Sports Litigation Alert

Volume 15, Issue 5 March 16, 2018

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Sports Litigation Alert is proud to offer an Expert Witness Directory at our website. SLA subscribers are entitled to be listed in that directory, please email your details to us and we will include you in the listing. Here is this issue's featured expert:

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NFL Picks Up Victory in Discrimination Case

Aura Moody appealed a 2016 ruling of a district judge who had voluntarily dismissed a discrimination case she had brought against the NFL on behalf of her son Julian Moody. The judge had concluded that because her son was an adult, and because he had reached a settlement with the NFL months earlier, that she had no standing. The appeals court agreed.

The original case filed in 2015 by Moody, through counsel, brought a discrimination action against the NFL on behalf of her minor son, Julian Moody, in the Supreme Court of New York, Queens County. Moody alleged that the NFL prohibited Julian from competing with his team at a national tournament because of his diabetes in violation of the Rehabilitation Act, 29 U.S.C. § 794. The NFL subsequently removed the case to the Eastern District of New York. During the proceedings, it came to light that Julian was an adult, and the complaint was amended to substitute Julian as the sole plaintiff. Julian, through counsel, then reached an agreement with the NFL and, on Aug. 12, 2016, voluntarily dismissed the action under Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

During a Sept. 15, 2016 hearing before the District Court, Moody argued that Julian had been intimidated into settling. “Your honor, Julian is a very sheltered young man who was in his junior year at college at the time of the mediation in this case,” she wrote. “It is my good faith belief that Julian was intimidated and pressured into agreeing to the terms presented to him by (the NFL). ... They even went as far to preach to him about the dangers involved in playing football, that the NFL is used to bad publicity and the limited possibility that he had of earning a scholarship.”

On Dec. 12, 2016, the District Court entered a text order advising her that it would take no further action in the case. Moody, proceeding pro se, appealed the order, arguing primarily that, “in its treatment of her son, the NFL infringed upon her rights and caused her damages.”

In its analysis, the court wrote that "’as a general rule, only a party of record in a lawsuit has standing to appeal from a judgment of the district court.’ Hispanic Soc'y of N.Y.C. Police Dep't v. N.Y.C. Police Dep't, 806 F.2d 1147, 1152 (2d Cir. 1986). Our case law notes two exceptions to this general rule: ‘where the non-party is bound by the judgment and where the non-party has an interest plausibly affected by the judgment.’ NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230, 239 (2d Cir. 2013). Neither exception applies here.

“First, Moody is not bound by the district court's text order, which

pertained only to Julian's claim—the only matter properly before that court. Second, Moody has not identified any legal interest of her own that may plausibly be said to be affected by the text order. The suit was based on allegations that the NFL unlawfully discriminated against Julian, not her. Although she has views about the matter, those are not legally cognizable within a setting where her adult son is a party to the proceedings. In Hispanic Society, for example, we held that nominal appellants did not have standing to appeal the district court's approval of a settlement agreement in a class action employment discrimination suit. 806 F.2d at 1152-53. The appellants did not allege that they had been discriminated against and had not intervened in the underlying case. We concluded that the validity of the settlement agreement did not affect their rights. Id. Similarly, Moody's legal rights would not have been affected if the District Court had permitted additional activity related to Julian's claims instead of entering its Dec. 12, 2016 text order. Nor were Mrs. Moody's legal rights affected by the stipulation with the NFL to which Julian agreed. See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC, 504 F.3d 229, 244 (2d Cir. 2007) (holding that non-party appellant lacked standing because it "would possess the same legal rights . . . whether or not the Settlement Agreement were approved"). Finally, we note that permitting Moody's appeal would interfere with the affairs of the parties because, as the District Court confirmed with him and as reflected by his Rule 41 dismissal, Julian wished not to continue the case."

Aura Moody, On Behalf of Her Minor Child, Julian Moody v. National Football League; 2d Cir.; 16-4315, 2018 U.S. App. LEXIS 3506; 2/15/18

Attorneys of Record: (for plaintiff) pro se. (for defendant) William A. Brewer III (Michael L. Smith, on the brief), Brewer Attorneys & Counselors, New York, NY.

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Court Sides With Student-Athlete Who Claims School District Discriminated Against Him Because of Behavioral Disability

A federal judge from the Eastern District of California has denied a school district's motion to dismiss the claim of a former high school basketball player who claimed the district discriminated against him when it kept him off the varsity basketball team because of his behavioral disability. In so ruling, the court found that the plaintiff had alleged "enough to withstand" the motion to dismiss, brought pursuant to Federal Rule of Civil Procedure 12(b)6.

Plaintiff Isaiah Brown, who had previously played on Franklin High School's traveling basketball teams, was allegedly praised as one of the school's best junior varsity basketball players. Yet he was the only JV player

not invited to the school's summer 2014 basketball program, an unofficial prerequisite to joining the varsity team. Soon afterwards, the varsity coach denied plaintiff a spot on the team's roster. Although the coach claimed he cut plaintiff for lacking "defensive awareness," the plaintiff alleged that the reason was pretext, noting the coach told others he was "not going to deal" with the plaintiff because "all he does is get upset" and "emotional" so he would not be a good fit.

The plaintiff's volatility derives from his "emotional disturbance" disability, for which he received special education services under an Individual Educational Program (IEP).

In November 2014, one month after the varsity coach cut the plaintiff, his mother complained to the Elk Grove Unified School District that the exclusion was discriminatory. In December 2014, the district denied her complaint.

The plaintiff tried to transfer to other schools within the district, but each time he was not permitted, despite his apparent ability, to make the varsity roster.

In response, Brown brought three claims against the district: (1) Disability discrimination under Title II of the Americans with Disabilities Act (ADA); (2) disability discrimination under § 504 of the Rehabilitation Act; and (3) failure to implement § 504's implementing regulations.

The district moved to dismiss all three claims, arguing that it did not exclude “the plaintiff because of his disability; and that he simply was not varsity material given his emotional state. The district explains the plaintiff was given an equal opportunity to participate on a varsity basketball team, but when shaping their teams the coaches could not ignore his blatant behavioral issues.”

In reviewing claims one and two (disability discrimination), the court wrote that “to establish a disability discrimination claim under Title II of the ADA or under § 504 of the Rehabilitation Act, the plaintiff must allege (1) he has a qualified disability; (2) he was entitled to participate in a public entity's services, program, or activities; (3) he was excluded from such services, programs or activities; (4) either partially (under Title II) or solely (under § 504) based on his disability. Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002) (listing Title II elements); Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990) (listing § 504 elements); see also Vinson v. Thomas, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002) ("We examine cases construing claims under the ADA, as well as section 504 of the Rehabilitation Act, because there is no significant difference in the analysis of rights and obligations created by the two Acts.")

"Because he seeks damages, the plaintiff must also plead (5) the district's deliberate indifference, which 'requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood.' Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001). Plaintiff has plausibly pled each element.

"That the first and third elements are sufficiently pled is undisputed: The plaintiff has a qualifying disability and he was excluded from varsity basketball teams at public high schools in the district."

