Dear Forum Members,

Welcome to Issue 34:1 of the Entertainment and Sports Lawyer! At the time of this writing, Summer is coming to a close, relief efforts and rebuilding is still underway in the aftermath of Hurricanes Harvey, Irma, and Jose, and Ezekiel Elliott still has not begun serving his six game suspension from the NFL. The damage caused by these weather systems has been catastrophic. What always amazes, however, is how Americans come together in times of need…to support, rebuild, and to heal.

Most of our Forum Members and readers are privileged…we work, live, and play in an industry that provides escape from most peoples’ daily toils. We work hard, but our industries are exhilarating! Our efforts allow the public to enjoy entertainment in the grandest of forms. As Robin Williams’ character, John Keating, said in Dead Poets Society: “We don’t read and write poetry because it’s cute. We read and write poetry because we are members of the human race. And the human race is filled with passion. And medicine, law, business, engineering, these are noble pursuits and necessary to sustain life. But poetry, beauty, romance, love, these are what we stay alive for.” The efforts of this Forum and our colleagues in the industry have led the relief efforts in the aftermath of these recent storms, have helped to create forums for people to come together, to seek respite from their hardships, and begin to heal. I could not be prouder to see friends and colleagues at the forefront of these efforts.

With this issue, we see a changing of the guard! Len Glickman has assumed the mantle of Chair of the Forum on the Entertainment & Sports Industries. We welcome Len with open arms, and at the same time, once again thank his immediate predecessor, Janine Small, for her years of service and guidance.

In this Issue, Thomas Reiter and Lucas Tanglen provide a detailed assessment of insurance coverage relating to concussions, CTE, and brain injuries sustained in sports. Jeremy Evans provides us with an in-depth history and analysis of professional sports stadium funding in California (originally published in the Practitioner, the official...
publication of the Solo & Small Firm Section of the State Bar of California, and re-run here, with permission, as a companion piece to the Author’s prior articles.

Larry Miller, Director of the Steinhardt Music Business Program at New York University, shares with us a most poignant Op-Ed piece on a much needed paradigm shift in terrestrial radio and the adaptation to the new digital world. Nancy Holtz shares her take on alternative dispute resolution, specifically, mediation, and how mediation can benefit the sports industry. Michelle Wahl and Ken Freundlich have one again compiled, with the help of a few student authors, another incredible Litigation Update which everyone in the Forum should find most useful.

We are also re-running Scott Sisun’s article “The Ball Is In Your Court: An Update on Trademarks (and Copyrights) in Sport. Unfortunately, due to technical issues, the article ran in a compromised format, and we wanted to make sure that our readers had access to this most poignant article in the manner in which it was meant to be shared. Our apologies for any confusion with the version that was previously published.

We are actively seeking articles from authors for the Journal. I encourage anyone interested to reach out to me and submit articles. We welcome submissions from any and all authors, and are always seeking amazing articles. The Author Guidelines can be found at: http://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/esl16authorguidelines.authcheckdam.pdf.

The pending deadlines for article submissions are:

- **Fall 2017 (anticipated October Publishing)** August 15, 2017
- **Spring 2018 (anticipated April Publishing)** February 15, 2018
- **Summer 2018 (anticipated July Publishing)** May 15, 2018

Please, come speak with me at the Annual Meeting in Las Vegas, and share with me your ideas for the Journal. Best Wishes for a Happy, Health, and Successful New (ABA) Year!

**Brian A. Rosenblatt**
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CONCUSSIONS AND COVERAGE: INSURANCE FOR CLAIMS ALLEGING LONG-TERM BRAIN INJURIES, INCLUDING CTE
by Thomas M. Reiter and Lucas J. Tanglen

INTRODUCTION

Risks associated with concussions and other head injuries have become a mainstay in the headlines, with the lawsuits asserted by former professional football players generating especially intense media attention, including in a Hollywood movie. However, the National Football League (“NFL”), which entered a concussion-related settlement that has been valued at approximately $1 billion, is far from the only organization affected by the emergence of claims alleging long-term injuries from repeated blows to the head. Sports organizations at all levels, from youth clubs to colleges to professional leagues, as well as coaches and other individuals, have faced lawsuits claiming that athletes suffered from such progressive injuries, including an alleged brain disease known as chronic traumatic encephalopathy (“CTE”). Given the potentially enormous stakes of CTE-related lawsuits and the wide swath of possible targets, being able to access liability insurance to cover the defense and potential settlement of any such claims could be critically important to many businesses (e.g., professional sports teams), non-profits (e.g., private and public colleges), and individuals (e.g., coaches, doctors, and education officials).

In some instances, insurers have refused to defend or indemnify their policyholders against such claims, leading to insurance coverage lawsuits. Coverage litigation relating to claims alleging long-term brain injury such as CTE is still in its early stages, and courts have not yet clarified the application of key insurance coverage concepts in this field. Established judicial approaches to other types of claims alleging latent injuries or damage (e.g., asbestos and environmental claims) suggest possible answers to some fundamental coverage questions, such as which years of insurance are implicated for multi-year injuries (the “trigger” issue) and how defense and indemnity costs should be spread among triggered policies (the “scope” issue). However, for other issues, such as how policy exclusions regarding “participants” in athletic events might apply in the CTE context, case law offers less direct guidance.

Section I of this article provides a brief introduction to CTE-related tort and insurance coverage litigation. Section II discusses key issues that may arise when entities and individuals seek coverage for the defense and possible settlement of CTE-related claims, especially under commercial general liability (“CGL”) policies. Section III considers other types of insurance policies that might respond to CTE-related claims. Section IV provides practical suggestions for assessing and renewing coverage for potential CTE claims, and Section V discusses steps policyholders might take to protect their insurance rights when responding to CTE claims.

I. CTE AND RELATED LITIGATION

The field of CTE-related research is developing, and there is not a uniform consensus among researchers (or litigators) regarding the existence, the nature, or the causes of the disease. Nonetheless, a basic understanding of the theory behind the emergence of CTE claims is helpful for an analysis of potential insurance coverage issues.1 Some researchers have described CTE as “a progressive degenerative disease of the brain found in people with a history of repetitive brain trauma (often athletes), including symptomatic concussions as well as asymptomatic subconcussive hits to the head.”2
The changes in the brain that CTE allegedly causes “can begin months, years, or even decades after the last brain trauma or end of active athletic involvement.” CTE has been associated with problems including “memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, suicidality, parkinsonism, and eventually progressive dementia.” These descriptions suggest at least three presumed characteristics of the condition that could be significant to potential coverage for a claim alleging the plaintiff suffered from CTE:

- **CTE is described as a “progressive degenerative” disease.** In contrast to an injury that causes damage immediately (e.g., a broken arm), alleged CTE has been described as causing damage, including the build-up of a protein called tau, on a progressive basis, potentially over a course of years.

- **Alleged CTE might not be linked to any single, identified blow to the head.** Rather, an alleged occurrence of CTE might be the asserted result of repeated contact, including “sub-concussive” hits.

- **Alleged CTE may not manifest in any perceptible symptoms until long after the damage-causing blows occurred.** A plaintiff might allege that impacts to the head and progressive injury occurred or began occurring years before the plaintiff allegedly experienced “CTE” symptoms.

Although coverage for every claim must be analyzed based on the facts alleged and the evidence developed in the particular claim, these generalizations are useful as a starting point in identifying and analyzing insurance coverage issues that could potentially arise in the CTE context, as discussed more fully in Section III.

In the highest-profile CTE-related litigation to date, the NFL was sued in 2011 by 73 former professional football players. Additional lawsuits followed, and the claims were consolidated in a multidistrict litigation (“MDL”) before the United States District Court for the Eastern District of Pennsylvania. About 300 similar lawsuits were subsequently brought by approximately 5,000 players against the NFL, and those claims were also transferred to the MDL court. The claims generally alleged that the NFL failed to protect players from long-term risks associated with concussive and sub-concussive head injuries, and that the NFL fraudulently concealed those risks. In 2013, the NFL agreed to principal terms of a settlement, including a commitment of $765 million to fund medical examinations and compensation for player injuries. After further negotiation and court proceedings, the MDL court approved a class settlement in April 2015. In April 2016, its ruling was affirmed by the United States Court of Appeals for the Third Circuit, which noted that the settlement could eventually cost the NFL $1 billion. The United States Supreme Court denied a challenge to the settlement.

