23XI Racing, Front Row Motorsports, Inc., and Curtis Polk, & Defs.' Answer to Am. Compl. and Defenses, NASCAR Event Management, LLC v. 2311 Racing LLC d/b/a 23XI Racing, No. 3:24-cv-886-KDB-SCR, at 25 (W.D.N.C. Mar. 5, 2025) ("Counterclaim Defendants engaged in active threats and coercive behavior in order to maintain their *per se* illegal cartel.").

7 *See id.* at 4 ("Aided by counsel who has a history of suing various sports leagues and claiming that they engage in anticompetitive conduct…").

8 *See id.* at 4-5.

9 *See id.* at 5.

10 *See* Jordan Bianchi & Jeff Gluck, *NASCAR Sues Michael Jordan's Team, Front Row Motorsports, Calls Them "An Illegal Cartel"*, The Athletic, Mar. 5, 2025, updated Mar. 6, 2025, https://www.nytimes.com/athletic/6177331/2025/03/05/nascar-michael-jordan-lawsuit-illegal-scheme/?redirected=1.

11 *See id.* (quoting both opposing attorneys' views on the conflict).

12 *See* Race Team Alliance, https://www.raceteamalliance.com (last visited Mar. 11, 2025).

13 *See* NASCAR's Counterclaims, *supra* note 6, at 5 (asserting allegations against Polk).

14 *See id.* at 13-15 (describing origins and benefits of Charter System).

prohibiting a Charter holder from competing in a stock car racing product that would be dilutive to the NASCAR Cup Series."[15] NASCAR does not want the Charter eliminated or their exclusivities removed.

The Preliminary Injunction and Appeal

Back in December 2024, U.S. District Judge Kenneth D. Bell granted a limited preliminary injunction allowing 23XI and FRM to compete as chartered teams in Cup Series races without being subjected to the anti-competitive release provision. The court justified this to maintain the status quo and found Plaintiffs likely to succeed on their Section 2 claim.[16] Yet, the litigation has taken another turn as NASCAR has appealed.[17]

NASCAR contends that the district court misapplied federal antitrust law, arguing that Plaintiffs' harm is merely dissatisfaction with NASCAR's terms, which does not constitute an antitrust injury.[18] NASCAR argues that the district court "conjured from thin air a categorical ban" on release clauses covering antitrust claims, a decision without precedent in other appellate courts.[19] NASCAR also argues that the injunction disrupts the status quo – it does not preserve it – by forcing it to offer the benefits of a contract that was rejected by the Plaintiffs and later withdrawn by NASCAR.

The appeal asserts that the injunction interferes with NASCAR's ability to freely negotiate with other teams and has impacted preparations for the 2025 Cup Series season. NASCAR's defense notes that the Charter system was voluntarily established at the request of the teams in 2014.[20] NASCAR's decision to withdraw its offers after 23XI and FRM rejected the 2025 terms is not an anti-competitive act. Instead, NASCAR maintains it was acting within its rights as a private entity to withdraw offers when terms were not accepted.[21]

However, the district court has now compelled NASCAR to do business with Plaintiffs under terms they are actively contesting as anti-competitive in the litigation. Plaintiffs' complaint challenges several Charter provisions beyond the release clause, including restrictions on teams competing in other leagues and NASCAR's use of Charter teams' intellectual property rights. Despite this, Plaintiffs have received preliminary injunctive relief that binds them to those very provisions.[22]

With the trial scheduled for December 1, 2025 and the appeal set for oral arguments on May 9, 2025, the ongoing legal battle over NASCAR's Charter system promises to complicate matters further, with both sides contending that their positions will ultimately reshape the sport's competitive landscape.

Katelyn Kohler is a third-year law student at Suffolk University in Boston, specializing in Sports & Entertainment, Intellectual Property, and Labor & Employment Law. She holds dual degrees from Ithaca College in Business Administration: Sports Management and Legal Studies.

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FIFA v Diarra: A Changing Transfer Market?

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

In October, the Court of Justice of the European Union (CJEU) handed down its much-anticipated ruling in the case of *FIFA v Lassana Diarra* [1].

The CJEU could not have been more explicit in its rejection of FIFA's multi-pronged, imprecise, discretionary and disproportionate system of sanctions applicable to a player who terminates their playing contract without just cause and those applicable to their new club.

While the Belgian Court of Appeal must finally determine certain elements of the case, this article postulates what the judgment will likely mean for

15 *See id. supra* note 6, at 5.

16 *See* Opening Br. of Appellants Nat'l Ass'n for Stock Car Auto Racing, LLC & James France, 2311 Racing LLC v. Nat'l Ass'n for Stock Car Auto Racing, LLC, No. 24-2245, 2025 WL 02/12/2025, at 22 (4th Cir. Feb. 12, 2025) (describing procedural posture of appeal).

17 *See id.* at 2.

18 *See id.* at 52.

19 *See id.* at 3-4.

20 *See id.* at 10; *see also id.* at 39 (arguing Michael Jordan voluntarily chose to invest in two NASCAR Charters and so "[h]is alleged 'lock in' results from his own voluntary choices, not from NASCAR's monopsony power.").

21 *See id.* at 32 (asserting plaintiffs rejected the 2025 Charter before NASCAR withdrew its offers, creating no contract, and are now unfairly reaping benefits from a Charter whose terms expired in 2024).

22 *See* Opening Br. of Appellants, *supra* note 16, at 5.

football's future framework for playing contracts and the transfer system. We have already seen FIFA introduce interim changes to its Regulations on the Status and Transfer of Players (**RSTP**) while it engages in consultation with stakeholders on making permanent changes to the RSTP to reflect the judgment (**Interim Measures**).

FIFA v Diarra: The contested provisions

The case concerned the RSTP provisions governing the termination of a playing contract without just cause (see footnote [2]).

While noting that the Interim Measures have temporarily changed how those provisions operate in practice today, the provisions in issue in Diarra (which are now the subject of consultation) can be summarised as follows (**Contested Provisions**):

1. The Financial Sanction: Any party terminating a playing contract without just cause is liable to compensate the other party. The RSTP stipulates that a party must calculate compensation by considering certain 'objective' criteria.

2. The Joint and Several Sanction: If the player joins a new club, the player and their new club are individually responsible for the full amount of the Financial Sanction.

3. The Sporting Sanction: Where a party terminates a contract without just cause in a certain period (see footnote [3]), FIFA can impose sporting sanctions on either the player (a playing ban) or the club (a two-window ban on registering new players). The governing body can also apply a sporting sanction to a prospective new club inducing the player to breach the contract (which would also lead to a transfer ban). The case primarily concerned itself with this latter form of the sanction. Significantly, the presumption is that the new club has induced the breach, so it is on that club to prove the contrary.

4. Withholding the ITC: The national association of the former club doesn't have to deliver an International Transfer Certificate (**ITC**) to the national association of the player's new club where, in essence, there is a dispute over the termination of the playing contract. The upshot is that the player cannot register with their new club.

The facts

Many will remember Lassana Diarra from his Portsmouth and Real Madrid days. After Real Madrid, Diarra found himself at Anzhi Makhachkala before signing a four-year deal at fellow Russian side Lokomotiv Moscow (**Lokomotiv**) in August 2013. Less than a year into his spell at Lokomotiv, things started to sour and culminated in Diarra refusing to train. Lokomotiv asserted that Diarra was in repudiatory breach of his contract, entitling the club to terminate it, which it did in August 2014.

Lokomotiv pursued Diarra for damages for breach of contract before FIFA's Dispute Resolution Chamber (**DRC**) to the tune of €20m. Diarra counterclaimed, contending that Lokomotiv had terminated his contract without just cause.

In the meantime, in February 2015, Diarra found a club interested in signing him – Belgian side Sporting Charleroi – but the Russian Football Union (Lokomotiv's national association) refused to issue an ITC for Diarra while the dispute was ongoing (which it was entitled to do under the RSTP). Charleroi also wanted Diarra to confirm that it wouldn't be liable for any compensation payable to Lokomotiv if he were to sign for them (the Joint and Several Sanction). The deal ultimately fell through.

On 18 May 2015, the DRC found in Lokomotiv's favour and awarded compensation. Diarra unsuccessfully appealed to the Court of Arbitration for Sport.

Separately, Diarra commenced proceedings against FIFA and the Belgian FA, seeking €6m in lost earnings, claiming that the Contested Provisions are contrary to EU law. The Belgian court upheld Diarra's claim, which FIFA and the Belgian FA appealed to the Belgian Court of Appeal.

Before reaching a decision, the Court of Appeal has requested a preliminary ruling from the CJEU on whether the Contested Provisions are precluded by EU law, in particular:

- The right to freedom of movement of workers within the EU (**Freedom of Movement Right**).
- The prohibition on certain arrangements that: (i) may affect trade between EU Member States; and (ii) by purpose or in effect, restrict, prevent or distort competition within the EU (**Prohibition on Anti-Competitive Agreements**).

The CJEU's preliminary ruling

Without getting into technical EU law details, the CJEU unsurprisingly followed recent decisions that the Freedom of Movement Right and the Prohibition on Anti-Competitive Agreements apply to FIFA and, therefore, also the RSTP (see footnote [4]).

- **The Freedom of Movement Right**

This right precludes any measure that might disadvantage EU nationals when they wish to pursue an economic activity in a Member State other than their own by preventing or deterring them from leaving their state of origin.