The court continued: "As to the plaintiff's 'entitlement' to be on varsity, the district contends the plaintiff's behavioral outbursts, regardless of the basis for them, rendered him unfit for varsity team membership. The district relies on the case of C.O. v. Portland Pub. Sch., which clarifies educational institutions are not compelled to 'disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate'; the rule is merely that 'a person who is otherwise qualified' may not be excluded 'based upon his disability.' 679 F.3d 1162, 1169 (9th Cir. 2012); 'To be otherwise qualified, an individual must be able to meet all of a program's requirements in spite of his handicap.' C.O., 679 F.3d at 1169. Although the evidence may later prove the plaintiff's behavioral outbursts meant he did not meet the requirements for temperament of a varsity player, the plaintiff's allegations, construed in his favor, plausibly show he 'met all of [Varsity's] requirements in spite of his handicap.' Id.; (highlighting plaintiff's talent and his praise from coaches). Dismissal on this basis is unwarranted.

"As to causation, the district contends again that plaintiff was denied a position on the varsity team based on inadequate qualifications; he was not denied a varsity position based on his disability. But the complaint plausibly alleges the plaintiff's disability drove the exclusion. He was the only Franklin JV player not promoted to Varsity and the only consistent summer league player not promoted to varsity. When faced with a 'noticeable lack of players,' Pleasant Grove's varsity coach promoted JV players rather than selecting the plaintiff for the team. Indeed, all the varsity coaches based the plaintiff's exclusion on his emotional state at least in part and the complaint directly links plaintiff's emotional state to his disability. These allegations are enough at the pleading stage.

"Finally, the allegations plausibly state the district acted with deliberate indifference. The district knew about the plaintiff's behavioral issues. The district knew the plaintiff was denied a varsity spot because of his behavior: Coaches openly stated as much, the plaintiff's mother twice filed discrimination complaints and his former coach warned others the plaintiff was qualified so his disability should not prohibit him from playing. It is also plausible to infer from the complaint that the district noticed his

decline in academic performance and well-being, as evidenced by the January 2016 IEP meeting during which plaintiff's mother drew this link, and by her repeated requests for this meeting.

“In short, at the pleading stage, a plaintiff need not prove discrimination; he must merely plead a plausible discrimination claim. See Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (explaining prima facie discrimination case is an "evidentiary standard, not a pleading requirement.) The plaintiff has met this requirement here. His ADA and § 504 disability discrimination claims therefore survive dismissal.

Turning to claim three and the Section 504 implementing regulations, the court noted that he alleges the district violated the regulations identified as 34 C.F.R. § 104.37(a)(1)1 and 34 C.F.R. § 104.37(c)(1)2 by providing neither reasonable accommodations nor meaningful access.

The court wrote that the plaintiff's “reasonable accommodation theory as pled survives dismissal. When an entity is on notice of needed accommodations, it ‘is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation.’ A.G. v. Paradise Valley Unified Sch. Dist. No. 69 ("A.G."), 815 F.3d 1195, 1207 (9th Cir. 2016).” In this instance, the plaintiff “has plausibly pled that the district knew he was denied access to varsity basketball teams based on his disability yet did nothing to investigate this exclusion or accommodate him with alternate arrangements. This theory survives.”

Similarly, the meaningful access theory survived dismissal. “A plaintiff may pursue such a theory by pleading a violation of a § 504 implementing regulation that ‘denied [him] meaningful access to a public benefit.’ A.G., 815 F.3d at 1204. The plaintiff alleged Pleasant Grove specifically denied him an equal opportunity to participate on varsity despite his qualifications, in violation of 34 C.F.R. § 104.37(c)(1), by refusing to let him try out for the team. These allegations are sufficient to plead a plausible ‘meaningful access’ denial claim.”

Isaiah Brown v. Elk Grove Unified School District; E.D. Cal.; No. 2:17-CV-00396-KJM-DB, 2018 U.S. Dist. LEXIS 27090; 2/20/18

Attorneys of Record: (for plaintiff) Jay T. Jambeck, LEAD ATTORNEY, Damien Berkes Troutman, Leigh Law Group, San Francisco, CA. (for defendant) Evan Michael McLean, LEAD ATTORNEY, Domenic D. Spinelli, Spinelli Donald & Nott, Sacramento, CA.

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Assumption of Risk Comes Into Play in Case Where 10-year-old Was Hit in Face by Baseball

A New York state trial court has granted summary judgment to Little

League Council of New York City, Inc. and other defendants in a case in which they were sued by the parents of a 10-year old child, who was hit in the face while he was participating in a Little League baseball practice. The court's ruling was made pursuant to the assumption of risk.

On the date of the accident, April 9, 2010, the plaintiff, age 10, attended his first Little League baseball practice. His father had previously registered him to play baseball through West Side Little League (WSLL) and had signed a waiver in which he agreed that as his father he had reviewed and consented to the waiver by signing his child up to play Little League baseball with WSLL.

The plaintiff had previously watched baseball on television and was generally familiar with the game, according to the court. He had also previously played catch with his father using a baseball mitt and with friends.

When the plaintiff arrived at his first baseball practice, the coach, Jeff Neuman, instructed the players to take various positions on the baseball field. The father spoke with Neuman and told him that his son had no prior experience and that he should be careful. Neuman told the plaintiff to take the shortstop position while Neuman pitched balls to other players to hit into the field and allow the others to practice fielding the balls. The players were using an aluminum bat and standard Little League baseballs. There were two pitches before the accident. On the third pitch, the batter hit a line drive towards the plaintiff. He tried to catch the ball, and the ball struck him in the mouth, inflicting dental injuries.

The plaintiffs argued to deny defendants' motion to dismiss based on assumption of risk.

The plaintiffs countered that the motion should be denied because a triable issue of fact exists as to whether defendants breached their duties owed to the plaintiff, and were negligent in their breach of reasonable care, supervision, control, training, instruction, direction, safety, and general coaching of the plaintiff. They further asserted that the child had never participated in any actual baseball activity on a baseball field before, and that Neuman placed him at the "highly skilled" shortstop position, despite being warned by the boy's mother that her son had never played baseball before. They also argued that the defendants failed to test his skill set before placing him on the field and they also failed to teach and give him basic instructions on how to field a ball. They asserted that the child did not assume the risk, but rather that defendants created a dangerous condition that caused his injuries by their indifference as to his skill and experience level.

The defendants countered that the plaintiffs "voluntarily assumed the inherent risks involved in playing baseball and plaintiffs cannot properly assert a negligent supervision claim where the injury is due to an inherent and obvious risk associated with the game."

In its analysis, the court noted that by "engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." Morgan v. State of New York, 90 N.Y.2d 471, 484, 685 N.E.2d 202, 662 N.Y.S.2d 421 (1997).