While the underlying lawsuits were still pending, the NFL and dozens of its insurers began to litigate over potential defense and indemnity coverage under liability policies issued to the NFL (and related entities) as far back as the 1960s. In 2012, the insurers prevailed in a forum battle. The NFL had wanted coverage litigation to proceed in California state court, perhaps motivated in part by relatively policyholder-friendly California law on coverage issues including trigger, allocation, and late notice. (These issues, including relevant differences among various states’ laws, are explained in Section III.) However, the insurers persuaded the California court to stay that action, in favor of an insurer-filed lawsuit in New York state court, and the California Court of Appeal affirmed the forum ruling. As discovery in the coverage action proceeded, the NFL’s insurers revealed some of the arguments they might make in an attempt to minimize or avoid coverage, including: that the NFL may have “expected or intended” the players’ injuries; that the NFL may not have provided proper notice to its insurers; and that “various exclusions for injury to athletic participants” may preclude coverage. However, the parties have not fully developed their coverage arguments on the record, and the court has not issued any rulings on substantive coverage issues.
Other sports and fields that have been affected by CTE and other long-term brain injury claims include:

- **Professional hockey.** The National Hockey League (NHL) has been sued by professional hockey players in multiple lawsuits alleging that the NHL failed to act to prevent brain injuries caused by blows to players’ heads, including a consolidated MDL in the United States District Court of the District of Minnesota.¹⁶

  In 2014, one of the NHL’s insurers filed a declaratory judgment action against the league and other insurance companies, seeking a determination of its defense and indemnity obligations to the NHL.¹⁷ The insurer’s declaratory judgment complaint set forth a non-exclusive list of a dozen theories on which it might seek to avoid or minimize coverage, including: that the NHL may have failed to provide proper notice; that the policies do not cover injuries that were “expected or intended” by the NHL; that certain policies do not cover injuries sustained “while practicing for or participating in athletic events;” and that the policies do not cover medical monitoring costs.¹⁸ That coverage action has been stayed.¹⁹

- **College sports.** The National Collegiate Athletic Association (NCAA) has agreed to settle a class action lawsuit regarding alleged head injuries to college athletes.²⁰ Pending final approval by the court, the settlement would create a $70 million program offering free medical monitoring for fifty years.²¹ The settlement does not preclude athletes from suing the NCAA for alleged injuries on an individual basis.

  In 2012, the NCAA sued numerous insurers, seeking a declaration of its insurers’ coverage obligations with respect to CTE-related claims.²² That coverage litigation is pending. Separate coverage litigation has also been initiated with respect to policies issued to college athletic conferences.²³

- **High school sports.** High school athletic associations and school districts have been named as defendants in several lawsuits alleging CTE or other long-term brain injuries.²⁴

- **Youth sports.** National soccer organizations have entered settlements aimed at improving safety for youth players.²⁵ The Pop Warner youth football organization has also been named as a defendant in CTE-related lawsuits.²⁶

- **Doctors, trainers, and coaches.** A variety of individuals have been sued based on their alleged roles in setting policies that contribute to the development of CTE, or otherwise subjecting athletes to alleged CTE-related risks.²⁷

- **Sports equipment.** On April 12, 2012, Riddell filed a declaratory judgment action against twelve of its insurers in California state court, seeking coverage under policies issued between 1959 and 2011 for claims brought by NFL players.²⁸ That coverage case is currently pending. On May 5, 2017, Riddell filed a separate declaratory judgment action against twenty-eight insurers in California state court, seeking coverage for an underlying lawsuit brought by forty-two individuals alleging long-term brain injuries resulting from playing high school football.²⁹

## II. EMERGING INSURANCE COVERAGE ISSUES

Policyholders and insurers have begun to develop arguments regarding how insurance coverage law should apply in the emerging area of CTE-related claims. In the coming months and years, it is likely that courts will begin to weigh in on some of the questions. In some respects, established judicial approaches to long-tail claims (e.g., asbestos and environmental) suggest
likely approaches to fundamental questions like “Which policies must respond to a CTE claim?” and “What is the scope of coverage that each responding policy must provide?” For other issues, the case law offers relatively little guidance applicable to the CTE context. A discussion of key coverage issues potentially relevant to CTE claims follows, with a focus on CGL policies. It should be noted that while this article refers to theories regarding the general nature of alleged CTE-related injuries as asserted by certain researchers and alleged in some CTE-related claims, potential coverage for any specific claim may depend on case-specific allegations at evidence.

A. Trigger

The “trigger” of coverage refers to the event or events that determine whether a policy must respond to a claim. In “occurrence”-based insurance policies—including many CGL policies—coverage is generally “triggered” by bodily injury during the policy period. For many injuries (e.g., a broken leg), it is a fairly simple matter to identify the period in which the injury occurred, and, thereby, the responsive insurance coverage. However, consider a hypothetical CTE claim based on the following allegations:

• The defendant is a professional football team.

• The plaintiff is a former professional football player, who played his entire five-year career for the team, and then retired.

• While playing for the team, the plaintiff was hit in the head on numerous occasions during games and practices, spanning all five years with the team.

• Upon his retirement, the plaintiff displayed no symptoms of any traumatic brain injury, and no such symptoms manifested for almost ten years following retirement.

• During the tenth year of his retirement, the plaintiff first experienced symptoms associated with CTE, and he asserted a claim against the team.

• The plaintiff alleged that the hits he absorbed during his five years with the team caused ongoing, degenerative brain damage, which the plaintiff alleged to be CTE.

• In each of the fifteen years, beginning with the plaintiff’s first year with the team and ending when symptoms allegedly manifest and the plaintiff brought his claim, the team had “occurrence”-based liability insurance policies, issued by various insurers.

Which year or years of the football team’s liability insurance policies potentially cover the claim? Courts have adopted various theories in addressing comparable “trigger” questions in the context of long-tail claims. Under the four main trigger theories, the number of triggered policy periods in our hypothetical might range from just one year of coverage, up to all 15 years of coverage.

1. The “exposure” trigger theory holds that policies in place when a claimant was exposed to an allegedly harmful substance are triggered. If a court were to apply the exposure trigger to our hypothetical, it might view the plaintiff’s repeated hits to the head as analogous to, for example, a worker’s exposures to asbestos-containing products. Thus, under an exposure trigger theory, a court might hold that policies in effect while the plaintiff played for the football team (Years 1–5) would be triggered, and the insurers who issued the subsequent policies (Years 6–15) would have no coverage obligations in our hypothetical.

The exposure theory has become less prominent than it was in the early stages of asbestos and environmental coverage litigation. As a recent example of the “exposure” theory’s declining influence, Delaware’s highest court, applying New York law, recently rejected application of
an exposure trigger to underlying asbestos claims.\textsuperscript{31}

2. Under the “\textit{manifestation}” trigger theory, the policy period that is triggered is the period in which the underlying injury “manifested.”\textsuperscript{32} The manifestation trigger has not been widely adopted with respect to progressive bodily injury claims. In our simple hypothetical, the manifestation trigger might hold that only the policy on the risk during the year in which CTE symptoms were allegedly discovered (Year 15) potentially must respond. The first fourteen years of the football team’s insurance program would have no coverage obligations.

Not all applications of the manifestation trigger would be so straightforward. Suppose that during the first year of his playing career, the football player suffered one concussion and experienced headaches for three months afterward. If he experienced no further symptoms until his tenth-year post-retirement, when did the alleged long-term brain injury “manifest”? Moreover, what if the plaintiff alleged occasional headaches starting in his first-year post-retirement, moderate memory loss starting in the fifth-year post-retirement, and severe depression starting in the tenth year? These variants on the hypothetical demonstrate that while the manifestation trigger is superficially simple, its application may be anything but.

3. The “\textit{injury-in-fact}” trigger would implicate only policies in effect while the plaintiff’s injuries actually took place.\textsuperscript{33} Application of this theory in the CTE context could be difficult, because it would require identifying the periods in which alleged ongoing, progressive injury actually occurred. This may be a daunting task where a plaintiff has pleaded broad, general allegations regarding an alleged history of head trauma.