The CJEU confirmed that the Contested Provisions are all of that nature; the Contested Provisions prevented and/or deterred Diarra from finding a new club in the EU and/or clubs across the EU from engaging him. The former association's decision to withhold the ITC prevented the player from joining a club in another state. However, FIFA can justify such restrictions on overriding grounds of public policy, provided it is proportionate.

The CJEU accepted that ensuring the regularity of club competitions is a legitimate objective of FIFA. This objective requires maintaining stability at clubs (which the Contested Provisions seek to do). As for proportionality, the key issue is whether the relevant measure goes no further than is necessary to achieve that objective. This is ultimately a question for the Belgian Court of Appeal to determine, but the CJEU gave its opinion on each limb:

The Financial Sanction: The CJEU was particularly critical of the factors laid down in the RSTP for calculating compensation. The relevant factors include the 'specificities of sport' and the player's remuneration at their new club. Regarding the first, the CJEU considered it too imprecise a term to be 'necessary' to ensure the regularity of club competitions. Regarding the latter, the CJEU considered what the player earns at their new club is irrelevant in calculating their former club's compensation (see footnote [5]).

The Joint and Several Sanction: Proportionality requires assessment of the specific facts of a case, in particular, the actual conduct of the new club. In other words, holding the new club liable regardless of whether it is at fault can hardly be necessary to ensure the regularity of club competitions.

The Sporting Sanction: Imposing the Sporting Sanction on the new club also goes beyond what is necessary, particularly where the onus is on the new club to prove that it didn't induce the breach of contract. As mentioned, proportionality requires assessment of the facts – at the very least, the former club should have to provide some evidence of incitement to shift the burden of proof to the new club. The CJEU also noted that imposing a rigid two-window registration ban, which can't be adapted depending on the facts, is clearly at odds with the principle of proportionality.

Withholding the ITC: As above, the ability of the former association to withhold the ITC overlooks the specific circumstances of a case, in particular, the factual context in which the breach of contract occurred (and indeed, whether a breach of contract has actually occurred). It also fails to consider the player's actions, the former club's conduct, and the new club's involvement or lack thereof.

Regarding the Joint and Several Sanction, the Sporting Sanction and Withholding the ITC, the CJEU acknowledged that there is flexibility to derogate from them where appropriate. In this case, the DRC determined that the Sporting Sanction should not apply to Diarra's next club. However, the mechanisms for such exceptions are too imprecise and ill-defined to cure the disproportionality of the existing framework.

- **Prohibition on Anti-Competitive Agreements**

The CJEU firmly stated that the Contested Provisions aim to restrict or even prevent competition. In the court's view, the Contested Provisions pose significant harm to competition. More specifically, they prevent clubs from unilaterally recruiting players already under contract or those alleged to have terminated their employment contract without just cause. Recruiting top players is, of course, a particularly significant aspect of competition between clubs.

While it's possible to fall outside the prohibition where the relevant measures pursue legitimate objectives, a crucial limb of that test is that the means used must be genuinely necessary for such objectives. It will be apparent from the foregoing that the CJEU

considered the harm caused by these measures too great to be justified and proportionate (see footnote [6]).

Does the ruling completely shake up football contracts and the global transfer system?

While the Belgian Court of Appeal must still make specific findings – and the case is technically limited in scope to the EU and, in the case of the Freedom of Movement Right, to transfers with a cross-border element involving an EU national – FIFA's Interim Measures show that FIFA accepts the need to make changes to the RSTP and intends to do so globally.

While the Interim Measures are not intended to prejudice the ongoing consultation with stakeholders, they do reflect the general trend towards increased player rights.

Footnotes:

[1] *Fédération internationale de football association (FIFA) v BZ, C-650/22*.

[2] These rules also apply to cases where the 'injured' party terminates a contract in response to the other party's serious breach of contract (which is what happened in this case).

[3] The period from when the contract becomes binding until the end of a specific number of seasons or years, whichever comes first. If the player is under 28 when the contract is signed, the period is 3 seasons or years; for players 28 and over, it's 2.

[4] See *European Superleague Company, SL v FIFA and UEFA*; and *UL and SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL*.

[5] Another factor is the law of the state concerned, which FIFA itself admits in its commentary on the RSTP is rarely followed in practice. The CJEU considered this unsatisfactory – there should be a real consideration of and effective compliance with such laws.

[6] The Belgian court will also have to determine whether a further specific exemption provided for under EU law, under article 101(3) of the Treaty on the Functioning of the European Union, is engaged. If so, the measures would not fall foul of the prohibition. However, again, one of those limbs concerns the necessity of the conduct (which the CJEU has made its position quite clear on).

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Industry Predictions for Esports in 2025: Legal Considerations in Revenue Innovation

By Jeffrey Levine, JD, PhD, Associate Clinical Professor, Department of Sport Business, Esport Business Program Lead, Drexel University

(Editors' Note: The following appeared in Esports and the Law, a complimentary periodical produced by Hackney Publications.)

In a recent *Esports Insider* article, industry thought leaders outlined their expectations for 2025 (Daniels, 2025). Revenue diversification emerged as one of the most frequently discussed issues, particularly in light of ongoing financial instability in the post-esports-winter era. As traditional revenue streams such as sponsorships and advertising become increasingly volatile, and therefore unreliable, organizations are forging alternative strategies to ensure financial sustainability. These individuals identified three key revenue streams poised to reshape the industry: esports betting, user-generated content (UGC) monetization, and AI-driven gaming experiences (Daniels, 2025; Takahashi, 2025).

However, while promising, these emerging revenue models introduce significant legal and regulatory concerns that will shape the industry's trajectory. Esports betting raises compliance challenges related to gambling laws, match-fixing, and protecting younger consumers. UGC monetization presents unresolved intellectual property (IP) disputes regarding content ownership and compensation models. Meanwhile, AI-driven esports tools introduce complex questions related to fair competition, data privacy, and content ownership. As esports organizations attempt to regain financial stability and transition into what some industry insiders are calling an "esports spring" (Waananen, 2025), it is imperative that they proactively address the evolving legal landscape surrounding revenue diversification.

Esports Betting: Expanding Legally but with Risks

Esports betting is becoming a significant emerging revenue stream in competitive gaming. For instance, one major sportsbook reported that esports wagering grew by 13% in 2024, far outpacing the 4% growth seen in traditional sports betting during the same period

(D'Elia, 2025). This surge in betting activity signals increasing consumer demand and suggests that gambling may play a pivotal role in esports' financial future. Riot Games' recent decision to lift restrictions on betting sponsorships for its leagues further underscores the industry's growing acceptance of esports gambling as a legitimate revenue stream (Fudge, 2024).

However, while esports betting presents lucrative financial opportunities, it also invites heightened regulatory scrutiny and integrity risks. The industry continues to face potential legal exposure associated with its popular, yet unregulated "skin gambling" market, which emerged in the mid-2010s and remains prevalent today (DeSena, 2024). Skins, cosmetic in-game items, became widely used as de facto virtual currency for betting, fueling a multibillion-dollar underground gambling economy that operated with little legal oversight and frequently involved underage users (*McLeod v. Valve*, 2016). While no federal statute exists that directly regulates skin gambling, this may change as the esports gambling economy matures.

Beyond the betting component, there are governance concerns. Unlike traditional sports, where leagues such as the National Football League and governing bodies like the International Ice Hockey Federation enforce strict gambling policies, esports lacks uniform oversight. Instead, as the primary intellectual property rights holder, this responsibility likely falls upon the developer. Thus far there is no dominant approach to regulation as each developer acts based on its own interests. This regulatory inconsistency heightens the risks of match-fixing, fraud, and other integrity concerns as developers and regions enforce varying standards.

If developers eschew regulatory responsibility, such burden likely falls to government. But the regulation of gambling varies significantly across jurisdictions, making compliance a formidable challenge for esports companies operating internationally. In the United States, for example, individual states police sports betting, with each jurisdiction having their own statutes that may differ materially. Few seem to have enacted esports-specific legislation, with Nevada and New Jersey leading the way and adding to the ambiguity. In contrast, countries like the United Kingdom and Australia have well-established gambling laws, allowing esports betting to flourish under clear guidelines. However, the industry's younger audience creates an added layer of scrutiny, as regulators seek to prevent underage gambling and promote responsible gaming practices. This fragmented regulatory approach leaves esports betting operators navigating a complex and often ambiguous legal environment.

User-Generated Content and IP Ownership Battles

UGC is emerging as a transformative force in the 2025 esports landscape, redefining how players interact with games and how developers monetize their platforms. The rise of UGC-focused platforms such as Fortnite Creative, Roblox, and other sandbox-style environments has empowered players to create, share, and monetize in-game content in ways that were previously limited to modding communities. However, while UGC presents new monetization opportunities, it also blurs traditional legal boundaries between developers, content creators, and esports organizations. As more companies integrate UGC-based business models, legal disputes surrounding intellectual property rights, derivative works, and revenue-sharing models are likely to emerge.