"In assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sport.' Id. at 485 (quoting Owen v. R.J.S. Safety Equip., 79 N.Y.2d 967, 970, 591 N.E.2d 1184, 582 N.Y.S.2d 998 [1992]). 'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty.' Id. at 484 (quoting Turcotte v. Fell, 68 N.Y.2d 432, 439, 502 N.E.2d 964, 510 N.Y.S.2d 49 [1986]). Related risks which are commonly encountered or 'inherent' in a sport, such as being struck by a ball or bat in baseball, are 'risks for which various participants are legally deemed to have accepted personal responsibility.' Bukowski v. Clarkson Univ., 19 N.Y.3d 353, 356, 971 N.E.2d 849, 948 N.Y.S.2d 568 (2012) (quoting Morgan, 90 N.Y.2d at 484).

"Logically, once a plaintiff has assumed a risk, recovery premised on injury attributable to the risk assumed is barred. Recovery may not, in such a circumstance, be had on a theory of negligent supervision. Negligent supervision remains a viable theory only insofar as the risk upon which the action is based has not been assumed." Roberts v. Boys & Girls Republic, Inc., 51 A.D.3d 246, 251, 850 N.Y.S.2d 38 (1st Dep't 2008)."

Summarizing its position, it wrote that "the plaintiff engaged and participated in a baseball practice, and his parents consented to the risks inherent and associated with playing baseball. The plaintiff's parents made a voluntary choice to join WSLL and permit their son to play baseball. Common and obvious risks of the game include being struck and injured by baseballs. Prior to the accident, the plaintiff had a basic understanding of how the game was played and had briefly practiced throwing and catching a ball with his father using a baseball mitt. Thus, while the plaintiff participated in a baseball practice, he consented, through his parents, to the possibility of being struck and injured by a baseball. Neuman's decision to place the plaintiff in the shortstop position is immaterial, as the risk of being struck by a batted baseball was present at any position on the field.

Also, plaintiffs' theory of Neuman's negligent supervision fails because the risk of injury was assumed by his voluntary participation in the practice."

Dawn Lerman as parent and natural guardian of D.V., and Dawn Lerman, individually v. Little League Council of New York City INC., individually, and d/b/a West Side Little League, and Jeff Neuman; Sup.Ct. N.Y.; NDEX NO. 150006/2014, 2018 N.Y. Misc. LEXIS 666; 2018 NY Slip Op 30342(U); 2/15/18

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Michigan Appeals Court Rules for Pistons in Sponsorship Dispute

A Michigan state appeals court has reversed a lower court's issuance of a preliminary injunction and sided with the owners of the Detroit Pistons — Palace Sports & Entertainment, LLC (PSE), and Detroit Pistons Basketball Corporation (the Pistons). The injunction had been issued at the request of a former sponsor, who sued the owners after the owners cancelled the contract with the sponsor.

In short, the appeals court found that the Michigan First Credit Union (MFCU) had failed to show the actual damage caused by the owners, and that the trial court's failure to see this represented an abuse of discretion.

The contract in question was signed on Nov. 9, 2016. It provided for MFCU to become a sponsor of the Pistons, and remain so until Oct. 13, 2021. A little over five weeks later, it was publicly announced that, beginning with the 2017-2018 basketball season, the Pistons were moving from the Palace of Auburn Hills (the Palace) to a new arena, ultimately named Little Caesars Arena. The move by the Pistons was not unanticipated. In fact, the 2016 sponsorship agreement expressly contemplated such a possibility and provided for it. The agreement stated in relevant part:

"In the event that (i) the Pistons cease to play home games at the Palace, or (ii) PSE ceases to operate the Palace as a sports and entertainment venue, PSE shall have the right to terminate this Agreement by giving written notice to Sponsor, without payment or penalty and effective on the date of the final sports or entertainment event that occurs at the Palace. In the event that PSE exercises this termination right, PSE and Sponsor shall negotiate in good faith regarding a new agreement that would provide Sponsor with sponsorship opportunities that are comparable to those provided hereunder."

On Aug. 27, 2017, PSE formally terminated the 2016 sponsorship agreement. MFCU commenced this action alleging breach of contract and other claims. At MFCU's request, and following an evidentiary hearing, the trial court issued a preliminary injunction requiring the defendants to

negotiate in good faith. The injunction also required PSE to continue providing MFCU with the "identical" sponsorship assets provided by the abrogated 2016 agreement, even though the agreement's terms required only that PSE, following the agreement's termination, negotiate in good faith toward the provision of "comparable" opportunities.

In entering the preliminary injunction, the trial court recited the familiar four-part test governing issuance of injunctions. The trial court held that "with respect to the first factor, it is likely that the plaintiff will prevail on the merits. The court makes the preliminary finding that the defendants' actions constituted a breach of the Master Agreement because the defendants could not possibly negotiate in good faith with the plaintiff for comparable sponsorship opportunities when it had already signed a competing, exclusive agreement with Flagstar. The defendants' actions in signing an exclusive sponsorship agreement with Flagstar before negotiating in good faith with the plaintiff for comparable sponsorship opportunities constitutes a material breach of the Master Agreement."

The trial court also found that “the plaintiff will suffer an irreparable injury if the Injunction is not granted. It is apparent that neither party could say with any reasonable degree of certainty how to monetize the damages suffered by the plaintiff as a result of the defendants' breach of the Agreement. This issue, in fact, will likely result in a battle of experts at a later date."

The defendants appealed.

The appeals court wrote that to “obtain a preliminary injunction, the moving party bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." Hammel, 297 Mich App at 648. Under this four-part test, the trial court is to consider:

"(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued." Id.

The appeals court also focused on the requirement to demonstrate “a particularized showing of irreparable harm”, which “is an indispensable requirement to obtain a preliminary injunction.” Pontiac Fire Fighters Union Local 376 v City of Pontiac, 482 Mich 1, 9; 753 NW2d 595 (2008)

The trial court seemed to gloss over the above requirement, which was the genesis for the appeals court’s decision that the trial court had exhibited an

abuse of discretion.

“It appears to the court that the plaintiff is a substantial company and would not be driven out of business in the absence of injunctive protection,” wrote the appeals court. “Under these circumstances, the plaintiff has failed to show irreparable harm. (A) possible loss of customer goodwill does not threaten complete destruction of its business.

“MFCU likewise failed to demonstrate any injury to its overall economic wellbeing. Sue Postemski (MCFU executive) testified that she was unaware of any customers or potential customers that MFCU would lose as a result of the changes in MFCU's sponsorship relationship with the Pistons, nor was she aware of any specific concrete business that MFCU had lost due to the sponsorship issue. Michael Poulos (MCFU executive) acknowledged that MFCU would not be destroyed because of the loss of the Pistons sponsorship and that there is no serious and immediate threat to MFCU's economic existence if MFCU were unable to obtain a comparable sponsorship deal. Accordingly, in the circumstances of this case, MFCU has failed to establish that it is likely to suffer irreparable harm as a result of an alleged loss of customer goodwill. See Pontiac Fire Fighters Union Local 376, 482 Mich at 9.”