The NFL insurance coverage litigation is pending in New York, where courts have applied this trigger theory.\textsuperscript{34} Seemingly anticipating application of the fact-sensitive “injury-in-fact” trigger, the NFL’s insurers have stated in public filings that they intend to develop facts regarding “whether the bodily injury alleged by the claimants took place during the Insurers’ policy periods.”\textsuperscript{35}

4. The “\textit{continuous}” trigger provides that all policies from the plaintiff’s first exposure through manifestation of the injury are triggered.\textsuperscript{36} Of the four main trigger theories, the continuous trigger theory tends to trigger the greatest number of policy periods. Many courts have applied the continuous trigger theory to asbestos and other latent bodily injury claims.\textsuperscript{37}

In the CTE context, a court applying the continuous trigger theory might treat the start of the plaintiff’s career with the football team as the first exposure to the injury-causing hits, such that every year of coverage (Years 1–15) would be responsive to our hypothetical claim.

B. Duty to Defend

Many liability policies require the insurer to provide a defense against claims that may fall within the terms of the policy. The duty to defend is generally understood as being broader than the insurer’s ultimate duty to indemnify.\textsuperscript{38} The broad nature of the duty to defend may be particularly important in the CTE context, where the scientific theories regarding plaintiffs’ alleged injuries are developing, and where plaintiffs might plead a variety of legal theories in attempting to establish defendants’ liability.

In determining whether an insurer has a duty to defend against a particular claim, most courts, at least initially, compare the allegations of the underlying claim with the coverage provided under the policy. If the claim alleges facts that, if proven, would be within the policy’s coverage, the insurer’s defense obligation is generally triggered.\textsuperscript{39} This is often called the “four corners” rule (or “eight corners”—the four corners of the complaint plus the four corners of the insurance
policy). When there is any doubt about whether a claim is potentially within the policy’s coverage, the question is generally resolved in favor of the insured.40

An underlying CTE-related complaint may not always clearly and specifically allege precisely when the long-term injury occurred. As discussed above, the “trigger” issue might present a fact-intensive inquiry, particularly in jurisdictions applying the “injury-in-fact” trigger theory. Nonetheless, under the prevailing approach to the duty to defend, as long as there is a possibility that the claim is within the policy’s coverage, based on the “four corners” of the complaint, the insurer’s defense obligation should be activated.

Lawsuits alleging CTE-related claims might allege a combination of legal theories for which coverage is routinely provided (e.g., negligence) and counts for which insurers might seek to avoid coverage (e.g., fraud and medical monitoring). Most courts hold that an insurer must defend its insured against such a suit in its entirety, as long as any claim is potentially covered.41

C. Scope of Coverage

When multiple policy periods are triggered under the applicable trigger theory, a question arises as to the “scope” of coverage that each triggered policy must provide. The significance of the issue comes into focus if we build on our “trigger” hypothetical from Section II.A. by further assuming that:

• The “continuous” trigger theory applies, such that all fifteen policy periods—from the former football player’s first exposure to hits to the head to the alleged manifestation of CTE—are triggered.

• Each of the fifteen triggered policies has a limit of $1 million.

• Five years of coverage (Years 6–10) were issued by now-insolvent insurers, such that no coverage is accessible under those policies.

Here, again, courts have developed competing theories that might apply. Policyholders often argue for a scope of coverage called “joint and several” or “all sums” allocation. Under this approach, each triggered policy is responsible for all the policyholder’s costs, up to that policy’s limits (subject to the exhaustion of underlying policies or risk retentions)42. Further, the policyholder is permitted to select which policy or policies will respond. In our hypothetical, if the plaintiff prevailed and obtained a $1 million verdict against the team, the team might simply pick which of the triggered policies must cover the verdict in its entirety. It might make no difference, for purposes of this claim, that one-third of the coverage is unavailable due to insurer insolvencies. The team could simply pick one of the solvent policy periods to cover the verdict.

Many courts have allowed policyholders facing asbestos and environmental claims to “pick and choose” among triggered policies under this “all sums” allocation method.43

The other major allocation approach, which is generally favored by insurers, spreads costs evenly across every year of triggered coverage on a “pro rata” basis.44 The downside for policyholders is that they are generally left responsible for gaps in coverage, such as for policies that were issued by now-insolvent insurers. For example, because one-third (5/15) of our hypothetical team’s coverage was issued by now-insolvent insurers, one-third of the million-dollar verdict might be borne by the team, instead of being covered by insurers. Outcomes can be even more extreme, depending on the policyholder’s particular coverage profile. An insurance program that has been severely depleted by insurer insolvencies in 90% of the triggered periods could reduce the insured’s recovery to 10%, even if ample limits to cover the entire judgment remain in the still-solvent years. Some courts, including courts in New York, have adopted the “pro rata” approach, despite its clear potential to minimize coverage.45

D. Number of Occurrences

For “occurrence”-based policies, the treatment of a claim or a series of claims as arising from one occurrence versus many occurrences
can have profound effects on coverage. For example, if our hypothetical team faced not one, but ten CTE-related claims, then determining its rights to coverage could require consideration of how many “occurrences” give rise to those claims. The consequences of the “number of occurrences” issue are highly dependent on the specifics of the insured’s coverage program. For example, if a given year of an insured’s coverage had limits of $1 million per occurrence and $2 million aggregate, then viewing all ten claims as arising from a single occurrence could cut the potential insurance recovery for that year in half ($1 million), as compared to treating each claim as a separate occurrence ($2 million).

Conversely, if an insured’s coverage in a given year was subject to a deductible of $1 million per occurrence, then a separate-occurrences ruling could require the policyholder to satisfy the deductible ten times over in order (a total of $10 million in deductible payments) to reach real coverage for each claim, as opposed to making a single $1 million payment in order to satisfy the deductible as to all ten claims.

The “number of occurrences” issue has not been litigated to conclusion in any CTE-related insurance coverage cases. In light of the many case-specific variables and the wide range of potential outcomes, it is not surprising that the “number of occurrences” issue has been litigated repeatedly in other contexts, with varying results. In asbestos products liability coverage litigation, some courts have held that numerous underlying claims resulted from a single occurrence, because they all result from the same cause: the insured’s manufacture and sale of asbestos-containing products. Other courts have ruled that each claimant’s exposure to asbestos constituted a separate occurrence. Some courts have grouped claims against an insured into several occurrences. For example, in the context of asbestos premises claims, some courts have held that claimants exposed to asbestos at the same location, at roughly the same time, should be treated as one occurrence, and claimants exposed at different locations should be treated as distinct occurrences.

In the CTE context, one might view numerous claims against a policyholder as (i) each arising from the same occurrence (e.g., the policyholder’s acts and omissions allegedly giving rise to the injuries), (ii) each arising from separate occurrences (e.g., each claimant’s alleged exposure to hits to the head), or (iii) properly grouped into several occurrences, depending on relevant timing and circumstances (e.g., claimants alleging exposure to hits to the head around the same time, or under similar circumstances, grouped as several distinct occurrences).

E. Participant Exclusions

One less-developed issue that could play a major role in CTE coverage disputes is the application of coverage exclusions regarding “participants” in athletic activities. Courts have not interpreted such exclusions in the CTE context. Nonetheless, many courts hold that to be enforceable, exclusionary language must be clear and specific as to what is excluded from coverage. If an exclusion is reasonably susceptible to more than one interpretation, many courts hold that they must adopt the reading that is more favorable to the insured.

Participant exclusions have been around for decades, and their particular wording can vary between policies and insurers. An Insurance Services Office form published in 1984 phrases the exclusionary language as:

[T]his insurance does not apply to “bodily injury” to any person while practicing for or participating in any sports or athletic contest or exhibition that you sponsor.

Under that wording, an insurer must establish at least three elements in order to successfully assert the exclusion: (1) “bodily injury’ to any person while practicing for or participating in,” (2) “any sports or athletic contest or exhibition,” (3) “that you sponsor.”