The central legal issue in UGC is ownership, a question that remains largely unsettled in video game law (Chau, 2023). The uncertainty surrounding who holds rights to user-created content affects modders, developers, and players alike, creating an emerging legal framework that has yet to be standardized across jurisdictions. UGC often constitutes derivative works based on pre-existing copyrighted material, raising questions about copyright ownership and the extent of an owner's exclusive rights, including control, distribution, and monetization. However, copyright law does not protect gameplay mechanics, general ideas, or elements considered standard within a genre (Maitra, 2015), making it difficult to define what exactly is protectable in a mod. This lack of legal clarity also complicates efforts by modders and independent creators to assert ownership over their work.

AI in Esports: Legal and Ethical Risks

As esports organizations continue to push the boundaries of innovation, AI-driven tools are poised to reshape competitive gaming and business models

in 2025. AI-powered coaching systems, predictive match simulations, and automated broadcasting enhancements are already being integrated into training, strategy development, and content production (Harper, 2025; Olavsrud, 2024). While these technologies offer unprecedented advantages, they also introduce legal and ethical challenges.

The legal landscape surrounding AI is in its early stages, with courts only beginning to define the scope of AI-generated works under existing intellectual property law. In an important 2025 decision, a court ruled that training an AI on copyrighted material does not qualify for the fair use defense, setting a critical precedent for AI-generated esports content (Soni & Levy, 2025). This ruling signals that AI-driven content creation in esports is likely to face increasing legal scrutiny in the near future. Additionally, 2024 saw more than 30 lawsuits filed against AI companies, with courts intensifying their examination of how AI models are trained on copyrighted works without explicit authorization (Madigan, 2025). These cases could profoundly influence how AI-generated strategies, game analysis, and highlight reels are regulated in esports.

Beyond copyright disputes, AI's role in esports also raises serious concerns about data privacy and player protection. AI-powered analytics systems process vast amounts of player data, ranging from in-game performance statistics to biometric tracking. Without clear regulatory frameworks, this data could be misused or exploited, leading to potential legal challenges under evolving AI and data privacy laws. As AI becomes more embedded in competitive gaming, regulators may need to establish stricter guidelines on data collection, consent, and the ethical use of player information to ensure compliance with emerging legal standards.

Conclusion

These 2025 esports industry predictions highlight revenue diversification as both a solution and a challenge for long-term sustainability. While esports betting, UGC, and AI-driven innovations offer new financial opportunities, they also introduce substantial legal risks that must be carefully navigated. Courts and legislators may begin to play a major role in defining the rules governing these emerging revenue streams. The industry must prepare for potential court cases that could set precedents for gambling liability, intellectual property rights in UGC, and the role of AI in competitive gaming. As the legal landscape continues to evolve, esports stakeholders must stay informed and take a proactive approach in crafting forward-thinking policies rather than reacting to legal challenges as they arise.

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Music Publishers Cry Foul on NBA Teams' Use of Music in Promotional and Marketing Clips

By Brandon M. Ballard & Michael S. Carroll

In July of 2024, Kobalt Music Publishing America, Inc. and other music companies filed suit against 14 NBA teams in the US District Court for the Southern District of New York, in the latest ongoing battle between music publishers and organizations that allegedly use copyrighted material without proper authorization (e.g., Artist Publishing Group, LLC v. New York Knicks, LLC, 2024). The plaintiffs, representing significant entities in the music publishing industry, allege that the defendants (teams) engaged in unauthorized use of copyrighted music in social media postings on Instagram, TikTok, X, Youtube, and Facebook and are seeking to protect their intellectual property rights and ensure that their works are not exploited without due compensation.

Kobalt represents the exclusive licensing agent for the plaintiffs named in the suits and has allegedly been notifying the music companies of the alleged infringement for the past three years. The music in question involves songs sung by artists such as Britney Spears, Justin Bieber, Doja Cat, Bad Bunny and other well-known artists. Defendants include the Atlanta Hawks, Cleveland Cavaliers, Denver Nuggets, Indiana Pacers, Miami Heat, Minnesota Timberwolves, New Orleans Pelicans, New York Knicks, Orlando Magic, Philadelphia 76ers, Phoenix Suns, Portland Trail Blazers, Sacramento Kings, and San Antonio Spurs.

The 14 complaints are slightly different with respect to specific instances and examples provided regarding the unauthorized use of artists' music, but they all contain the same basic allegations. Each team is being sued for three separate causes of action for copyright infringement and cover a range of activities, from directly using copyrighted material without permission to contributing to or benefiting from such unauthorized use. By including these various allegations, the plaintiffs aim to address all possible ways in which their rights may have been violated and to hold the defendants accountable for their actions. The causes of action include:

- Direct copyright infringement, alleging that the teams used certain songs without getting a license from the respective publisher.
- Contributory copyright infringement, alleging that the defendants knowingly contributed to and participated in the distribution of these videos by third parties.
- Vicarious copyright infringement, seeking to impose secondary liability and holding the teams accountable for further infringements by third parties.

An example allegation in one of the complaints involves the Orlando Magic, who are accused of unauthorized use involving 27 songs. The complaint states that the Magic had exploited the copyrights of Kobalt Music Publishing by synchronizing the music with team video clips intended to promote commercial activities of the team and also posting on a variety of consumer-facing platforms (e.g., social media) and that they did so without plaintiffs' license, authorization, or consent.

Within the respective suits, plaintiffs note that the defendant teams are "acutely aware" of the protections that copyright law in the US affords companies, as they themselves have active trademarks registered with the United States Patent and Trademark Office (USPTO). The defendants furthermore utilize the full extent of legal protections available for their own intellectual property (IP) while knowingly and willfully infringing on the intellectual property rights of the plaintiffs. This specific claim highlights the broader issue of how sports teams and organizations may use music in their promotional and entertainment activities without securing the necessary permissions. The complaint alleges that the use of these songs without authorization not only infringes on the rights of the music publishers but also potentially deprives the artists and creators of their deserved royalties and recognition.

Damages Sought for Copyright Infringement

Plaintiffs are seeking up to $150,000 for each unauthorized use of the copyrighted material, an amount that reflects the seriousness with which the plaintiffs view the infringement of their rights. As such, the damages for each team could be in the millions, considering the high number of documented instances of alleged infringement. Plaintiffs believe that these potential

financial penalties will serve as a deterrent to other organizations that might consider using copyrighted material without proper authorization. It also underscores the value of intellectual property and the importance of respecting the legal rights of creators and publishers.

Defendant Teams' Response

All 14 NBA teams deny any wrongdoing in their response and raise a number of affirmative defenses, arguing that even if they did copy music they did so under lawful circumstances. First, the teams argue that the relevant three-year statute of limitations to bring such a case has passed. The teams claim that the plaintiffs first indicated that they were aware of the use of music by the teams on February 26, 2021 and that they brought the lawsuits in July of 2024, approximately five months past the three-year mark. As such, plaintiffs may have deliberately allowed the teams to use music for years before suddenly crying foul and demanding compensation.

The teams also allege that the plaintiffs utilized software to monitor song usage on the internet and created a database of archived uses long before 2021, which means plaintiffs should have been aware of the alleged infringement prior to 2021. TuneSat LLC was used to detect the alleged infringements by each team. This company specializes in monitoring and identifying the use of music across various platforms, providing evidence that can be crucial in legal cases involving copyright infringement. The use of such technology underscores the importance of accurate and reliable detection methods in enforcing intellectual property rights. Defendants also allege copyright misuse and argue that plaintiffs engaged in extortion and seek disproportionate payments for the allegedly infringing use. Finally, defendants also argue that any use of the alleged infringed works constitutes fair use. Key elements in a fair use analysis would include such things as the amount of a work (i.e., song) used in a clip, the purpose of the use of the song, whether the use transformed the original work into something new, and the extent to which the use of the infringed song hurt the sales of the original work.

Settlement and Consolidation

Subsequent to the filing of the lawsuits, the Atlanta Hawks engaged in settlement negotiations with the plaintiffs and are currently working to finalize the terms of an agreement. The plaintiffs are seeking to consolidate the remaining 13 cases, as the alleged infringing conduct is essentially the same, defendants' defenses are essentially the same, and the only differences include the specific songs exploited, the medium on which the alleged infringement occurred, and the ultimate damage amounts.

These NBA music cases are occurring while the American Hockey League (AHL) and nine AHL teams are being sued by Associated Production Music, a production music company with a catalog of more than 650,000 tracks, over the same basic issue: use of copyrighted songs in teams' social media posts. The AHL case is being heard in a California federal court.

Conclusion

In conclusion, this battery of suits filed by Kobalt Music Publishing America, Inc. and Artist Publishing Group against these teams highlights the ongoing challenges in protecting intellectual property rights in the digital age. The case underscores the importance of securing proper authorization for the use of copyrighted material and the potential consequences of failing to do so. The involvement of technology such as TuneSat LLC in detecting infringements and the strategic use of consolidation in legal proceedings are key elements in this complex legal battle. As the case progresses, it will be interesting to see how the courts address these issues and what impact the outcome will have on the broader landscape of intellectual property rights and enforcement.

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Brandon M. Ballard is an PhD student at Troy University specializing in research related to athletic identity, Afrofuturism, law and social change/social justice in sport and entertainment. He has self-published articles aimed to mobilize the African American community, and created a comic book series that advocates for understanding, support, and community action regarding mental health among veterans. He lives in Raleigh, NC.

Michael S. Carroll is a Professor of Sport Management at Troy University specializing in research related to sport law and risk management in sport and recreation. He also serves as Online Program Coordinator for Troy University and works closely with students in the TROY doctoral program.