The trial court also overstepped its authority in another way by requiring that PSE “continue to provide identical sponsorship opportunities,” according to the appeals court

“The entry of such an injunction was erroneous because it changed the status quo rather than preserving it during the pendency of litigation. Moreover, by requiring PSE to continue providing the identical sponsorship opportunities which it had previously granted, the trial court granted MFCU the entire scope of relief which it was seeking. However, ‘a preliminary injunction will not be issued if it will grant one of the parties all the relief requested prior to a hearing on the merits.’ Bratton v DAIEE, 120 Mich App 73, 79; 327 NW2d 396 (1982), citing Epworth Assembly v Ludington & N R Co, 223 Mich 589, 596; 194 NW 562 (1923). Thus, even if injunctive relief was warranted, the present injunction could not stand.”

Michigan First Credit Union v. Palace Sports & Entertainment, LLC, and Detroit Pistons Basketball Company; Ct. App. Mich.; No. 340529, 2018 Mich. App. LEXIS 388; 2/27/18

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On Appeal, Patch of Mud Deemed Open and Obvious and Not Inherently Dangerous, Dismissing Baseball Spectator’s Claim

By Carla Varriale and Shawn Schatzle, of Havkins Rosenfeld

Ritzert & Varriale

Plaintiff Marian Sirianni was allegedly injured on June 12, 2011 while watching her grandson play youth baseball at Picken Field in Massapequa, New York. She had been standing in a spectator area behind one of the dugouts and began walking toward the field to say good-bye to her grandson. While doing so, she slipped in a patch of mud in the spectator area, sustaining injuries.

Sirianni thereafter commenced suit against the Town of Oyster Bay, which owned the public park in which the baseball field was located, and Plainedge Youth Baseball League (PYBL), the organizer of the baseball game. She alleged, among other things, that both defendants were negligent in their maintenance of the grounds surrounding the field, such that they should be held liable for negligence.

HRRV, on behalf of PYBL, moved for summary judgment on the basis that the patch of mud in question was open and obvious and not inherently dangerous as a matter of law. Similarly, in addition to other contentions, HRRV argued that the condition was a naturally occurring topographic condition that was not actionable as a matter of law. On these points, the deposition testimony of Sirianni's ex-husband was submitted, who testified that he consciously avoided mud throughout the spectator area of the field. Certified weather

reports were also submitted, among other evidence, establishing that it had rained on the day of the accident, and on each of the three days leading up to it. The Town of Oyster Bay cross-moved with similar arguments.

Sirianni's counsel opposed the motion, largely on the basis of the opinion of an expert, who opined that various structural deficiencies in the park somehow caused the patch of mud in question. HRRV argued that the expert's opinions should be given no weight, as they were speculative, conclusory and without any independent factual basis.

HRRV's motion on behalf of PYBL was initially denied by Judge Angela Iannacci of Supreme Court, Nassau County. In a brief decision, the judge held that both PYBL and the Town of Oyster Bay had failed to meet their entitlement to judgment as a matter of law and that, in any event, Sirianni raised a triable issue of fact.

However, on appeal, the Appellate Division, Second Department reversed, dismissing Sirianni's negligence action in its entirety. The appellate court determined that the evidence established that "the mud condition of the field, caused by rain, was an open and obvious condition readily observable by those employing the reasonable use of their senses, and not inherently

dangerous." As it relates to the plaintiff's opposition, the Appellate Division, Second Department similarly agreed with HRRV, holding that the opinions of the expert in question were "conclusory and speculative and with no independent factual basis."

Sirianni v. Town of Oyster Bay Appellate Division, Second Department Index No. 6666/2012 A.D. Docket No. 2016-03782 December 13, 2017

Varriale and Schatzle represented Plainedge Youth Baseball League. Varriale can be reached at 646-747-5115 or carla.varriale@hrrvlaw.com. Schatzle can be reached at 646-747-5124 or shawn.schatzle@hrrvlaw.com.

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Articles

Miami-Dade and City of Miami Suing Former Marlins Owner Loria

By Jordan Kobritz

Paul Beeston, a former president of the Toronto Blue Jays and MLB, is also a chartered accountant in Canada. He once tried to explain how businesses — including baseball teams — could engage in *creative accounting*.

"I can turn a $4 million profit into a $2 million loss and get every national accounting firm to agree with me," he famously — and accurately - said.

Jeffrey Loria, who last year sold the Miami Marlins for $1.2 billion to a group that includes Derek Jeter, is a Beeston disciple.

On February 16, Miami-Dade County filed a 64-page lawsuit against Loria (MIAMI-DADE COUNTY VS MIAMI MARLINS, L.P. and MARLINS TEAMCO, LLC, L: 2018-004718-CA-01) accusing him of engaging in "self-serving" and "fuzzy math" designed "to deceive the public." The lawsuit stems from a 2009 agreement to construct a 37,000-seat, retractable roof stadium for the Marlins in Miami's Little Havana neighborhood at a cost of $634 million. The Marlins agreed to contribute about $155 million to the stadium construction costs, $35 million of which was in the form of annual rent payments.

As part of the stadium deal, Loria also agreed to pay the County and the City of Miami, which also participated in the construction cost of the stadium, a declining percentage of the profits on the sale of the Marlins if the team was sold during the ensuing decade. The profit-sharing clause was designed to discourage Loria from "flipping" the team as it increased in value from having a new stadium largely funded by South Florida

taxpayers. For the final year of the deal, 2018, Miami-Dade was entitled to about four percent of the profits and the City of Miami approximately one percent.

In addition to suing Loria, the County joined the new ownership group as a defendant, a move designed to preserve assets from which to recoup any potential judgment against Loria. As a condition of the team's sale, Loria and the new owners agreed to allocate $50 million of the sale price to an escrow fund to cover any claims from unknown creditors of the seller. Miami-Dade asked for an injunction to prevent either side from tapping into the fund until the County's claim is decided.

The suit was filed after Loria claimed a $141 million loss on the sale of the team. Five days after the County filed their suit, the City of Miami also sued Loria. Both parties claim that under the terms of the 2009 agreement, Loria is required to provide them with a detailed calculation of the proceeds of sale, prepared by independent auditors. Instead, on February 1 Loria's lawyers and accountants handed over a five-page summary report, leaving the County and City unable to determine the accuracy of any deductions and expenses.

The summary statement is quintessential Loria. In an effort to convince the taxpayers of South Florida to build the team a shiny new stadium, Loria and his stepson, team president David Samson, pled poverty, claiming the team was losing money. A year later a Deadspin article based on leaked financial statements detailed the finances of several MLB teams, including the Marlins. The article revealed the Marlins were one of the most profitable MLB teams in 2008 and 2009, thanks to baseball's generous revenue-sharing provisions.

The revelations created additional backlash against Loria and Samson who were already on the defensive for a number of public relations missteps since acquiring the Marlins in 2002. Perhaps the most egregious of those occurred after the team won the World Series in 2003, when Loria proceeded to trade off his high-priced stars in an effort to reduce payroll. While campaigning for a new stadium, Loria lavished back-loaded contracts on free agents in an effort to convince the populace he was committed to winning. After moving into the new stadium in 2012, Loria once again gutted the team.