1. “bodily injury’ to any person while practicing for or participating in.” This temporal element is interesting as applied to a potential CTE claim. In our hypothetical
(Section II.A.), an insurer whose policy contains the exclusion might assert that the player’s alleged injury occurred “while practicing for or participating in” games and practices with the team, because the hits to the head occurred in games and practices. On the other hand, the team might argue that the hits themselves are not necessarily the injuries for which the plaintiff seeks compensation; rather, the alleged CTE-related brain damage may have occurred during games and practices at all. Indeed, although the science may not be settled, CTE researchers have stated that the progressive brain damage associated with CTE might not begin until long after the hits were sustained. Because it is the insurer’s burden to establish applicability of an exclusion, it may be difficult for insurers to establish that the specific alleged “injury” of CTE took place while a person was “practicing for or participating in” a contest or exhibition.

Case law, while not addressing CTE, does suggest that the temporal element of the participant exclusion should be applied exactly. For example, a jockey’s death resulting from on-site medical treatment after being injured in a horse race was not excluded under a participant exclusion, because the specific injury at issue did not occur “while” the jockey was horse racing. At a minimum, it should not be assumed that CTE-related injury necessarily occurred “while” a person was practicing for or participating in a contest or exhibition.

2. “any sports or athletic contest or exhibition.” These terms are not defined in standard coverage forms. Disputes between policyholders and insurers over the meaning of this language have arisen with some frequency. In some cases, policyholders have defeated insurers’ assertions of the exclusion, including several cases in which the term was deemed ambiguous. The following activities have been held to be outside the scope of the exclusion: cheerleading at a football game; participation in a “challenge course” involving climbing an elevated platform and performing a free fall with a rope; “breeze” riding to exercise race horses at a track; and a jump-rope game during a children’s birthday party at a gymnastics center. One court has suggested that professional wrestling may not be an athletic event for purposes of the exclusion. Although some courts have applied the wording more broadly, events should not be assumed to be within the wording.

3. “that you sponsor.” Similarly, “sponsor” is not a defined term in most liability policies. Even where the other elements of the exclusion are met, it may not apply where the insured did not “sponsor” the event at which the injury occurred. One court avoided having to rule on whether a donkey basketball show was “of an athletic or sports nature,” based on its holding that the exclusion was ambiguous (and therefore inapplicable) as to whether the show was “sponsored” by the insured (because the term could mean either “paying for” or, alternatively, “planning and carrying out” an activity). Depending on the nature of the insured’s involvement with the events associated with a CTE claim, the sponsorship issue could determine the application or non-application of a participant exclusion.

F. Brain Injury Exclusions

An insurer might insist that new or renewed CGL policies contain coverage exclusionary language referring to CTE or other brain-injury claims. For example, one insurer has relied on the following “Concussion Exclusion” language in an insurance coverage lawsuit related to a football player’s concussion-related claims against an arena football league:

This insurance does not apply to damages for “brain injuries” sustained by a “player” arising out of or in any way related to
participation in any sports or athletic game, contest, event, exhibition or practice.

The term “brain injuries” includes concussions, chronic traumatic encephalopathy or any other injury to the brain and any symptoms, conditions, disorders, or diseases resulting therefrom...\textsuperscript{58}

The insurer’s motion to dismiss in that case was denied, with no substantive ruling regarding the application of the “Concussion Exclusion.”\textsuperscript{59}

The potential application of any similar exclusions could be highly dependent on the specific wording of the exclusion and the nature of the underlying claim against the policyholder. Policyholders should review their insurance policies for any “brain injury” or similar exclusions, and should be aware of the possibility that insurance underwriters may seek to impose such an exclusion in connection with policy placements or renewals.

G. Employers’ Liability Exclusions

Many CGL policies contain “employers’ liability” exclusions, which insurers may argue preclude coverage for certain CTE-related claims. Such exclusions may purport to preclude coverage for bodily injury to “[a]n ‘employee’ of the insured arising out of and in the course of: (a) Employment by the insured; or (b) Performing duties related to the conduct of the insured’s business . . . .”\textsuperscript{60} The potential applicability of this issue is likely to depend on the specifics of the underlying case and the insured’s relationship with the claimant.

A careful analysis of the policy language, including the relevant definition of “employee,” is warranted to determine whether the exclusion applies in a given circumstance. For example, where a claim is brought not against the team that directly employed the player, but against a league, there may be strong arguments against applying the exclusion. Similarly, it may not be appropriate to apply the exclusion where the claimant is a contractor, rather than an employee of the insured.

Moreover, even if the claimant was previously an “employee” of the policyholder, in light of the possibility that alleged CTE-related damage may not even begin until after the end of a player’s career, such injury might be reasonably viewed as not both “arising out of and in the course of” the player’s employment, such that the exclusion is arguably inapplicable.

H. Allocation as to Periods When Coverage Was Unavailable

As noted above, it should not be assumed that any exclusions—including “participant,” “brain injury,” and “employers’ liability” exclusions—necessarily bar coverage for a particular CTE-related claim. However, in the event that an exclusion does bars coverage in some, but not all, of the years that would otherwise be “triggered” by a CTE-related claim, a policyholder may be able to argue that defense and indemnity costs should not be allocated to any periods in which coverage for the claim was not available to be purchased by the insured.\textsuperscript{61} This so-called “availability” rule, developed and adopted by some courts in the context of long-tail asbestos and environmental claims in jurisdictions applying pro rata allocation rules, can significantly affect policyholders’ and insurers’ respective obligations.

Returning to our hypothetical football player’s claim (Sections II.A., C.), assume:

- All 15 years of coverage are “triggered” under a continuous trigger theory.
- All 15 years of coverage are solvent.
- “Pro rata” allocation applies.
- The policies in Years 6 through 15 (10 of the 15 triggered years) contain a “brain injury” exclusion, which a court has ruled bars coverage for the specific claim.

If the court does not adopt the availability rule, then only 33.33\% of defense and indemnity costs might be allocated to the team’s insurers, for the five of fifteen triggered years without
the exclusion. The remaining 66.67% might be allocated by the team, representing the ten of fifteen triggered years that are subject to the exclusion.

However, if the court adopted the availability rule, and if insurance without the “brain injury” exclusion was not available to the team for any of Years 6–15, then the team might successfully argue that no costs should be allocated to Years 6–15, such that 100% of the costs would be allocated to Years 1–5 (20% per year), representing the period in which the team’s insurance was not subject to the “brain injury” exclusion.

The potential application of the “availability” rule to CTE-related cases has not been tested in court, and insurers might resist its application, including by contesting the specific periods in which coverage was truly unavailable, versus periods in which an insured allegedly made a knowing and willful decision to “self-insure” for CTE-related claims. Insurers might also attempt to argue that “exceptional circumstances” or equitable considerations limit or preclude the application of the availability rule in specific cases.

I. “Expected or Intended” Injury and Related Issues

Many liability policies contain exclusions or other wording that purport to exclude coverage for injuries “expected or intended from the standpoint of the insured.” Even in the absence of such policy language, insurers might argue that public policy requires that insurance not provide coverage for intentional injuries.

Insurers generally face substantial burdens when they attempt to avoid coverage based on “expected or intended” arguments. The majority of courts approach the issue as a subjective inquiry, based on whether the insured actually expected or intended the injury at issue, at the time that it allegedly caused the injury. In other jurisdictions, courts use an objective inquiry, based on whether a “reasonable” person would have expected or intended the injury at issue to occur.

Moreover, courts have disagreed over precisely what must have been (or should have been) expected or intended for an insurer to escape coverage. Many courts have held that the particular type or magnitude of injury at issue must have been (or should have been) expected or intended. However, other courts have held that it is sufficient that the insured expected or intended (or should have expected or intended) that some injury result from its acts or omissions, such that it is irrelevant that the policyholder had no reason to expect that an injury of the particular type or magnitude of the injury at issue would occur.

Even if an insurer were demonstrate that injury was expected or intended by a low-level employee of the insured, that showing may not be sufficient to demonstrate that the injury was expected or intended from the standpoint of a corporate policyholder. Many courts have required insurers to show that the corporate policyholder specifically directed and acted through its employees to cause the injury at issue.

There could be complications in applying this coverage defense to CTE-related claims. For example, an insurer might choose to focus on a range of potentially fact-intensive issues, such as: (1) what the insured knew about CTE-related risks; (2) when the insured acquired knowledge regarding CTE-related risks; (3) who in the insured’s organization knew about CTE-related risks, and when; (4) what the insured did in response to learning about CTE-related risks; (5) whether the insured should have undertaken to learn more about CTE-related risks; and (6) even if the insured did not specifically expect or intend CTE-related injuries at a given point in time, whether the insured expected or intended other injuries sufficient to support an “expected or intended” defense.