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Former College Football Player Sues Insurance Company That Fails to Pay

A college football player, who suffered a catastrophic injury on the field, sued an insurance company for breach of contract, violations of the Texas Insurance Code, and violations of the Texas Deceptive Trade Practices Act after the defendant, Certain Underwriters of Lloyd of London, "delayed and failed to pay [him] the benefits he is entitled to receive under the terms of [an insurance] policy."

The plaintiff is represented by Christian Dennie of the Dennie Firm.

By way of background, Sevyn Banks, the plaintiff, was a 4-star high school football player, who was widely recruited as one of the top defensive backs in the country. He ultimately accepted a full scholarship to play football for Ohio State University. Banks began his career with the Buckeyes in the fall of 2018.

Four years later, as a graduate transfer, he transferred to Louisiana State University to play football for the SEC school. Then, on October 1, 2022, during the opening kickoff in LSU's game against Auburn, Banks "went to make a tackle and collided head-to-head with the ball carrier," according to the complaint.

"At the time of the collision and for a significant period of time thereafter, Banks was paralyzed. He was taken from the field on a stretcher and transported to a hospital in Auburn." Banks never played another down of the football. This was tragic in that he had been projected to be a first-round pick in the NFL draft, according to the complaint.

Five days after the head-to-head collision, on October 6, 2022, an "athlete's disability application – proposal" was submitted to the defendant on Banks' behalf. In the application, Banks "disclosed a litany of previous injuries, surgeries and medical treatment, including specifically the cervical spine injury sustained" during his last game and his ongoing treatment for that injury. He also submitted a "medical" application in which his injury was "disclosed in more detail by an LSU physician." Specifically, the application detailed that the injury occurred at the C4-C5 level and as a result Banks experienced significant side effects, including paralysis. The complaint summarized the LSU's physician's findings, noting that Banks "remains mere centimeters away from being paralyzed from the neck down if he sustains hard pressure to the head."

On October 24, 2022, Banks obtained a permanent total disability policy, underwritten by the defendant with a lump sum benefit for $1 million for the period of September 16, 2022 through August 1, 2023. This policy period began 15 days before the injury in question. The description of benefits outlined coverage for temporary and permanent total disability benefit.

Central to the plaintiff's claim was the fact that the policy "expressly states that all pre-existing conditions declared to the insurance company will be covered unless otherwise excluded in a special exceptions rider." The spinal cord injury was not mentioned.

Banks sent "a notice and demand" to the defendant's agent on October 17, 2024, seeking "a full lump sum benefit of $1 million due to the spinal cord injury preventing him from pursuing his chosen profession." Supporting documentation with the notice included an "attending physician's statement of disability," which suggested Banks never play football again because of the injury.

Despite this, the defendant "delayed and failed to pay Banks the benefits he is entitled to receive under the terms of the policy," according to the plaintiff.

In the complaint, the plaintiff argued the defendant breached its contract (count 1), as well as violated the Texas Insurance Code (count 2) and the Deceptive Trade Practices Act (count 3).

Under count 1, the plaintiff alleged that he entered into a contract that required the defendant "to pay [him] a lump sum benefit of $1 million for any injury sustained during the policy period that resulted in permanent total disability."

Regarding count 2, the plaintiff maintained that "since being alerted to the failure, breaches, acts, and omissions, [the] defendant has failed to make an offer to pay the damages obviously incurred by plaintiff and covered by the [insurance] policy. In fact, [the] defendant has knowingly and intentionally wasted time and failed to enter into productive communications with plaintiff."

As for count 3, he maintains that the defendant's "actions and inactions constitute false, misleading and deceptive acts," which are "a producing cause of plaintiff's damages."

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The State of Texas Failed in Bid to Compel the NCAA to 'Sex Test' All Women Athletes

By Ellen J. Staurowsky, Ed.D., Senior Writer and Professor, Sports Media, Ithaca College, staurows@ithaca.edu

In the aftermath of University of Pennsylvania swimmer, Lia Thomas, becoming the first and only transgender woman athlete ever to win an NCAA Division I championship in 2022, efforts to foster inclusive environments for a de minimis number of transgender girls and women in the U.S. sport system have been aggressively challenged in court rooms and in the public square. The issue of transgender women athletes became the focal point in the months leading up to the election of President Donald Trump in November of 2024, promoted with the aid of $215 million in TV ad spending. Fulfilling a campaign promise, President Trump signed Executive Order14201 titled "Keeping Men Out of Women's Sports" on February 5, 2025. The next day, the National Collegiate Athletic Association (NCAA) changed its transgender athlete eligibility policy, stipulating that athletes assigned male at birth as documented in their birth records are not eligible to compete on women's team, regardless of their gender identity, although they may practice with women's teams and receive medical treatment. Transgender athletes who identify as men are not prohibited from competing on men's teams.

Just weeks before those steps were taken to exclude transgender women athletes from competing on men's teams, the Texas state attorney general, Ken Paxton, filed a complaint against the NCAA in the District Court in Lubbock on December 22, 2024. In its original petition, the State alleged that the NCAA violated Texas's Deceptive Trade Practices Act (DTPA) by "… engaging in false, deceptive, and misleading practices by advertising and selling goods and services associated with women's sporting events that are, instead, mixed sex sporting events where men can compete against women" (p. 1). The State further alleged that consumers of NCAA women's events were motivated by a desire to support women's "empowerment" and "fair competition between women". According to the complaint, these alleged deceptive practices result in women athletes being deprived titles, records, trophies, scholarships, and opportunities to win and consumers being deceived because they do not know who the competitors are. In its prayer for relief, the State sought a permanent injunction that would prohibit the NCAA from permitting transgender women athletes (referred to as biological males in the complaint) from competing in events within the state of Texas and/or on teams sponsored by NCAA members located in Texas. In the alternative, the State sought to require the NCAA to stop using the term "women's" in association with its championships.

An amended complaint filed in February 25, 2025 after the NCAA changed its policy in a way that bars athletes who are assigned the designation of "male" at birth as documented in their birth records from competing on women's teams continues to allege that the NCAA persists in an intention to "fool consumers" and has subjected consumers to "even more confusion, deception, and misleading statements" (p. 1). The centerpiece of the state of Texas's focus is on the NCAA's lack of a mechanism to certify women athletes as women through a "sex screening" process. The State sought a preliminary injunction that would have compelled the NCAA to subject all women athletes competing on teams sponsored by NCAA member schools, which would have impacted 233,662 women athletes in 2023-2024, to genetic testing. As the NCAA noted in its defense, such testing has never been done by school athletic associations in the United States. The specific test advocated by the State was the test for the presence of the SRY gene, a test abandoned by the International Olympic Committee in 1996 because of its flaws (Williams, 2025).

In rejecting the State's request for a preliminary injunction on March 19, 2025, Judge Hatch noted ""Before I started delving into this lawsuit, I figured there was a test out there that was black and white, that was 100%, but I think if that were the case, that would have been included in the executive order. It's just not there" (as quoted in Williams, 2025, para. 12). While the request for a permanent injunction was denied, this case is likely not over.

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Would Baseball Players Consider The 'Nuclear Option' In Labor Negotiations?

By Christopher R. Deubert, Senior Writer

Major League Baseball's (MLB) collective bargaining agreement with the Major League Baseball Players Association (MLBPA) does not expire until after the 2026 season. Nevertheless, the rhetoric is heating up in advance of the 2025 season. In a wide-ranging January interview, MLB Commissioner Rob Manfred referred to the possibility of a league-imposed work stoppage – a lockout – as a "positive." Tony Clark, Executive Director of the MLBPA, rejected Manfred's statement and has since said he expects MLB to impose a lockout. The possibility of a work stoppage raises the question of whether the MLBPA would, for the first time in its history, pursue the "nuclear option" of decertifying the union and pursuing antitrust litigation.

A World Series Missed and Remembered

The specter of the 1994 players strike continues to hang over the relationship between MLB and the players union. That year, the players walked out on August 12, 1994 after extensive negotiations between the parties failed to produce a new collective bargaining agreement governing the sport. As a result, there was no World Series for the first time since 1994, drawing considerable public anger.

Principally at issue then – as now – was team owners' desire to implement a salary cap similar to those that then existed in the NFL and NBA. The teams believed that such a cap was necessary to restrain player salaries to reasonable levels and to ensure competitive balance among the teams. By comparison, the MLBPA has generally argued that any competitive balance issues are the result of lower payroll teams' disinterest in winning.

In December 1994, with the parties' negotiations ongoing, MLB announced that it would unilaterally impose a salary cap and eliminate salary arbitration, an important process by which players with generally between three and six years of experience can meaningfully increase their pay.

In response, the MLBPA filed a complaint with the National Labor Relations Board (NLRB) arguing that the league's conduct constituted an unfair labor practice in violation of the National Labor Relations Act, the federal law governing labor relations. The NLRB agreed with the players' position and, in March 1995, sought an injunction in federal court prohibiting MLB from unilaterally making changes to the terms and conditions of players' employment.

On April 3, 1995, Sonia Sotomayor, then-Judge for the United States District for the Southern District of New York and today a Supreme Court Justice, granted the requested injunction. Judge Sotomayor ordered MLB and its clubs to restore the terms and conditions of the expired 1990 collective bargaining agreement – under which the players had offered to continue playing – and to bargain in good faith with the MLBPA about changes to the agreement.