Loria's foray into MLB came in 1999 when he purchased a 24 percent stake in the Montreal Expos for $12 million. Within three years he parlayed that investment into a 94 percent stake in the team by engineering cash calls that his Canadian partners were unwilling to fund. In 2002 he fled to South Florida as part of the great franchise switcheroo that saw MLB purchase the Expos from Loria; Loria purchase the Marlins from John Henry; and

Henry purchase the Red Sox from the Yawkey Estate, despite not being the high bidder. Loria is hardly an unsophisticated or naive businessman.

The agreement with the County pegged the team's value at $250 million in 2008 and allowed it to increase by eight percent each year. However, in the report provided to the County and City, the team claimed the franchise increased by $374 million when it should have really been $180 million. Loria also claimed more than $300 million in debt and cash contributions to the franchise. The agreement also allowed the team to deduct transaction costs from the profit on the sale. It used that clause to justify the deduction of a $30 million payment to Tallwood Associates, a firm founded and operated by Loria's financial adviser, Joel Mael, who also served as vice chairman of the Marlins.

The County questions the $30 million payment to Tallwood, asking in the lawsuit if it "...relate(s) solely to the 2017 sale of the Marlins, or were (sic) instead a fee for Tallwood's financial services to Loria for the past 17 years, with a payment structured to reduce the net proceeds of the sale of the Team." The payment to Tallwood understandably raised a red flag. To earn $30 million on a 5 percent commission, the profit on the sale of the Marlins should have been $600 million.

A hearing on the request for an injunction was held on February 22 before Miami-Dade Circuit Judge Beatrice Butchko. The Judge granted the injunction after determining that the five-page report failed to comply with the contractual requirement to provide a detailed financial computation. Butchko did not rule on the legitimacy of the Tallwood deduction but she seemed to take a dim view of it. "So the vice chairman of the Miami Marlins, for financial advisory fees, gets $29 million while the city and the county, under their contract terms, would get zero?" Butchko asked. "All that may end up being a proper line item. But there needs to be the documentation to back up that payment," she said.

Butchko also authorized County and City lawyers to begin requesting financial documents from Loria through the court. Yet to be decided is whether the County and City can pursue their claims in court or will be forced to abide by the arbitration provision of the original agreement. A County attorney argued before Butchko that the arbitration provision was effectively voided by the Marlins when they failed to provide any supporting documentation during a pre-trial hearing.

Loria's team understandable prefers arbitration to a court trial. The former would allow the Marlins' financial information to remain confidential. A trial, on the other hand, would disclose those finances to the world, something Loria could avoid by agreeing to a settlement, however reluctant he may be to compromise.

The case is in its early stages and may not be decided for years. But until it is you can be sure it will capture the attention of the media and taxpayers, whose final bill on the stadium, including interest, is estimated to reach $2.4 billion.

The author is a former attorney, CPA, Minor League Baseball team owner and current investor in MiLB teams. He is a Professor in and Chair of the Sport Management Department at SUNY Cortland and maintains the blog: http://sportsbeyondthelines.com. The opinions contained in this column are the author's. Jordan can be reached at jordan.kobritz@cortland.edu.

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Lawmakers in Four States Pursue Youth Tackle Football Ban

By Robert L. Clayton, Partner, and Christien D. Oliver, Esq., of Goldstein & McClintock, LLLP

Lawmakers in California, Illinois, Maryland and New York have proposed legislation that will set an age minimum for youth to participate in tackle football. These Bills are supported by the mounting research indicating that (1) Chronic Traumatic Encephalopathy (CTE) is caused by repetitive impacts to the head sustained over a period of time, and (2) children who play contact sports during their most critical years of brain development face a greater risk for CTE and other brain damage later in life.

Hits absorbed by young athletes are particularly problematic because their developing brains are less capable of healing themselves. Young athletes also have weaker neck muscles and are therefore less able to brace for impact, and support the weight of a football helmet.

In 2015, the National Football League (NFL) acknowledged a connection between blows to the head and brain disease, and agreed to a $1 billion settlement with former players. A week before this landmark settlement, Aaron Hernandez, a former NFL player for the New England Patriots, was sentenced to life in prison for murder. Hernandez would later commit suicide in his prison cell at age 27, and his autopsy would uncover that he had stage 3 CTE. Prior to Hernandez, stage 3 CTE had never been found in an individual younger than 46.

By creating a minimum age for youth to participate in tackle football, the proposed legislation seeks to encourage the identified youth to participate in noncontact sports alternatives. These alternatives include touch football, flag football, and 7-on-7 football. Proponents of the proposed legislation cite NFL legends Jerry Rice, Walter Payton, Lawrence Taylor, Jim Brown, and Tom Brady as participants in noncontact youth football.

California State Assembly members Kevin McCarty (D-Sacramento) and

Lorena Gonzalez Fletcher (D-San Diego) introduced the "Safe Youth Football Act" in February. The Bill would prevent California youth from participating in tackle football until they become high school freshman. Assemblymember Gonzalez Fletcher issued a statement regarding the Bill, explaining "the science is clear: head injuries sustained at a young age can harm kids for the rest of their lives." Assemblymember McCarty noted "the Golden State's children need to know that no touchdown or interception is worth the long-term damage to their brains caused by tackle football."

Illinois State Representative Carol Sente (D-Vernon Hills) introduced "The Dave Duerson Act to Prevent CTE" (House Bill 3431) in January. The Bill is named for Dave Duerson, a former Chicago Bears player who was diagnosed with CTE after committing suicide. Duerson shot himself in the chest so that his brain could be studied. The Bill extends beyond its Californian counterpart and precludes Illinois children younger than 12 years old from participating in organized tackle football. Regarding the proposed legislation, Representative Sente reasons that "the overwhelming data and powerful stories of our supporters…show the risks of playing tackle football before turning 12 just aren't worth it."

Dave Duerson's son Tregg, who played football at Notre Dame like his father, issued a statement supporting the bill, noting that "thanks to increased attention and research on brain trauma, we know that part of the solution is to guard young children's developing brains from the risks of tackle football."

Maryland State Delegate Terri L. Hill sponsored House Bill 1210 in February. Delegate Hill is a practicing physician and her comprehensive Bill reflects her professional experience. In addition to banning children younger than 14 from participating in tackle football on publicly-funded fields, House Bill 1210: bans body-checking in hockey and lacrosse; prohibits "headers" in soccer (players using their head to shoot or pass the ball); and mandates that coaches and youth athletes receive training on the risks associated with head injuries.

Delegate Hill notes that while a football helmet may protect young children from a fracture, "it doesn't protect them from the brain flopping back and forth inside the skull." The Bill is also supported by Madieu Williams, who played football at the University of Maryland and for nine seasons in the NFL. Williams distinguishes the bill from an outright football ban: "What the bill is saying is to delay tackling in football."

New York State Assemblyman Michael Benedetto (D-Bronx County) sponsored "The John Mackey Youth Football Protection Act" (A. 01269) in January. Benedetto initially introduced the Bill in 2013, but decided to reintroduce it in light of recent scholarship linking years of tackle football

to long-term cognitive and neurological problems. The Bill bears the name of John Mackey, a New York native and NFL Hall of Fame member who battled memory loss and severe dementia - largely stemming from brain injuries — prior to his death in 2011.