Further, the related doctrines of “known loss” and “loss in progress,” while conceptually distinct from “expected or intended,” would likely involve
similar factual inquiries. The known loss doctrine generally precludes coverage for damage that the insured knew about before a policy was issued. The loss in progress doctrine generally provides that there is no coverage for losses that began before a policy was issued and continue after the policy’s inception date. Some courts have found these doctrines inapplicable in the context of third-party liability insurance, particularly where the insured’s legal liability for the injury at issue had not been established at the time the policy was issued.\(^69\) However, other courts have held that the doctrines may apply to certain long-tail claims where the insured is aware that damage is likely to result in legal liability.\(^70\)

The foregoing suggests that even if “expected or intended” and related arguments might ultimately lack any merit with respect to a particular policyholder, discovery and argument on such issues might nonetheless become time-consuming and burdensome, with insurers potentially perceiving incentives to develop unflattering depictions of their policyholders.

J. Late Notice

Provision of timely notice to insurers is generally a very important consideration in claims handling. Occurrence-based CGL policies often require that the insured provide notice of an occurrence, claim, or suit “as soon as practicable,” which courts have interpreted to mean within a reasonable time, based on the facts and circumstances.\(^71\) There are variants of notice provisions in occurrence-based policies, so policyholders should consider carefully reviewing the relevant policy wording.

In a majority of states, courts will allow an insurer to avoid coverage based on late notice only if the insurer was prejudiced by the lack of timely notice.\(^72\) Some courts have held that in order to establish prejudice, an insurer must demonstrate that it actually would have asserted a valid defense to the underlying claim if notice had been provided earlier.\(^73\) Given the potential long-tail nature of alleged CTE claims, an insured might initially be named as a defendant in a small number of CTE claims and, as months and years progress, eventually face a large number of claims. An insurer who was not given notice while the initial claims were litigated or settled, but is later asked to provide coverage for subsequent claims, might attempt to develop creative arguments that it was somehow prejudiced by its lack of opportunity to become involved in the litigation earlier. However, it should not be sufficient for an insurer to argue that it was prejudiced by the mere loss of “opportunity” to monitor or participate in the defense of past or pending claims.

In a minority of jurisdictions (notably, New York), courts have been willing to deprive policyholders of coverage for late notice with no concern for whether the late notice was prejudicial, as opposed to harmless.\(^74\) Also, courts in many jurisdictions will not impose a prejudice requirement for so-called “claims made” policies, which, unlike occurrence-based policies, are triggered by the assertion of a claim against the insured.\(^75\) Many directors and officers policies, errors and omissions policies, and other types of specialty liability policies are written on a “claims made” basis, as are some CGL insurance programs.

K. Duty to Cooperate

Policyholders may be obligated to cooperate with their insurers in the defense and settlement of CTE-related claims. Liability policies commonly contain a clause requiring the policyholder to “cooperate” with the insurer in the investigation, settlement, or defense of the claim or suit. The contours of the duty to cooperate may depend on the policy language and other relevant circumstances, but it has been held to include, for example: an obligation to provide the insurer with a full and truthful description of the occurrence and to comply with the insurer’s reasonable requests for information;\(^76\) a duty to forward case filings;\(^77\) and an obligation to cooperate in substantive aspects of the defense, such as refraining from settlement without the insurer’s approval.\(^78\)

A court may place limitations on an insurer’s attempts to avoid coverage based on alleged
lack of cooperation, such as by requiring that the insurer demonstrate a “material” breach of the duty,79 or that the insurer suffered substantial prejudice as a result of the breach.80 Further, a policyholder may be relieved of the duty to cooperate in certain situations, such as where an insurer has wrongly denied coverage.81 Nonetheless, policyholders facing CTE-related claims should consider any possible obligations they might have to provide information or otherwise cooperate with insurers, because an insurer might argue that a failure to cooperate carries severe consequences.

L. Settlement of CTE-Related Claims

As a policyholder prepares to negotiate the settlement of an underlying CTE claim, it might find itself in one of three basic postures with respect to any insurer that has been notified of the claim: (1) the insurer has committed to covering the defense and indemnity of the claim without reservations; (2) the insurer has agreed to provide a defense subject to a reservation of rights, and has not committed to cover any settlement; or (3) the insurer has denied any defense or indemnity obligation for the claim.

Each settlement scenario comes with its own nuances that might inform the policyholder’s and its coverage counsel’s approach to settlement with respect to insurers. In many cases, however, an important consideration is the maintenance of a line of communication between the policyholder, the insurer, and defense counsel throughout negotiations leading up to the potential settlement. Where an insurer has agreed to cover a claim, the insurer may be entitled to control settlement decisions, such that keeping the insurer in the loop may be important. Even where an insurer has not committed to covering indemnity or has denied coverage, providing the insurer with information and opportunity to object in advance of settling may support arguments by the policyholder that the insurer cannot subsequently challenge the reasonableness or amount of the settlement.82

M. Emotional Distress

A CTE claim might allege that a plaintiff suffered emotional distress. An insurer might attempt to argue that CGL policies are not intended to cover damages for emotional distress. However, courts generally agree that emotional distress, when manifesting in physical injury, is within the “bodily injury” coverage of typical CGL policies.83 Because a CTE claim would likely allege physical injury related to any alleged emotional distress, it might be difficult for an insurer to succeed in arguing that the “emotional distress” component of a CTE claim is not covered by insurance. A closer question, on which courts have split, might arise if a claimant alleged an injury that manifested solely in the form of emotional distress.84 However, because the underlying theory of CTE is based on alleged physical damage to the brain resulting from repeated impacts, it seems unlikely that a claim alleging CTE claim would not be viewed as alleging some form of potentially covered physical injury.

N. Medical Monitoring

Some CTE-related lawsuits have included counts for “medical monitoring.” Such claims might seek to require a defendant to contribute to a fund to support the cost of future medical examinations for detecting CTE in a plaintiff or a class. As discussed above, the NFL and NCAA have entered settlement agreements that include commitments of millions of dollars in medical monitoring costs. Insurers sometimes assert that medical monitoring is not covered by general liability policies, because no “bodily injury” covered by the policy has necessarily occurred. Several courts have rejected this type of insurer argument.85 However, underlying case-specific facts and allegations are likely to be important in determining potential coverage for “medical monitoring.”

O. Misrepresentation

When asked to cover CTE-related claims, an insurer might attempt to avoid coverage by arguing that the insured misrepresented or omitted facts relevant to its exposure to CTE-
related claims when it submitted its application for insurance. When an insurer successfully asserts a misrepresentation defense, some courts have held the insurer may be entitled to the drastic remedy of rescission, resulting in the policy being deemed void in its entirety, thereby completely excusing the insurer from any coverage obligations under the policy. However, insurers face several hurdles to successfully asserting a misrepresentation defense.

For one, in a majority of jurisdictions, an insurer generally cannot rely on omissions, as opposed to affirmative representations, in order to void a policy. The majority rule, then, places the onus on an insurer to ask the insured for the specific facts it requires regarding potential CTE exposure during the application process.

Further, the alleged misrepresentation must generally be both material and intentional. Under one common formulation, a representation is material if it induced or would reasonably have induced the insurer to issue the policy. There are variations among jurisdictions as to the materiality issue, including as to whether the test is objective or subjective, and whether the focus is on the effect on the insurer, or on the mindset of the insured. In addition, some jurisdictions require an insurer to demonstrate that it actually relied on the alleged misrepresentation in order to void a policy.

Given the hurdles that an insurer must overcome to establish a valid misrepresentation defense and the many differences in the law among jurisdictions, an insurer’s assertion of this issue in an attempt to avoid coverage for CTE-related claims might be viewed with skepticism. Nonetheless, insureds should consider the potentially severe consequences of misstating or omitting facts related to potential exposure to CTE-related claims in insurance application or renewal materials.