Judge Sotomayor's decision saved the 1995 season, which began on April 25. The parties then played the 1995 and 1996 seasons without a revised collective bargaining agreement, before finally agreeing to one in December 1996.

Since then, MLB and the union have successfully negotiated new collective bargaining agreements on multiple occasions without the loss of games, despite an offseason lockout from December 2, 2021 to March 10, 2022.

The "Nuclear Option"

The 1994-95 work stoppage was perpetuated in part by the players' inability to utilize legal arguments made by other players unions in disputes with their leagues.

Those arguments revolve around a concept known as the non-statutory labor exemption. The non-statutory labor exemption protects employers from potential antitrust liability for rules and policies they have collectively agreed on and which restrain a relevant labor market if those rules and policies were agreed to by a union which represents the employers' employees.

In sports, the leagues want to restrain the player labor markets in a variety of ways, including through maximum salaries, salary caps, free agency restrictions, player drafts, and more. These restrictions are likely only legal if they are negotiated with the players. This tension between antitrust law and labor law is generally what compels both parties to negotiate comprehensive collective bargaining agreements governing the sports' operations and which create a partnership between teams and players to grow the revenue pie they have agreed to share.

In the 1980s and 1990s, a series of cases between NFL players and the NFL established that the non-statutory labor exemption no longer applies if the union ceases to be the players' designated representative for purposes of collectively bargaining with the league. This process is generally referred to as union decertification.

If the union decertifies, players may bring a class action lawsuit against the teams challenging the various restrictions on their labor market as antitrust violations. Such a prospect is concerning to the leagues since damages under antitrust law are tripled.

This exact series of events played out in the early 1990s. The NFL players decertified the NFLPA as their bargaining representative and then filed a class action lawsuit against the NFL and its teams. The eventual settlement of that case in 1993 brought about free agency in the NFL for the first time and included a payment to players of $200 million. The NFL got a salary cap in return.

The NFL players reformed their union after that settlement but employed the same strategy in 2011 after the league locked out the players. That same year, the National Basketball Players Association also disbanded as part of filing antitrust lawsuits amid failed labor negotiations. In each instance, the parties eventually reached a new collective bargaining agreement, dismissed the lawsuits, and agreed to the reconstitution of the unions – a necessary element for the application of the non-statutory labor exemption to the rules the leagues wish to impose.

The idea of unions voluntarily giving up their authority seemed so extreme, that it has been referred to as the "nuclear option," including by former NBA Commissioner David Stern.

The Disarmament and Rearmament of MLB Players

Yet, the nuclear option was unavailable to MLB players in 1994 because of baseball's historic but "aberrational" exemption from antitrust law, as described by the Supreme Court.

In the *Federal Baseball* case of 1922, the Supreme Court infamously ruled that baseball was not interstate commerce and therefore was exempt from antitrust scrutiny. The Supreme Court reluctantly upheld this exemption in cases in 1953 (*Toolson*) and 1972 (*Flood*), despite having previously refused to extend it to other sports and acknowledging the errors of *Federal Baseball*.

Consequently, MLB players historically did not have the potential to sue the league and its clubs for alleged antitrust violations like their compatriots in the NFL and NBA. The absence of this option meaningfully diminished the players' leverage during labor negotiations with the league. Moreover, the clubs were likely emboldened in their negotiating positions by knowing that the players could not resort to antitrust litigation.

Congress recognized that this disparity in bargaining power, which was the result of an antiquated legal decision that most everyone agreed was generally incorrect, contributed to the 1994 strike that caused so much public consternation. Therefore, in the Curt Flood Act of 1998, Congress repealed the exemption insofar as it concerned MLB players but left it alone with regard to other areas of baseball (the scope of which continues to raise questions).

As a result, in all collective bargaining negotiations since 1998, MLB players theoretically had the option

of decertifying the union and pursuing an antitrust class action lawsuit.

DEFCON What?

Perhaps more than ever before, it seems possible that the MLBPA will consider the nuclear option. MLB and its owners seem once again determined to obtain a salary cap. The union's wherewithal to resist the cap has become almost part and parcel of its identity and there has never been any indication that the players are prepared to give in now.

Moreover, consider the potential role of Bruce Meyer, MLBPA's Deputy Executive Director. Meyer, during his time at the law firm of Weil, Gotshal & Manges LLP, was an integral part of the legal team that led the NFL players' groundbreaking decertification and litigation in the 1980s and 90s.

Meyer's colleague in those battles was Jeffrey Kessler, the leading athlete-side litigator, now at Winston & Strawn LLP. Kessler regularly represents the MLBPA in litigation (including in a recent case concerning the scope of the union's over agents), and has been involved in every past decertification effort by players unions. As labor negotiations unfold, Kessler and Meyer will almost certainly discuss the possibility of the nuclear option for the MLBPA. F

While the nuclear weapon analogy may seem overheated, consider that Commissioner Manfred describe an off-season work stoppage as compared to an in-season one as "like using a .22 (caliber firearm), as opposed to a shotgun or a nuclear weapon." Clark later expressed his disapproval of Manfred's analogy. We'll see though whether the MLBPA ultimately responds in kind.

Deubert is Senior Counsel at Constangy, Brooks, Smith & Prophete LLP

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Latest NCAA Settlement Means Colleges Can Use NIL Funds for Recruiting

By Rob Dickson and Joshua D. Nadreau, Fisher & Phillips

Another day, another settlement impacting college athletics. The NCAA and the states of Tennessee and Virginia recently announced a settlement that essentially ends the NCAA's rules prohibiting name, image and likeness (NIL) deals in recruitment efforts across the country. What does your college, university, or business need to know about this January 31 development and other challenges the NCAA is facing?

How Did We Get Here?

In January 2024, the attorneys general of Tennessee and Virginia brought suit against the NCAA challenging its prohibition of the use of NIL deals while recruiting student-athletes in the transfer portal or from high school. The lawsuit came in response to the NCAA's investigation into the University of Tennessee for possible violations of the rule across multiple sports.

Early in the case, the court issued an injunction prohibiting the NCAA from enforcing its longstanding rule, and finding the challengers had shown a likelihood of success on their claims that the restrictions violated antitrust law. Shortly thereafter, the NCAA announced that it would halt enforcement of the rule and would not commence any new investigations related to whether an NCAA member institution used NIL compensation to induce athletes to join a given team. The announcement was significant because, in effect, it broadened the court's injunction beyond the court's original order to all institutions nationwide.

Why is a Settlement Important?

Pending final approval and a ruling on the request for a permanent injunction, set for March 17, this decision further erodes the "traditional notions of amateurism" undergirding most of the NCAA's eligibility rules. As a result, transfer portal and high school athletes will be able to maximize their NIL value when deciding on a school.

The March 17 hearing comes just a few weeks before the hearing for final approval of the House v. NCAA settlement which is set to distribute nearly $2.8 billion in damages as well as permit schools to directly share revenue with their athletes beginning in the 2025-26 academic year. Part of the terms of the proposed *House* settlement includes a third-party clearinghouse that would review all NIL deals over $600 to determine whether deals are in line with the market value for the athletes. This clearinghouse is important to the NCAA as they attempt to maintain competitive balance and their status as a governing body in college athletics.

The proposed settlement and request for a permanent injunction in the TN/VA case may benefit athletes who are looking to maximize their NIL value without fear of infractions. That said, schools and business should still function in accordance with current NCAA standards which prohibits "pay for play" NIL deals. You should not enter into an agreement under the guise of NIL that include terms that are related to athletic performance or amount to merely a salary without the athletes having to perform a service, such as a marketing campaign.

What Are Other Challenges the NCAA is Facing?

While a settlement here seemingly brings an end to this challenge, the challenges to the NCAA and student-athlete amateurism are legion.

- Along with the *House* case, Johnson v. NCAA is an existential threat to student-athlete amateurism. In *Johnson* a group of former student-athletes brought suit alleging they were "employees" under federal and state wage and hour law and thus entitled to minimum wage and overtime for their time spent representing their institution in collegiate sports. On appeal following an unsuccessful motion to dismiss by the NCAA, the Third Circuit created a new test to analyze athletes' status under the FLSA and rejected the NCAA's longstanding defense of "history and tradition of amateurism in college athletics." The case is on remand to the district court, with responses to an amended complaint due in late March.
- The NCAA sustained yet another blow in December 2024 when a federal judge in Tennessee granted an injunction that allowed a quarterback at Vanderbilt to pursue another year of eligibility after he sued the NCAA alleging its rules that count junior college seasons towards NCAA eligibility violated antitrust law. Following the injunction, the NCAA D-I board granted a waiver to all similarly situated players, permitting them to participate in the 2025-2026 season.
- Even more recently, a baseball student-athlete has sued seeking a temporary restraining order and a preliminary injunction to allow him to play D-I baseball this spring. As was the case with the quarterback, the baseball athlete alleges that current eligibility rules violate antitrust law because they prevent the extension of a college career and prevent athletes from engaging in potential NIL deals and revenue sharing opportunities. The athlete began his college career at a community college in the fall of 2019, but his spring season was shortened due to the COVID-19 pandemic. After playing one more year at the junior college level, he transferred to a NCAA member institution and then participated in three seasons. The district court recently denied the athlete a temporary restraining order, but a hearing on the request for a preliminary injunction is scheduled for this week.