If enacted, the Mackey Act would preclude children younger than 12 years old from playing tackle football. Assemblyman Benedetto likens the Bill to laws requiring the use of seatbelts, car seats, and bicycle helmets. Nonetheless, the Bill faces long-odds because it does not have a co-sponsor in the State Senate.

Each of these proposed laws face several shared obstacles and criticisms. First, given that these bills have been put forth by Democrats in legislatures with a Democratic majority, partisanship will likely be a factor. Second, despite a recent decline in youth football participation, more boys still play football than basketball and baseball combined. Third, despite a recent decline in television ratings, the NFL remains the largest and most watched sports league in the county. Fourth, youth football leagues have recently introduced a number of rules to prevent brain injuries, including eliminating kickoffs and reducing contact time in practice.

Finally, the science regarding brain injuries in tackle football is still evolving, and there is no consensus as to the precise age when youth should be permitted to play. To that point, Dr. Robert Cantu, the co-founder and medical director of the Concussion Legacy Foundation, reasons that this lack of consensus is immaterial: “health experts set age minimums for all sorts of activities like drinking, smoking, and driving, and the science is never purely black and white.”

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Kaepernick’s Arbitration: Are the Odds Against Him or Is the Tide Turning?

By Richard Lee and Natalie Rastegari, Salisian Lee LLP

For years, the NFL’s steadfast popularity with the American public has remained impregnable and unwavering, with legions of fans seemingly always ready to forgive negative news about players, owners, or even the commissioner in loyally following their favorite teams on television, in person, and in discussion. Lately, however, the NFL has seen its attendance figures drop, television and radio ratings decline, and negative news coverage increase. To some, these negative news stories about selected NFL players have created an atmosphere of dissonance with the Average Joe.

At the center of many of those controversial news stories in the past couple of years has been former San Francisco 49ers quarterback Colin

Kaepernick, whose very public position on kneeling during the national anthem to bring attention to issues of police brutality created international headlines. Accordingly, a rumored backlash by NFL owners against Colin Kaepernick, most overtly in his inability to find employment by an NFL team, remains the focal point of Kaepernick's ongoing employment grievance against the NFL.

Did NFL team owners collude against hiring former San Francisco 49ers quarterback Colin Kaepernick for any team this past season? And will Kaepernick be able to prove collusion and win his legal battle against the NFL and all of its 32 teams? The two are separate, distinct issues, and the latter appears likely to be an uphill battle.

But Kaepernick's chances of success just got better, and the stakes just got higher. Last week, probably to the horror of the league, Miami Dolphins owner Stephen Ross told the New York Daily News: "All of our players will be standing [for the national anthem]." Ross stated, "when you change the message, about, is it support of our country or the military, it's a different message. When that message changed, and everybody was interpreting it as that was the reason, then I was against the kneeling." (Kaepernick repeatedly stated in his final 2016 season that his kneeling during the national anthem was a protest of police brutality and racial injustice.)

Ross went further in saying that President Trump's "message became what kneeling was all about," and admitted that his view about player protests was shaped by it: "From that standpoint, that's the way the public is interpreting it. So, I think that's really incumbent upon us to adopt that, because that's how I think the country is now interpreting the kneeling issue."

Let that sink in. Ross, an owner of a major NFL team, is explicitly requiring a protest-free zone that runs contrary to our First Amendment principles. The repercussions for any non-compliant team player is suggested to be like those experienced by Kaepernick.

A day later, likely on the advice of legal counsel, Ross backed off on his position and issued a *statement* to clarify that there will be no anti-kneeling policy. Why is this all so important, and why does Trump's interpretation of the anthem protests matter?

Kaepernick demand for arbitration against the NFL and its teams alleges that NFL owners (1) were coerced by Trump's comments and the rhetoric at large, (2) communicated and coordinated with the Trump Administration, and (3) ultimately colluded against Kaepernick and his efforts for employment in the NFL. A copy of Kaepernick's arbitration demand can be found here.

Kaepernick has alleged violations of the NFL's Collective Bargaining Agreement ("CBA"), Article 17 of which prohibits any club, employees or agents from entering into any "express or implied" agreement "to restrict or limit" decisions on whether to negotiate with any player; whether to offer a contract to any player; or "concerning the terms or conditions of employment offered to any player." As alleged in the arbitration demand, Kaepernick alleges that the NFL and its owners have enforced "implied and/or express agreements to specifically deprive Claimant Colin Kaepernick from employment in the NFL, as well as from practicing with and/or trying out for NFL teams," and have "colluded to deprive Mr. Kaepernick of employment rights in retaliation for Mr. Kaepernick's leadership and advocacy for equality and social justice."

Ross' statements are evidence of the NFL owners' implementation of Trump's anti-protest rhetoric. Within a day of Ross' statements, Kaepernick's lawyers jumped on this new evidence and subpoenaed Ross for his testimony on this subject, and have already subpoenaed the spouses of team owners. Kaepernick's lawyers will likely use Ross' statements, as well as other evidence including statements by other owners and Trump's statements, to support their claim that the NFL owners were directly influenced by Trump's comments and rallying of the crowds.

Specifically, Kaepernick is attempting to show that his unemployment in the league in part stems from owner response to Trump's criticism regarding the NFL's handling of national anthem protests and Trump's explicit statements on the campaign trail shortly after Kaepernick became a free agent on around March 3, 2017. Indeed, Trump seemed to relish the fact that he had power over the league, stating that the "NFL owners don't want to pick [Kaepernick] up because they don't want to get a nasty tweet from Donald Trump." Trump also famously stated: "Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, to say, 'Get that son of a b**** off the field right now. Out! He's fired. He's fired!'"

By now, Kaepernick's lawyers have reviewed tens of thousands of documents during the discovery process in the case, and they have surely found emails exchanged between NFL officials relating to the NFL's position on anthem protests. There are likely emails and statements illustrating an official NFL position that players have the right to demonstrate -- consistent with the NFL's most recent statement that "the right of players to demonstrate would be protected" in this upcoming season.

On the other hand, there are likely emails and statements showing that the NFL did not in fact protect this right. Depositions in Kaepernick's case against the NFL and its owners are set to begin as early as this month, which may provide additional ammo for Kaepernick's legal team to show

that there is, at the very least, "indirect" collusion in the NFL against protesting players.

The evidence is undisputed that Kaepernick is a talented player on the field -- who led his San Francisco team to a Super Bowl appearance as its starting quarterback — and certainly better, at least statistically and in his win-loss record, than the likes of Brandon Weeden, Blaine Gabbert, and other, lesser veteran quarterbacks signed in free agency in the past year or more.