P. Corporate Successorship and Assignment Issues

A company’s corporate history can have a significant effect on its ability to access historical insurance policies for claims alleging long-tail injury such as CTE. For example, as a result of a corporate transaction, a sports league might have assumed liabilities arising from the prior conduct of a former rival league that eventually gives rise to CTE claims asserted by the former rival’s players. The league might understand that because it assumed the former rival’s liabilities, it is also entitled to the benefit of the former rival’s historical insurance policies. Insurers have opposed comparable attempts to access historical coverage, arguing that “non-assignment” policy language prohibits assignment of historical policies to a successor without the consent of the insurer.

However, courts have viewed such insurer arguments skeptically. For example, in a significant decision in which it overruled insurer-friendly precedent, the California Supreme Court recently held that a consent-to-assignment clause cannot be invoked by insurers to deny coverage where the insured has assigned rights to insurance coverage for a pre-assignment “loss sustained by a third party that is covered by the insured’s policy, and for which the insured may be liable.” Many other issues relating to corporate history and successorship could arise when a policyholder seeks coverage for CTE-related claims. It may be important to consider such issues when assessing potential coverage and developing coverage positions.

Q. Forum and Choice of Law

Insurance policies are interpreted according to state law, and many policies do not contain choice-of-law provisions. As discussed throughout this article, the determination of which state’s insurance law applies to issues such as trigger, scope, and late notice could have a critical impact on the existence and amount of insurance available for CTE claims. Differences among states’ substantive laws may lead to vigorous “forum battles” and choice-of-law disputes among policyholders and their insurers. For this reason, questions regarding the forum for potential coverage litigation and the substantive law to be applied should, in many cases, be
considered early in the process of pursuing coverage for CTE-related claims.

The “forum” issue refers to the determination of the state and county in which an action should be filed (including whether to proceed in state court or federal court). Many liability insurance policies do not have any “forum selection” provisions requiring that coverage disputes be brought before a particular court (or arbitration tribunal), potentially giving rise to forum disputes. One of the earliest decisions in CTE-related insurance coverage litigation was a California trial court’s granting a motion for forum non conveniens brought by the NFL’s insurers. The NFL brought suit against its insurers in California, after the insurers had previously instituted a coverage action in New York. (California is often considered to have relatively policyholder-friendly law on key coverage issues including trigger, scope, and late notice, while the insurers’ preferred forum of New York has been perceived as favoring insurers.) In affirming the trial court’s grant of the insurers’ forum motion, the California Court of Appeals emphasized that, as an organization that had long maintained its headquarters in New York, the NFL was not a California resident entitled to a strong presumption of convenience of a California forum, and that California does not recognize a strong presumption in favor of a nonresident plaintiff’s forum.

Once the appropriate forum is determined, the forum state will apply its own choice-of-law rules to decide the substantive law applicable to coverage issues like trigger, scope, and late notice. The state in which the contract (i.e., the insurance policy) was made is often an important factor in choice-of-law decisions, but most states consider other factors, as well. The majority of states have adopted the “most significant relationship test” from the Restatement (Second) of Conflict of Laws § 188 (1971), which accounts for factors including, but not limited to: (a) “the needs of the interstate and international systems;” (b) “the relevant policies of the forum;” (c) “the relevant policies of other interested states;” (d) “the protection of justified expectations;” (e) “the basic policies underlying the particular field of law;” (f) “certainty, predictability, and uniformity of result;” and (g) “ease in the determination and application of the law to be applied.” Some other states, including New York and California, apply a “governmental interest” approach under which, in a case of a “true” conflict of law, the court will apply the law of the state whose interests would be most impaired if its law were not applied.

III. ALTERNATIVE SOURCES OF INSURANCE COVERAGE

This article has focused primarily on CGL policies, but other types of insurance may also be relevant to potential coverage for CTE-related claims.

A. Workers’ Compensation and Employers’ Liability Insurance

When CTE claims are brought by employees of the policyholder (potentially implicating an employers’ liability exclusion that might appear in the insured’s CGL policies), workers’ compensation and employers’ liability insurance may be a source of coverage. Workers’ compensation statutes generally make employers strictly liable for employees’ accidental bodily injury or disease suffered in the course of their work, in an amount limited by the relevant statute. Workers’ compensation insurance is a vehicle to fund an employer’s workers’ compensation liabilities. The answers to questions such as whether an individual is deemed an employee for purposes of workers’ compensation, and whether the particular operations alleged to have resulted in CTE are within the scope of workers’ compensation coverage, will be highly dependent on the wording and interpretation of the workers’ compensation statutes of the relevant state.

Employers’ liability insurance is often a companion product of workers’ compensation insurance. It is intended to protect employers against liabilities that arise out of employment, but are not covered by workers’ compensation. Employers’ liability policies typically provide a broad scope of coverage (e.g., “bodily injury by accident or disease . . . sustained . . . by any employee of the insured arising out of and in the course of his employment”), and they may
include a duty to defend. Workers’ compensation and employers’ liability insurance should not be overlooked as a potential source of coverage for CTE claims.

B. D&O Insurance

When an individual director or officer of an entity is sued in a CTE-related claim, it is possible that the organization’s directors and officers liability (D&O) policy will provide coverage. D&O policies are typically written on a “claims made” basis, rather than an “occurrence” basis. One implication of “claims made” coverage is that providing prompt notice of a claim to the insurer may be especially critical, as some courts impose stricter notice obligations under such coverages than they might under “occurrence” coverage. The scope of coverage provided by D&O policies can vary significantly, depending on the terms and exclusions set forth in a particular policy.

It is worth noting that many D&O policies contain exclusions for bodily injury claims, which an insurer might cite to avoid coverage for a CTE-related claim. One court has held that the “bodily injury” exclusion in a D&O policy issued to a professional arena football league excluded from coverage a former player’s lawsuit alleging long-term brain injuries. Nonetheless, any such exclusions must be read carefully against the allegations of an underlying claim. Depending on the facts and legal theories alleged in a specific CTE-related claim, the director or officer may have strong arguments for coverage.

C. E&O Insurance

Errors and omissions (E&O) policies are intended to protect individuals and entities that render professional services against claims arising from deficiencies or errors in providing such services. Terms and exclusions in E&O policies coverage can vary significantly, based in part on the nature of services provided by the policyholder. For example, a doctor or medical entity that is sued in a CTE-related claim might look to its medical malpractice insurance policies (a type of E&O policy) for coverage. Like D&O policies, many E&O policies are written on a “claims made” basis.

IV. ASSESSING COVERAGE FOR POTENTIAL CTE-RELATED CLAIMS

Practical steps that a policyholder might take in analyzing available coverage for potential CTE-related claims include the following:

- **Reviewing the terms of potentially applicable policies.** As discussed throughout this article, coverage can vary significantly based on the terms of a particular policy. A policyholder should consider attempting to identify language, including exclusions, that an insurer might argue bars coverage for CTE-related claims. Language supporting potential coverage might also be noted. This review could include CGL, D&O, E&O, and any other potentially relevant policies available to the insured. With respect to occurrence-based liability programs, an insured may find it advantageous to be at least generally aware of relevant features of its historical policies that may be implicated by a claim alleging latent brain injury.

- **Reviewing policy limits and retentions.** Policyholders with CTE-related risks should consider whether their current policy limits are sufficient, as well as whether any self-insurance features of their programs (e.g., deductibles, self-insured retentions, and retrospective premiums) are appropriate.

- **Preparing renewal strategies.** Even if current coverage terms appear appropriate to respond to the insured’s potential CTE-related exposures, an insurer might attempt to introduce an exclusion or other provision that could restrict potential coverage for CTE claims into subsequent policies. A policyholder faced with such circumstances might seek to negotiate for more favorable renewal terms or seek coverage through an alternative provider. It may prove important for policyholders to carefully respond to questions posed by insurers in the renewal process, because an
insurer might attempt to use any misstatements in the renewal process to support a potential misrepresentation defense in an attempt to avoid coverage.

V. RESPONDING TO CTE-RELATED CLAIMS

When CTE-related claims are asserted, policyholders should promptly consider undertaking threshold steps to securing coverage under available insurance policies, including:

• **Identifying potentially applicable policies.** As discussed above, a CTE claim might trigger “occurrence”-based CGL policies dating back as far as the plaintiff’s earliest alleged hits to the head. Other potentially responsive coverage types, including D&O and E&O insurance, should also be considered.