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Examining the Legal and Ethical Issues Involving Minor Leaguers and the Companies that Purport to 'Help' Them

By Jack Ladgenski, 3L at Santa Clara Law

Issue

Whether the practice of "investing" in potential professional athletes' future career earnings in exchange for a present, relatively marginal, cash sum is unconscionable and qualifies as unjust enrichment; especially when the majority of targeted athletes are non-English speakers from poor backgrounds who are not represented by competent counsel.

Background

It is no secret that athletes who play in a professional sport's minor league system, particularly that of Major League Baseball, are among the most underpaid individuals in our American economy.[23] Courts have been reluctant to increase wage protections for Minor League Players, consistently ruling that players are "seasonal employees" and holding that baseball itself is a matter of amusement, not commerce.[24] Most

23 See Plaintiff Class Second Consolidated Amended Complaint at 9, *Senne et al v. Office of the Commissioner of Baseball* 315 F.R.D. 523 (2016) (No. 3:14-cv-00608) ("Most minor leaguers earn between $3,000 and $7,500 for the entire year despite routinely working over 50 hours per week).

24 Major League Baseball's 'Working Poor': Minor Leaguers Sue Over

players live below the poverty line, and it is not uncommon to see nine players sharing a two-bedroom apartment because they cannot afford housing in today's market.[25]

As a "solution" to these problems, firms such as RockFence Capital and Big League Advantage[26] have emerged, presenting themselves as the saviors of Minor Leaguers with missions like "help[ing] Minor League players make it to the Major Leagues by providing economic security."[27] But these firms are potentially more insidious than they seem at first glance. As an initial matter, these firms almost exclusively target non-English-speaking athletes from impoverished backgrounds who show high upside potential to earn significant money in their respective sports.[28] The firms claim that they operate like an investment fund, providing athletes with "capital" not loans, and athletes do not incur any repayment obligation unless they sign a Major League contract.[29] Top Cleveland Guardians prospect, Francisco Mejia entered a deal with Big League Advantage wherein the company provided him $360,000 in exchange for 10% of *all* his future earnings should he make it to the Major Leagues.[30] Mejia's mother was very ill at the time he was approached by the firm, and the funds were necessary to support her medical bills. San Diego Padres megastar Fernando Tatis Jr. stands to owe Big League Advantage upwards of $30,000,000 on his current contract alone, as repayment for an "investment" estimated at $500,000.[31] This equates to a Return on Investment for Big League Advantage of approximately 1,194%. While the firms claim that they are simply "sharing in the success of the athletes", many athletes feel that the firms took advantage of them in times of financial crisis and are expected to seek to have their contracts invalidated.[32]

Analysis

"Under California law, a contract term is unconscionable if it is both procedurally and substantively unconscionable; procedural unconscionability takes into consideration the parties' relative bargaining strength and the extent to which a provision is hidden or unexpected, while substantive unconscionability requires terms that shock the conscience."[33] The cause of action for unjust enrichment has emerged from the understanding that one should not be permitted to unjustly enrich himself at the expense of another, and restitution should be made where it is just and equitable.[34] The contracts entered by athletes such as Mejia and Tatis Jr. appear unconscionable on their faces.

Procedural Unconscionability

Mejia's contract is particularly illustrative of the procedural unconscionability of terms. Representatives from Big League Advantage approached Mejia directly when they learned of his mother's illness and the family's struggle to pay her medical bills.[35] Mejia did not have an interpreter or lawyer present while Big League Advantage's "runner" encouraged Mejia to enter into the contract.[36] Such tactics by Big League Advantage are common across most of the contracts they enter into with athletes and completely hinder the bargaining strength of the athletes, since they are approached during times of financial crisis, and most terms are hidden from the athlete since they frequently do not have interpreters or representatives present when approached by the "runners". Accordingly, the terms of the contracts are likely procedurally unconscionable.

Pay, NBCNews (Jul. 16, 2014), https://www.nbcnews.com/news/sports/major-league-baseballs-working-poor-minor-leaguers-sue-over-pay-n156051.

25 Matt Moore, Baseball's Predatory Loan Firms Give Us a New Lake Monster, The Rake Vermont (Sep. 8, 2021), https://www.rakevt.org/2021/09/08/baseballs-predatory-loan-firms-give-us-a-new-lake-monster/.

26 Big League Advantage is also referred to as "Big League Advance". For the sake of clarity, this paper will refer to them as they are named in Mejia's complaint, "Big League Advantage".

27 Big League Advantage, https://bigleagueadvantage.com/.

28 Moore, *supra*.

29 Big League Advantage, https://bigleagueadvantage.com/.

30 Danny Wild, Indians' Mejia sues over financial deal, MiLB (Apr. 26, 2018), https://www.milb.com/news/indians-prospect-francisco-mejia-sues-bla-over-disputed-deal-272068894.

31 Dave Hannigan, Big League Advance is a Major League Scam targeting the prodigious and vulnerable, The Irish Times (Jul. 21, 2021), https://www.irishtimes.com/sport/other-sports/big-league-advance-is-a-major-league-scam-targeting-the-prodigious-and-vulnerable-1.4625721.

32 Wild, *supra*.

33 Cal. Civ. Code § 1770(a)(19).

34 See *Melchior v. New Line Productions, Inc.*, 106 Cal. App. 4th 779, 793 (2003).

35 See Plaintiff's Complaint at 16, *Mejia v. Big League Advance* (No. 1:18-cv-00296-UNA).

36 *Id*.

Substantive Unconscionability

Tatis Jr.'s contract is particularly illustrative of the substantive unconscionability of the terms. As previously mentioned, Big League Advantage's contracts typically advance funds in exchange for 10% of an athlete's future earnings.[37] This rate is comparable to the rates charged by credit cards in terms of Annual Percentage Rate (APR).[38] For an athlete with a contract the size of Tatis's, Big League Advantage stands to make a return on investment close to 1,200% (nearly $30,000,000) for the current contract alone, not counting any future contracts Tatis may enter into. Such amounts almost certainly "shock the conscience", especially in the context of the procedural unconscionability under which the contracts are initially entered into.

Unjust Enrichment

Finally, firms like Big League Advantage are almost certainly unjustly enriched by the contracts they enter. The firm fronts a relatively marginal cash sum to players in exchange for huge potential returns. Unlike typical venture capital firms who tend to enter their contracts with savvy business owners, Big League Advantage preys on poor, non-English speaking athletes desperate for funds. The principles of justice and equity almost certainly support the contention that Big League Advantage stands to be unjustly enriched by taking advantage of these athletes.

Recommendations

Athletes certainly face an uphill battle against firms such as Big League Advantage and RockFence Capital. The precise reason these athletes enter contracts with the firms present some of their greatest challenges to voiding the agreements, lack of funds. The "obvious" recommendation is for the leagues and team owners to pay their minor league athletes livable wages; but reality shows us this is unlikely to happen.

Another potentially viable solution is for teams to monitor their athletes more closely. These predatory firms almost exclusively target athletes who have already been drafted by professional organizations; therefore, these organizations can and should take a more active role in protecting their athletes. Teams could provide financial counseling services directly to their new draft-ees which would educate the players and provide awareness and caution them against dealing with predatory firms.

Additionally, teams could provide legal counsel for their athletes. Affected minor league athletes are trapped in a vicious cycle wherein they are already in questionable financial situations, so they cannot necessarily afford legal counsel to fight on their behalf against firms such as Rockfence and Big League Advantage. If teams were to assist with or directly provide, legal counsel to their minor league players, the players would be much better protected against predatory firms, and better armed to fight back should they still fall prey.

On a macro level, firms such as Rockfence and Big League Advantage are backed by a large number of wealthy investors. To fully protect players, the respective leagues should come together to challenge the contracts and practices of these predatory firms. Action on the part of the leagues has the potential to drive large scale change and either pressure these firms to draft friendlier provisions for the athletes they contract with, or push these predatory firms out of business all-together.

Conclusion

While there have not been a significant number of public challenges to these contracts, it is plain to see that the terms and practices are not especially friendly to athletes. After Mejia filed his lawsuit, an increasing number of athletes and agents have begun to speak out against these firms; MLB super-agent Scott Boras has been particularly vocal.[39] Regardless of how courts will hold when assessing these contracts in the future, there is a strong argument to be made that they are unconscionable. There are a number of solutions that can be taken on an individual player as well as a league level to better protect these athletes.

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37 Moore, *supra*

38 *Id.*

39 Julio Ricardo Varela, This Financial Decision Could Haunt Cincinnati Reds Rookie Elly de la Cruz, (Jun. 18, 2023), https://www.msnbc.com/opinion/msnbc-opinion/elly-de-la-cruz-big-league-rcna89603

Class Action Lawsuit Challenges Transgender Eligibility Policies of NCAA: A Pivotal Moment for Women in Women's Athletics

By Stephanie Barnes

In March 2022, during the second day of the Women's National Collegiate Athletic Association (NCAA) Swimming & Diving Championships held at Georgia Tech University, Kentucky's All-American Riley Gaines tied with the University of Pennsylvania's transgender athlete Lia Thomas in the 200-yard freestyle event (AP News, 2024). Earlier in the competition, Thomas won the 500-yard freestyle, finishing ahead of second-place finisher Emma Weyant, a 2020 Olympian from Florida, by nearly two seconds (SwimSwam, 2025). On the third day of the championships, Thomas placed eighth in the 100-yard freestyle. Interestingly, Thomas swam considerably slower than her preliminary times in the finals of the 100 and 200-freestyle events (Sutherland, 2022).