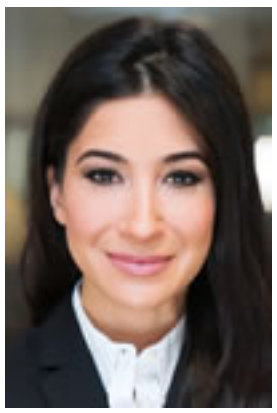
Head coaches named on Kaepernick's witness list will need to explain their positive statements to Kaepernick regarding interest in signing him, only to then go silent when it came time to act. The arbitrator will have to decide whether NFL owners were affected by or participated in that anti-protest pushback — for which Kaepernick can surely make a *prima facie* showing — and whether they colluded against hiring him to essentially banish him from the league.

If Ross' public statements are any indication of the testimony that Kaepernick's lawyers may elicit in the numerous upcoming depositions, it would be wise for the NFL to settle this dispute -- whether that means (1) offering up significant money in exchange for a dismissal and Kaepernick's silence or (2) granting Kaepernick the opportunity to earn his place on a team. Given the NFL's fear of alienating its fan base or eliciting further negative Twitter trolling from the White House, it appears probable that the former option is the more palatable one for the NFL.

Richard Lee is a founding partner of Los Angeles-based business law firm Salisian Lee LLP.

Natalie Rastegari is an associate of the firm.

Richard Lee



Natalie Rastegari

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VITAC Captioning Is Carving Out a Niche in the Sports Industry While Helping Sports Content Providers and Facilities Along the Way

If you are like most people, your eyes will turn to the television or computer screen in the coming weeks to watch March Madness in all its splendor.

Hit the mute button. It will give you an idea what VITAC Captioning does.

Founded in 1986, VITAC, the largest provider of real-time and offline captioning products and services in the United States, helps sports content providers and facilities in two ways — by mitigating legal risks and increasing revenue streams.

On the first front, VITAC and others in the field, like LNS Captioning, help clients comply with the Americans with Disabilities Act (ADA). Over the last decade, a number of legal challenges have emerged from the hearing-impaired, and those who represent them, who want the same rights as the hearing-enabled when it comes to watching sporting events.


John J. Capobianco

While the value when it comes to risk management has been around for a while, the business growth piece is more recent, according to John H. Capobianco, the Chief Marketing Officer of VITAC. “There are 50 million deaf or hard of hearing,” he said. “Many of them would attend sporting contests if they could enjoy the contests as much as everyone else. Our clients have decided to embrace that market.”

But the real growth Capobianco sees will come from the 83 million millennials. He says many of them watch videos with the sound off and would prefer the option of captioning while attending a sporting event.

A recent story in the Dallas Morning News, “Why falling student attendance at college football games is a real concern ... is TV to blame?”, may have made an even more compelling connection.

Journalist Tim Cowlishaw notes that college football has “suffered its biggest attendance drop in 34 years last season.” He added that “falling student attendance” is the likely culprit.

Why? He writes that “it’s just easier to watch on your big screens at home.”

He continues that “it's incumbent upon teams in every sport to try to recreate the home viewing experience for those actually in the arena. It's remarkable how much effort (and how many millions of dollars) get spent in new buildings on things unrelated to actually seeing the game from your seat.”

While captioning may not be the last piece of the puzzle when it comes to maintaining and growing revenues, it certainly seems to be a piece. So, it’s no surprise that Capobianco is seeing “tremendous growth in in-stadium captioning. We’re being approached on multiple fronts with teams and facilities leading the way. The tipping point is here where they are buying

captioning services because they want to, not because they have to."

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Study Shows Power Five Football Fans Approve of Alcohol Sales, Advertising at College Sports Events

By Tim Hipps

College football fans of Power Five conference schools approve of alcohol sales and advertising at NCAA games, according to a recent study at Samford University.

Drs. Clifton Eason and Nathan Kirkpatrick revealed their "Fan Perceptions of Alcohol Related Sponsorship and Sales at Collegiate Sporting Events" during the 2018 Sport and Recreation Law Association's annual conference.

Alcohol was sold inside the football stadiums of 34 NCAA Division I schools in 2017, a growing trend that influences college administrators' business decisions.

The study researched fans' perceptions of alcohol-based corporate sponsorships and sales at NCAA Division I athletic events, where several schools began selling beer in recent years to bolster attendance and revenue.

The study sought to be administratively and managerially relevant to collegiate athletic departments, university-level administration, and adult-beverage companies that may be considering sales and/or sponsorship agreements with academic institutions.

The study also addressed potential legal issues caused by increased alcohol sales and consumption on college campuses, such as underage drinking, drug use, and sexual assault.

Armed with a more complete understanding of these issues and potential legal ramifications from the perspective of fans, college administrators can better anticipate and plan for legal realities, such as the need for additional security and law enforcement.

These research questions were posed to 533 survey participants, 422 of whom responded:

- What are fan and alumni perceptions of alcohol-related sponsorships and sales at NCAA Division I collegiate athletic events?
- How do fans expect selling alcohol and/or beer at collegiate athletic

events would lead to more illegal and violent issues (drunk driving, sexual assault, underage drinking, civil disobedience, property damage, trespassing, etc.) on college campuses both during and after the games?

- How would selling alcohol and/or beer at collegiate athletic events impact the decision to purchase tickets and attend — given the potential increase for alcohol-related illegal activities around these events?

Survey participants included "big fans" of college football teams from the Atlantic Coast, Big Ten, Big 12, Pacific-10 and Southeastern conferences.

The survey revealed a slight preference for alcohol sales, which would have little to no impact on attendance. Likewise, fans said alcohol-related sponsorships would have little impact on their perception of the schools. Concerns about crime and behavior were expressed, but alienated fans were outweighed by fans of the additional revenue generated.

Responses varied little by gender or fan type, more so by age. Parents were less favorable to alcohol sales and more concerned about drunk driving.

"The older people got, the less favorable their attitudes were toward having alcohol sales or alcohol sponsorships or what they thought the alcohol sales or sponsorships might do to the public perception of their school," Eason said.

What It All Means

Having a better understanding of fans' perceptions of alcohol-related sponsorships and sales at college athletic events can help administrators make better informed decisions when establishing ground rules for college campuses.

"The financial data is really going to prove to be a big driver for decisions that get made," Eason said. "Athletic directors, school presidents, sponsorship directors are people who really dig into these numbers more clearly and understand the financial impact of allowing alcohol sales will have on campus."

The notion that beer is consumed every autumn Saturday on college campuses across America is nothing new. The fact that football fans approve of the growing number of schools allowing alcohol sales and advertising inside the stadiums of their beloved teams, however, may be foretelling.

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DLA Piper Beefs Up Sports Law Practice With Addition of Ben Mulcahy and Gina Reif Ilardi

DLA Piper announced last month that Ben Mulcahy has joined the firm's Intellectual Property and Technology practice as a partner in Los Angeles, while Gina Reif Ilardi has joined the IPT practice as a partner in New York.

Mulcahy's practice focuses on representing major film studios, broadcast and cable television networks, prominent website operators, retailers and major consumer brands in all aspects of sports marketing, entertainment marketing and interactive marketing, as well as in virtual reality, gaming, eSports and innovative branded entertainment initiatives.