• **Closely reviewing insurance policies.** The policy review might, ideally, focus on substantive terms and conditions (including exclusions) and any important timing requirements (including notice obligations), which could potentially result in a waiver of coverage if not observed. Reviewing multiple years’ (and, perhaps, decades’) worth of occurrence-based CGL coverage may appear to be a daunting task, but it could prove critical to assessing potential coverage.

• **Sending prompt notice to insurers.** If a policyholder fails to timely notify its insurers of a CTE claim (or even, under certain policies, of a potential CTE claim), it may risk waiving coverage. Close attention to policy language is generally warranted when determining the nature of contractual notification obligations and the potential consequences of failing to satisfy them.

• **Cooperating with insurers.** Many insurance policies expressly require the policyholder to cooperate with its insurers in the investigation, settlement, or defense of claims. An insurer may assert that a failure to cooperate on the part of the insured constitutes a breach of the policy, thereby relieving the insurer of its coverage obligations. Although the occurrence of CTE-related claims may implicate sensitive or confidential information for the policyholder, insureds should consider that they may be obligated to make certain information available to insurers.

CONCLUSION

Insurance is an important factor to consider whenever CTE-related claims are anticipated or asserted. Because this emerging field of potentially high-stakes litigation might affect a broad range of possible defendants, from an individual youth sports coach to the world’s most famous professional sports organizations, the resolution of key insurance coverage issues could have enormous impacts on sports-related industries and organizations across the country. Policyholders may be well served by conferring with insurance coverage counsel both before claims are asserted (e.g., in navigating renewal processes and assessing historical insurance programs) and after (e.g., in considering notice to insurers and developing coverage strategies).

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While this article focuses on alleged CTE, which has become a prominent theory asserted by plaintiffs in concussion-related litigation, much of the discussion is relevant to other claims alleging long-term brain injuries, even if CTE is not specifically alleged.


In re NFL Players’ Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016).

Gilchrist v. NFL, 137 S. Ct. 591 (2016); Armstrong v. NFL, 137 S. Ct. 607 (2016).


Id., ¶¶ 55, 60.


Joint Motion for Preliminary Approval of Second Amended Class Settlement and Certification of Settlement Class and Settlement Subclasses, In re NCAA Student-Athlete Concussion Litig., No. 1:13-cv-09116, MDL No. 2492 (N.D. Ill. May 20, 2016), ECF No. 266.

Id., Ex. 1, ECF No. 266-1.


Archie v. Pop Warner Little Scholars, No. 2:16-

27 E.g., Second Amended Complaint, Alt v. Shirey, No. 2:11-cv-00468, 2011 WL 11684876 (W.D. Pa., filed July 15, 2011) (lawsuit by former high school football player against head coach, athletic trainer, and administrators, as well as school district).


E.g., Blackburn v. Fid. & Deposit Co. of Md., 667 So. 2d 661 ( Ala. 1995).


E.g., U.S. Fid. & Guar. Co. v. Armstrong, 479 So. 2d 1164, 1167 (Ala. 1985) (“[T]he legal standard to determine whether the injury was either expected or intended . . . is a purely subjective standard.”).


E.g., Sargent v. Johnson, 551 F.2d 221 (8th Cir. 1977).


Entertainment & Sports Law


(This article was originally published with the PRACTITIONER, the official publication of the Solo & Small Firm Section of the State Bar of California, and is re-run here, with permission, as a companion piece to the Author’s prior articles.)

by Jeremy M. Evans

Let us be honest—sports are always fun to talk about, on and off the field of play. There is a reason why it is a multi-billion dollar industry. When it comes to the places where the sports are played, a bit of history is both fun and educational, and the future of stadium building is of great significance to lawyers and our clients.

Here we will explore the history of professional sports franchises and their stadiums in California. We will also look at the cost of such stadiums (and where the money came from); whether litigation was involved in building, and what government and taxpayer approvals were needed. From this historical base, we will look at the future of stadium building in our state and why taxpayer-funded stadiums in California are important to our profession and our clients.

History of Professional Sports Franchise in California

Building new stadiums and moving into new stadium homes have been all the rage of American professional sports franchises.¹ The change and movement of professional sports franchises has particularly been a California-thing for some time. The San Diego Chargers, for example, began in Los Angeles in 1960 and then moved to San Diego for the 1961-2016 seasons.² The Chargers will now be back in Los Angeles from 2017 until who knows when.

Similarly, the Los Angeles Rams (1946–1994, 2016–present) were once the Cleveland Rams (1936–1942, 1944–1945), but were the St. Louis Rams (1995–2015) for twenty years before moving back to Los Angeles in 2016. The Los Angeles Clippers (1984–present) were once the San Diego Clippers (1978–1984), and before that the basketball franchise was known as the Buffalo Braves (1970–1978). Of course the Los Angeles Dodgers (1958–present) moved west from Brooklyn (1884–1957), and the Oakland Raiders (1960–1981, 1995–present) were in Los Angeles for twelve years (1982–1994) before now are moving to Las Vegas, Nevada.³


The California/Anaheim/Los Angeles Angels of Anaheim (1961–present) were an expansion franchise, along with the San Diego Padres (1969–present). However, all Major League Soccer and National Hockey League teams in California (e.g., the Los Angeles Galaxy, San Jose Clash/Quakes/Earthquakes (1994–present)), Chivas USA (2014), Los Angeles Football Club “FC” (2014–present/first season in 2018), Mighty/Anaheim Ducks (1993–present), Los Angeles Kings (1967–present), and the San Jose Sharks (1991–present) are expansion franchises.⁵

By the way, the Houston Rockets (1971–present) were once the San Diego Rockets (1967–1971). Of course, the San Francisco Giants (1958–present) were once the New York Giants (1883–1957).⁶
That is a lot of cities, a lot of moves, and a lot of stadiums. That is also a lot of taxpayer and private dollars going in private and public-private partnerships to build those sports stadiums. How much exactly? Let us look at the numbers on a few stadiums.

Older & More Recent Sports Stadiums in California

Qualcomm Stadium
Former Home of the San Diego Chargers and San Diego Padres
(Opened in 1967)

Cost: $27.75 million USD\(^7\) ($199 million in 2017 dollars)\(^8\)
Financial Source: Bonds\(^9\) (The City of San Diego still owes $47 million on previous stadium renovations)\(^10\)
Government Approval(s) Needed: San Diego City Council and San Diego Taxpayers,\(^11\) with additional litigation\(^12\)
Site: Mission Valley, San Diego, California
Taxpayer approval: Yes

Petco Park
San Diego Padres
(Opened in 2004)

Cost: $456.8 million USD
Financial Source: Public-Private Partnership, $225 million financed with municipal bonds repaid by hotel taxes; $57.8 million from redevelopment funds generated within the project area; $21 million from the Port of San Diego and $153 million from the Padres\(^13\)
Government Approval(s) Needed: San Diego City Council, San Diego Taxpayers after private litigation\(^14\)
Site: East Village/Ballpark Village, Downtown San Diego
Taxpayer approval: Yes

Levi’s Stadium
San Francisco 49ers
(Opened in 2014)

Cost: $1.31 billion USD
Financial Source: Public-Private Partnership, the Santa Clara Stadium Authority (e.g., Santa Clara City Council is responsible for up to $950 million in construction loans to be repaid by the Levi’s naming rights deal and seat licensing, where the 49ers were responsible for construction overruns and the team’s annual rent is $24.5 million on a 40-year lease, and finally the National Football League provided a $200 million loan)\(^15,16,17\)
Government Approval(s) Needed: Santa Clara City Council and Santa Clara Taxpayers\(^18\)
Site: Santa Clara, California, South of San Francisco, California
Taxpayer approval: Yes

Proposed Sports Stadiums in California

Banc of California Stadium\(^19\)
Los Angeles Football Club “FC”
(Exp. open date 2018)

Cost: $250 million USD\(^20\)
Financial Source: Privately financed\(^21\)
Government Approval(s) Needed: Coliseum Commission and the Los Angeles City Council\(^22\)
Site: Sports Arena in Exposition Park, Downtown Los Angeles\(^23\)
Taxpayer approval: N/A

Chase Center\(^24\)
Golden State Warriors
(Exp. open date 2019)