Thomas, an accomplished swimmer on the University of Pennsylvania men's swimming team, last competed for Penn in 2019-2020, finishing second in the 2019 Ivy League Championships, but did not qualify for the NCAA Championships (University of Pennsylvania Athletics, 2023). After completing testosterone suppression therapy (Thomas did not undergo any gender transition surgery), Thomas was allowed to compete in the women's category for the 2021-2022 season (*Gaines v. NCAA*, 2024a).

On March 14, 2024, Gaines and several other NCAA female athletes filed a lawsuit against the NCAA for discrimination against women under Title IX, the Equal Protection Clause, and for violating their right to bodily privacy (Schlam, Stone & Dolan, 2024). The suit, *Gaines v. National Collegiate Athletics Association* (2024), does not name Thomas as a defendant; however, the complaint centers on the 2022 NCAA championships. According to the plaintiff;,jjmnjlhijlp;, the complaint warrants legal action under Title IX because the NCAA receives federal financial assistance, thus conceding control over certain aspects of college athletics. In its state actor theory against the NCAA under 42 U.S.C. § 1983, the complaint alleges that a non-state actor can be liable under Section 1983 "if: (1) the non-state actor collaborates with or participates in a constitutional violation for which a state actor may also be held responsible; (2) the state actor delegates authority to the private actor; or (3) "where the state provides a mantle of authority that enhance[s] the power of the private actor" (Schlam, Stone & Dolan, 2024).

The key legal argument in *Gaines* is that allowing transgender female athletes to compete in women's athletics violates Title IX by depriving women of equal competitive opportunities. (Schlam, Stone & Dolan, 2024). Ratified in 1868 and part of the 14th Amendment, the Equal Protection Clause requires that government bodies treat people equally under the law (Justia, 2024). The NCAA's permissible level of testosterone is higher than the highest level of testosterone a female can produce without the aid of anabolic steroids (Schlam, Stone & Dolan, 2024). If a female athlete artificially raised her testosterone levels to that degree, she would be deemed ineligible, hence making the claim of competition equality difficult to comprehend. Furthermore, "the NCAA does not have a monitoring and enforcement program for its testosterone suppression requirement" (*Gaines v. NCAA*, 2024a, p. 80). In other words, the NCAA does not monitor, observe, or keep track of men who are required to participate in testosterone suppression therapy to compete in women's sports.

Although the Constitution does not explicitly protect the right to privacy, the Supreme Court has repeatedly interpreted it to do so (*Griswold v. Connecticut*, 1965; *Loving v. Virginia*, 1967). The female athletes' right to bodily privacy, as stated in *Gaines,* was violated by allowing Thomas, a biological male with male genitalia, to share the women's locker room at the NCAA Championships (Schlam, Stone & Dolan, 2024). Due to the over 300 female swimmers at the event (only female swimmers attended), male and female locker rooms were reserved for women (*Gaines v. NCAA*, 2024a). Unbeknownst to the female participants, the locker rooms and adjacent bathrooms were designated "unisex" for the sole purpose of allowing Thomas full access to all restrooms and changing facilities in the building. However, no verbal or otherwise announcements or signs were placed to inform the female athletes of this change. The girls were compelled to shower, dress, and undress in front of or in the

same space as Thomas, who was often fully exposed in front of the women in the locker rooms (*Gaines v. NCAA*, 2024a). In their motion to intervene, the National Women's Law Center's (NWLC's) alternative solution for the female athletes who were "uncomfortable and inconvenienced" (*Gaines v. NCAA*, 2024b p. 38) by being exposed to Thomas' naked body in the locker rooms could accommodate their right to bodily privacy by "change(ing) in stalls or a separate storage area (a closet)… or single-user facilities" (*Gaines v. NCAA*, 2024b, p. 38).

One interesting aspect of this case was the intervention proposed by the NWLC, which sought to become a party in the ongoing proceedings (*Gaines v. NCAA*, 2024b). They argued that the NCAA was not in a position to sufficiently defend the policies or rights of transgender women, which were central to this case. The NWLC further claimed that none of the existing parties could adequately defend the legality of the policies. The U.S. District Court for the Northern District of Georgia, however, disagreed and denied the NWLC's petition for intervention (*Gaines v. NCAA*, 2024c).

The student-athletes with remaining NCAA eligibility seek declaratory and injunctive relief regarding the NCAA's Transgender Eligibility Policies (*Gaines v. NCAA*, 2024a). At the same time, the plaintiff and members of the class who have experienced discriminatory treatment and suffered emotional distress "are entitled to declaratory relief, compensation, punitive damages, and attorneys' fees under 42 U.S.C. §§ 1983 and 1988" (*Gaines v. NCAA*, 2024a, p. 34).

As a former Division I swimmer and coach, I can relate to the plaintiffs in this case. I can attest to the close quarters and the extended time spent undressing while changing in and out of a tech suit. Furthermore, I do not believe this case is "reinforcing pernicious sex stereotypes and depriving all individuals of the benefits of inclusive policies" (*Gaines v. NCAA*, 2024b, p. 8), as the NWLF stated. Instead, it represents a desperate attempt to protect women's sports and maintain a sense of decency and common courtesy when women are in their most vulnerable state. It is paramount to recognize that transgender athletes are not the only individuals who need protection.

Stephanie Barnes is a doctoral student in Sport Management at Troy University. She is also a professional swimming coach and holds two Master's degrees: one in Sport Management from Liberty University and another in Exercise Science from Auburn University. Recently, she presented her thesis at the 2025 COSMA Conference in Las Vegas, Nevada.

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PANDA Interactive Sues Genius Sports & Sportradar for 'Anti-Competitive Conduct' in Sports Betting Market

Amended Complaint Details Market Manipulation & Anti-Competitive Practices That Restrict Industry Competition

SportsCastr Inc. (D/B/A PANDA Interactive), a sports streaming and betting technology company, has announced that it has filed amended complaints against Genius Sports (NYSE: GENI) and Sportradar (NASDAQ: SRAD), adding parallel antitrust claims to its ongoing patent infringement lawsuit. The complaint asserts that both Defendants have unlawfully

tied access to the official sports data they exclusively control with their own betting technology—suppressing competition and limiting consumer choice.

"The Defendants' bullying takes bad behavior to new heights—illegally using our own patented technology against us by packaging it with their platform, tying it to their exclusive data, and effectively shutting the door to fair competition," said PANDA Interactive's Chairman, Donald Schupak.

This antitrust action builds on PANDA's original lawsuit, filed in October 2023, which accused the Defendants of willfully infringing PANDA's foundational patents for ultra-low latency, interactive sports streaming and betting technology. The expanded claims allege that Genius Sports and Sportradar have engaged—and continue to engage—in anticompetitive conduct. This includes, allegedly, coercing sportsbooks into using their technology as a condition for accessing essential, real-time league data, which they exclusively control through long-term agreements with all major sports leagues, including the NBA, NFL, NHL, MLB, NCAA, and others.

PANDA is seeking a court order preventing Genius Sports and Sportradar from engaging in "further anticompetitive practices." Additionally, the company is pursuing damages for the "ongoing and accelerating harm caused by their unlawful conduct."

Kevin April, CEO of PANDA Interactive claimed that "the facts speak for themselves—this action is a necessary response. Many in the industry have raised concerns about how Genius Sports and Sportradar operate, and their strong-arm tactics have coerced the market at the expense of all layers of sport. Their unchecked dominance has persisted for far too long. The future of sports betting should be driven by innovation and competition, not control and coercion."

For years, the Defendants' "exclusionary practices have blocked new competitors and forced sportsbooks and media companies into restrictive technology deals, leaving them with no real choice," according to PANDA. "This has created an unfair system where companies are backed into agreements that benefit only those who control access to essential data—Genius Sports and Sportradar."

PANDA is represented in these cases by King & Spalding LLP.

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BakerHostetler Represents Basketball League Sponsorship Negotiation

BakerHostetler's sports practice group represented Mount Sinai Medical Center of Florida in negotiating a sponsorship and medical services agreement with Unrivaled LLC, the privately held company that developed, owns and operates a newly formed, professional, three-on-three women's basketball league.

The endeavor, co-founded by current U.S. Olympians Napheesa Collier and Breanna Stewart, has garnered plenty of attention for offering a domestic opportunity for WNBA (Women's National Basketball Association) players to compete during the offseason. It was built in collaboration with the sports' biggest stars and boasts unique features such as the highest average salaries in women's sports history, as well as all 36 initial players receiving equity ownership.

Mount Sinai Medical Center of Florida – the largest, private, independent, not-for-profit teaching hospital in the state – welcomed the opportunity to be involved with the league: Its services include board-certified and fellowship-trained sports medicine, primary care and other physicians providing expert care for the diagnosis, treatment and prevention of sports-related injuries.

Ron Gaither, Nicholas Simon and Yaima Seigley drafted and negotiated the sponsorship and medical services agreement necessary to provide certain services to the professional athletes in exchange for certain sponsorship benefits.