Reif Ilardi's practice focuses on counseling advertising, marketing and public relations agencies, motion picture studios, television networks and major brands in their online and mobile marketing initiatives, along with all aspects of sports marketing, entertainment marketing, e-commerce and branded entertainment. She and Mulcahy will serve as co-chairs of the firm's newly formed National Advertising Team.

Stuart Liner, co-managing partner of the firm's Los Angeles offices, noted the hire of Mulcahy is “strategic” in nature in that Mulcahy and Reif Ilardi “complement our media and entertainment capabilities well, and their skillset will be immediately beneficial."

Mulcahy and Reif Ilardi both join DLA Piper from Jenner & Block, where Mulcahy was the co-chair of the firm's Trademark, Advertising and Unfair Competition team. Prior to that, Mulcahy was a partner at Sheppard Mullin.

Mulcahy received his J.D. from the University of Minnesota Law School and his B.A. from St. John's University. Reif Ilardi received her J.D. from Fordham University and her B.A. from New York University.

Mulcahy has been a contributor to *Professional Sports and the Law* and *Sports Litigation Alert*.

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Examining Boston University’s Study about Repetitive Contact

By Anthony B. Corleto, of Wilson, Elser, Moskowitz, Edelman & Dicker LLP

A recent Boston University study about repetitive contact, “Concussion, Microvascular Injury, and Early Tauopathy in Young Athletes after Impact

Head Injury and an Impact Concussion Mouse Model," is being viewed as establishing a link between "sub-concussive hits" (any contact that doesn't produce a frank concussion) and chronic traumatic encephalopathy (CTE). This piece is getting full-on media exposure. It's also the centerpiece for legislative calls to ban organized youth tackle football in New York and Illinois.

The Illinois proposal states a broad "finding" that the "best available evidence" says CTE is caused by years of repetitive hits to the head and cites sub-concussive impacts as an important factor. Both proposals would prohibit organized youth tackle football; Illinois up to age 12 and New York up to age 13. Illinois specifically says all other organized youth sport activities are acceptable. Presumably that would allow youth boxing, where the objective is to "knock out" or deliver a concussion to the opponent. New York includes a definition of tackle football, as if it were needed.

A Closer Look

A group of 25 independent doctors have signed a letter, agreeing that "limiting head impacts among youth is smart, overstating scientific consensus is not." Citing the Boston University study's ascertainment bias and its conflict with other studies, the group points out that scientific evidence linking sports to brain injury, brain injury to CTE and CTE to dementia is not strong, and that further work is needed before policy makers engage in risk-benefit analysis.

CTE pathology in the brain has been shown to be present in 12% of normal healthy people who died at an average age of 81 years. The presence of CTE pathology in the brain on autopsy has not been shown to correlate with neurologic symptoms prior to death. To be clear, CTE pathology could be present in a normal person. Ling, et al., Acta Neuropathologica.

They also point out that before enacting broad sweeping legislation based on fear of CTE, we need to assess risk-benefit in light of broader public health concerns, citing the rising sedentary trend among our youth, pointing out the generally acknowledged proof that an active lifestyle mitigates the risk of obesity, high blood pressure, diabetes, depression, cardiovascular disease, drug use and dementia. The group also points out the uncomfortable truth: that tackle football is the number one participation sport in high school and that it is accessible to children with diverse physiology in ways that other sports are not.

A 2015 British Journal of Sports Medicine study of youth sports showed that concussion rates are 18 times higher than average for rugby, five times greater for hockey and roughly double for American football, as compared to other activities. Why target football?

Looking Ahead

Neither of the proposed acts described above is likely to pass. The New York proposal lacks a sponsor in the state senate. Illinois and Chicago in particular have well-established and cherished youth football programs, in addition to boxing. Even if passed, nothing will prevent kids from playing unorganized games. Without supervision. Without coaches. Without a concussion protocol. Legislative restrictions based on overstated "scientific consensus" are likely to have unintended consequences, hurting rather than helping the population. Studies show that early sports participation leads kids to succeed and make good choices.

As science learns more about concussion, sport administrators are better equipped to make remove-from-play decisions and doctors are better equipped to support the concussed athlete's recovery and return to activity and address those whose recovery may be compromised. In 2009, the state of Washington passed the Lystedt Act. Since then, every state has adopted a similar law, and every responsible youth sports organization has adopted the corresponding rules. Lystedt acts are smart regulation — they recognize the historical under-appreciation of concussive injury, require that coaches and parents be educated in the risk of concussion, and establish concussion protocols for youth sports: removal from play when concussion is suspected and return to play after medical clearance. And they don't interfere with our freedom to swim, run, ski, box or play football.

Disclosures and Acknowledgments: Tony Corleto serves as general counsel for Pop Warner football. He defends concussion litigation.

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News Briefs

Football Program's Use of Quality Control Coaches Comes Under Scrutiny in Lawsuit

A former employee in the Florida State University athletic department is suing the university, claiming it violated the Fair Labor Standards Act. Plaintiff Mike Warren alleges in the complaint that the university, after former head football coach Jimbo Fisher departed for the same post at Texas A&M in December 2017, promoted him from one of its quality control coaches to running backs/special teams coach for the Independence Bowl. In the several weeks leading up to that game, the plaintiff put in "approximately 84 hours per week," according to the complaint. One of the benefits of employing quality control coaches is that it doesn't count against the NCAA's mandated limit of 10 on-field coaches.

Alliance MMA Settles Class Action Litigation

Alliance MMA, Inc. announced this week that it has agreed to settle and resolve a stockholder class action lawsuit initially filed in April 2017 against Alliance, certain of its current and former officers and directors, and the underwriter in Alliance's initial public offering completed in October 2016. If approved by the District Court, the settlement will lead to a dismissal of all claims against the defendants in the litigation. Under the terms of the settlement, the settlement amount attributable to Alliance will be covered in full by its D&O insurer. Alliance's sole financial responsibility with respect to the settlement will be to pay costs and expenses up to the policy deductible amount of $250,000, of which it has already paid $137,761 in the form of legal fees. Alliance MMA is a sports and media company that combines MMA promotions with event ticketing, media production and talent management services.

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Sports Lawyer Named President and CEO of National Basketball Retired Players Association

The National Basketball Retired Players Association's Board of Directors has announced that Scott Rochelle has been hired as CEO, a role he has held on an interim basis since April 2017. The decision to hire Rochelle comes as a result of an eight-month, nationwide search. Rochelle will lead the national organization, its board of directors and the growth of the associations' 11 local chapters. Rochelle's career with the NBRPA began in 2013, when he served in various roles including legal counsel and membership, programming and business development before being named interim president and CEO in April 2017. Over the past 10 months, Rochelle has overseen the NBRPA's day-to-day operations, including securing new national partners and growing the NBRPA's signature initiatives, such as Full Court Press: Prep for Success Youth Clinics. Prior to joining the NBRPA, Rochelle worked for the law firm of Querrey & Harrow, Ltd. in Chicago, where he represented government and corporate entities, and in particular, served as legal counsel to the NBRPA.

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Sports Litigation Alert is a bi-monthly publication of Hackney Publications.

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