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Detroit Lions' Dykema Brings 15 Years of NFL Experience with Contracts/ Salary Cap to MSU Athletics

After spending 15 years, including the last 14, with the Detroit Lions organization, working with contracts, negotiations and salary cap structure, Jon Dykema has been hired by Michigan State as Executive Senior Associate AD/Student-Athlete Management and Assistant General Counsel.

In the newly created position, Dykema will play a pivotal role in drafting, managing and negotiating contracts for Athletics, including, but not limited to, contracts related to sponsorships; commercial partnerships; name, image and likeness (NIL) activities; media rights and employee contracts. He's expected to work collaboratively with MSU coaches, administrators and student-athletes to understand their needs and provide effective contract solutions, while also ensuring compliance with recent legal rulings and NCAA regulations. The position is a dual report to the Office of General Counsel and Athletics.

"With the constant evolution in college athletics and revenue sharing on the horizon, this is an incredibly important hire for Michigan State athletics," said MSU Vice President and Director of Athletics Alan Haller. "Jon brings a wealth of experience working with contracts and the salary cap at the NFL level, where he has played an important role behind the scenes in the Detroit Lions' success. He will be a great resource to Spartan coaches and administrators as we navigate our new landscape."

Among his many duties with the Lions, Dykema oversaw all legal aspects of the football operation for the club, and assisted the Chief Operating Officer and Senior Director of Football Administration with the management of the salary cap. He negotiated and drafted player contracts and served as the club liaison to the NFL Management Council. Dykema also advised the coaching staff on playing rule interpretations, penalty trends, and replay reviews, in addition to being the club's primary contact for the NFL Officiating Department.

"I'm thrilled to be returning to the place where my career in athletics administration began," said Dykema. "I'm very excited to start working with the coaches, staff and student-athletes across multiple sports at Michigan State, especially Coach (Tom) Izzo who has been a big supporter of mine since I was a student manager for the basketball program. At the same time, I'm incredibly grateful to the entire Detroit Lions organization for everything they've done for me and my family, including helping me develop the skills required for this job. I can't thank Alan Haller and his staff enough for this unique opportunity and look forward to being an asset to the athletics department moving forward."

Since June 2021, Dykema had served the Lions as Director of Football Compliance/Lead Football Counsel. His 14-year stint began in July 2011 after being hired as Staff Counsel. From July 2015-February 2016 he was Interim General Counsel. In March 2016, Dykema assumed the role of Manager of Football Administration/Lead Counsel. He also completed a yearlong football administration internship with the Lions from June 2003 through May of 2004.

He also brings experience in college athletics to Michigan State, spending four seasons (2007-11) as Director of Men's Basketball Operations at the University of Utah. While attending the University of Akron Law School (JD, 2007) and College of Business (MBA, 2007), he spent a semester working in the Akron Athletics compliance office.

Dykema is a 2003 graduate of Michigan State, where he worked as a manager on the men's basketball team for four years, serving as a head student manager for two seasons. During his time with the team, the Spartans won the 2000 NCAA Championship, captured two Big Ten regular-season championships, one Big Ten Tournament title and appeared in four NCAA Tournaments and two Final Fours.

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Melissa Robertson Promoted to SVP and General Counsel of Mariners

Robertson began Mariners career in 2008, and was serving as VP and Deputy General Counsel; Fred Rivera transitions to Special Advisor role with club

Seattle Mariners President of Business Operations Kevin Martinez has announced that Melissa Robertson has been promoted to Senior Vice

President and General Counsel for the organization. Robertson will report directly to Martinez and joins the club's senior leadership team.

Fred Rivera, who had been serving as General Counsel, is transitioning to a Special Advisor role with the team.

"Melissa has proven her ability to set and drive strategy to ensure the organization's compliance with applicable laws, rules, and regulations," Martinez said. "Since 2008, she's been a tremendous partner, providing expert counsel and guidance across our organization. I have always valued her strategic thinking as well as her thoughtful and detailed approach. She is an extraordinary, collaborative teammate, who is truly passionate about the Mariners. I look forward to her thriving in this expanded role."

Robertson is in her 18th season with the Mariners after joining the club in 2008. She leads all aspects of the Club's legal affairs, serving as a legal resource to all Club departments including baseball operations, ballpark operations, corporate partnerships, marketing, people & culture, and sales. She also manages the Club's litigation matters, oversees government relations at the federal, state, and local level, and acts as counsel to the Mariners non-profit foundation, the Seattle Mariners Foundation.

Prior to joining the Mariners, Robertson was an attorney at Perkins Coie in Seattle from 2003–2008, where she served as outside counsel to the Mariners. Robertson serves on the Board of Directors for YWCA Seattle/King/Snohomish and has volunteered as an attorney for the King County Bar Association Housing Justice Project in connection with Home Base, an eviction prevention program that is a cooperative effort of the Seattle Mariners, United Way of King County and King County Bar Association.

A Seattle native, and lifelong Mariners fan, Robertson is a 1998 honors graduate of Scripps College in Claremont, California and 2003 graduate of University of Washington School of Law, where she served as Executive Articles Editor for the Washington Law Review.

Rivera joined the Mariners in March of 2017 and has served as Executive Vice President and General Counsel since that time. In his new role he will continue to be directly involved in supporting the Mariners with his continued work on ROOT SPORTS and other aspects of the Mariners off-field business, including partnering with Martinez on overseeing the Seattle Mariners Foundation.

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RPC Appointed Exclusive Legal Services Provider to Premiership Women's Rugby

International law firm RPC has been appointed as the exclusive legal services provider to Premiership Women's Rugby (PWR), the top tier of women's club rugby in England, for the next two seasons.

The appointment builds on the firm's longstanding collaboration with PWR, having advised on the league's formation and transition from the Rugby Football Union (RFU). As the competition continues to evolve, RPC will provide legal guidance across governance, commercial partnerships, and strategic initiatives to support the growth of women's rugby.

Neil Brown, Partner at RPC, commented: "We are incredibly proud to continue our partnership with PWR as its exclusive legal services provider. Having supported the league from its inception, we've seen firsthand its rapid development and the impact it is having on the women's game. With the 2025 World Cup on the horizon, it's an exciting time for women's rugby, and we look forward to working closely with PWR to help drive the next stage of its journey."

Genevieve Shore, Executive Chair at Premiership Women's Rugby, said: "Elite professional sport becomes more complex each year, so PWR is delighted to have an internationally renowned legal firm at our side. We are delighted to bring them on board as a partner and as our exclusive legal services provider. RPC's dedication to excellence, its forward-thinking approach, and commitment to supporting initiatives that promote diversity and inclusion make them an ideal partner for PWR."

Joshua Charalambous, Partner at RPC, concluded: "Women's sport is evolving at pace, and PWR is at the forefront of this transformation. We are delighted to bring our expertise in sports law and governance to support the league's ambitions,

its clubs, and the players shaping the future of the game."

RPC's appointment reinforces the firm's commitment to the sports sector, where it advises a broad range of clients on legal and strategic matters to help unlock commercial opportunities, enhance governance structures, and support the long-term sustainability of professional sport.

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News Briefs

Spencer Fane's Peter Goplerud Publishes Sports Law for Sports Management

Peter Goplerud co-authored the recently released textbook Sports Law for Sport Management. Published by Carolina Academic Press, the book features the knowledge of five industry thought leaders and covers amateur sports, professional sports, and their common issues. The material is "designed to introduce sport management students to the structures of governance and regulation associated with high school, college, Olympic, and professional sports. It also provides an overview of the historical development of the governing bodies, conferences, federations, and leagues that administer and regulate amateur and professional athletics." At Spencer Fane, Peter serves as of counsel in the Higher Education practice. With a focus on higher education and sports law, he is a frequent lecturer and is widely published in the sports law area, including serving as co-author of another leading textbook on the subject, Sports Law: Case and Materials, 9th edition. Peter also has extensive accreditation experience, particularly within legal education, having served as chair of numerous ABA Site Evaluation teams. Learn more about the book here.

Montgomery McCracken Elects Sports Lawyer Kimberly Sachs as Partner

Montgomery McCracken has announced that that sports lawyer Kimberly L. Sachs has been elected to the firm's partnership. Sachs is based in the firm's Philadelphia office. Sachs focuses her practice on catastrophic sports injury defense and other complex litigation matters involving commercial disputes, products liability, and intellectual property. She earned her J.D. degree from Villanova University Charles Widger School of Law.

Morgan Lewis, Villanova Law to Explore Emerging Trends in Sports Finance at 2025 Moorad Symposium

As the recent surge of institutional capital and private equity (PE) funding continues to reshape the sports finance landscape, panelists at the 2025 Jeffrey S. Moorad Sports Law Journal Symposium at Villanova will discuss the evolving methods of investing in sports as an asset class in a half-day program, Investing in Sports: The Future of Sports Financing, on April 11. Morgan Lewis partner and chair of the firm's global sports industry team Jeff Moorad will lead a discussion examining how the sports investment industry has changed with the rise of PE and the challenges in neg otiating, drafting, and structuring sports investments in this new era. Partner Andrew White, alongside league and team executives, will analyze the ways in which leagues and teams are funding the sports asset class and how these efforts are evolving as team valuations continue to rise. The event will conclude with a panel addressing the forthcoming *House v. NCAA* settlement and how it will transform the financial landscape of college sports.Tickets for the in-person symposium are available through the Villanova University Charles Widger School of Law. Pennsylvania CLE credits are available upon registration.