Cost: $1 billion USD\(^25\)
Financial Source: Privately financed\(^26\)
Government Approval(s) Needed: Various Local Regulatory Agencies\(^27\) after private litigation\(^28\)
Site: Mission Bay, Downtown San Francisco\(^29\)
Taxpayer approval: N/A

Los Angeles Stadium at Hollywood Park\(^30\)
Los Angeles Rams and Los Angeles Chargers
(Exp. open date 2020)

Cost: $2.66 billion USD (currently the most expensive sports stadium project in the world)\(^31\)
Financial Source: Privately financed\(^32\)
Government Approval(s) Needed:
Inglewood City Council and Federal Aviation Administration (FAA) (because the stadiums height and proximity to the Los Angeles International Airport (LAX))³³
Site: Inglewood, California, Los Angeles, California³⁴
Taxpayer approval: N/A

Note: The STAPLES Center was privately financed for $375 million USD through asset-backed securitization financing.³⁵ The Lakers, Clippers, Kings, Sparks, and other professional sports teams play/played at the 1999-built arena. However, recently, Clippers owner Steve Ballmer expressed an interest in moving his franchise to Inglewood, California, to be near the Rams in a new arena.³⁷

The Future of Professional Sports Stadiums in California

The figures in the above examples are enormous—more than the gross domestic product of some small nations. In analyzing the sports stadiums in California, what is interesting is that the three proposed stadium projects in California are all privately financed, not requiring direct taxpayer funding. It is, however, the publicly-financed and public-private stadium development partnerships that have been passed through increased hotel taxes on tourists or bonds that have created issues. These deals have created issues in terms of buyer’s remorse, interest payments on bonds, and sports teams leaving town with the city and its taxpayers holding the proverbial bag.

In addition, what the numbers do not tell us are the infrastructure (parking, roadways, highways, and public transportation costs), land donations or discounts, and tax breaks that were given to team owners and developers to build the projects. However, giving business owners tax breaks and the like is as old as the nation. It is an accepted part of doing business with the government. This is especially true for capital projects that deal in community relations, specifically sports stadiums or other developments where citizens gather in what would generally be public spaces (think shopping malls and large apartment/condo projects with grocery stories, etc.).

Let us also not forget about tax-free bonds.³⁸ Legislation was presented a few sessions of Congress ago that would have prevented certain tax breaks and dollars from being used towards sports stadiums, but it was not passed.³⁹ Then again, it looks that taxpayers in California have caught on and refused, at least directly, to be responsible financially for private sports stadiums. Moreover, and maybe more directly, it looks as if team owners of the California variety have looked to privately finance their home venues with some tax incentives and revenue sharing partnerships from local and state governments. Whether those incentives are provided in the future is yet to be seen.

Is it any surprise though that sports franchise owners and league commissioners want to build new stadium homes? It has been proven that teams with new and/or greatly renovated stadiums perform better than their stadium-lowly counterparts. More specifically, professional sports franchises that have new stadiums and/or greatly renovated stadiums put more fans in the seats, sell more merchandise, host more non-sports events, and even obtain more wins and championships.⁴⁰

Why it is Important to Lawyers and Our Clients

The building of a multi-million or billion dollar sports stadium may seem of little significance to the average client of a solo lawyer. After all, the lawyers and clients involved is such stadium deals are small in number and highly experienced.

Nevertheless, our clients and we are all taxpayers and how we vote matters, especially to our pocketbooks. In addition, whom we elect in the ballot box to make decisions for us at the local level matters. Remember the phrase “All politics is local” by former Speaker of the House Tip O’Neill? It rings especially true in this circumstance because all of the taxpayer-funded
stadiums in the charts above were approved by local city council men and women. Therefore, it is important to be informed.

For those who navigate the real estate, land-use planning, and commercial development space, which includes may solo lawyer and our clients, the professional sports stadium government approval processes teaches us a lot about getting things done and being prepared. Each of the projects listed above required environmental impact reports, coastal and port approvals, and the signing-off of building permits just to break ground and to continue building once third-party groups enter the picture to litigate over land use.

In the end, sports are a part of the American Dream, our psyche, our culture, and assimilation into this country. Whether the part it plays in our lives is financial or not will be seen in how we vote with our feet and how team owners and the market respond to the three proposed privately financed stadiums in California.

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PARADIGM SHIFT: WHY RADIO MUST ADAPT TO THE RISE OF DIGITAL

by Larry S. Miller

I. EXECUTIVE SUMMARY

1. A New Challenge: AM/FM radio has been a resilient medium in the Internet era, but that resilience is weakening. While it was able to survive and adapt to the introduction of television, new digital services are beginning to change the way people listen to music, endangering radio once again.

2. From Tastemaker to Validator: Record labels and key industry charts are flocking to digital in search of tastemakers and breaking music. Increasingly, digital plays are being integrated into radio-driving charts like the Billboard Hot 100 and touted in trade ads seeking spins for new songs, weakening radio’s traditional role as a minter of hits.

3. Dawn of the Digital Generation: Gen Z music fans, born in 1995 or later, are embracing digital formats at the expense of radio use. Having grown up as true digital natives, this generation is uninterested in AM/FM radio and prefers the increased interactivity and personalization of digital services like Spotify and Pandora.

4. Discovery Migration: Radio is declining as a source to discover new music. Younger music fans are increasingly turning to sites like YouTube to find new artists and songs, leaving radio in the lurch.

5. Revenue, or Lack Thereof: Broadcast stations pay no royalties to record labels for the use of master recordings. Digital services, by contrast, are a source of discovery and revenue.

6. Dashboard Invasion: Cars, once the bastion of AM/FM radio, have now introduced competition to the dashboard, decreasing radio listenership. As newer models with improved technology continue to proliferate, radio is being pushed further and further from the center of in-car entertainment systems as drivers demand choice and access to more customized, often commercial-free, digital services.

7. Talking Is Not the Cure: Smart speakers like the Amazon Echo have sparked a new opportunity for audio-only entertainment in the home and are shaping consumer practices and preferences. Unlike cars and traditional home audio receivers, smart speakers access wi-fi networks and don’t have an AM/FM antenna at all. Without a strong digital presence, and a focus on digital streaming services, traditional broadcasters are going to be left behind in this critical and growing part of the market.

8. Improper Measurement: Radio’s ratings system can be gamed and fails to deliver on the specifics that advertisers demand. Nielsen’s current system, reliant on Portable People Meters (PPMs) in top markets, fails to take into account the passion a listener feels toward specific stations, under-samples younger and ethnic demographic groups, and has led to the mass format changes by stations devoted to softer music genres that can’t mask the PPM signal in noisier music, and led to a race for technology-driven advantages that allows richer stations to buy bigger ratings.

II. INTRODUCTION

Radio has been historically resilient when confronted with new competitive technology. When faced with new competition in the form of television, radio adapted and became portable, capitalizing on the invention of the transistor and an increased focus on local content.

However, that resilience is weakening. Radio, and music radio in particular, is now falling behind as audiences have begun to move on and listen to music on Spotify, Pandora, YouTube and other digital services via smartphones at listening locations and times of day that have been radio’s
exclusive province for nearly a century: in the car and during drive time. Car manufacturers are transitioning vehicles to be digitally compatible. Many models now come with built-in Bluetooth technology and other easy ways to integrate hand-held mobile devices, enabling drivers to listen to digital services, while other newer models are “connected cars” with built-in support for these digital services. These advances are essentially turning the car into an interactive, digital, mobile media device. Radio is facing competition of virtually unlimited choice, exactly where it has enjoyed a virtual monopoly since the first commercially successful car radio was first introduced in 1930.2

AM/FM radio had been able to wait out the digital disruption that has already affected every other form of media. Now radio is the latest industry facing massive disruption from the digital age. To survive, radio must innovate, learn from other media and take control of its path to maintain its unique position with advertisers, audiences and other stakeholders into the third decade of this century and beyond.

The structure of this white paper is as follows: In section III, we look at how the relationship between radio and record labels has changed in recent years. In section IV, we examine current research on the rapidly developing connected car and smart speaker markets. In section V, we discuss the shortcomings of the ratings system and how radio is failing to grow spot revenue while at the same time losing “favoriteness” among younger listeners. We’ll also reveal illuminating new insights from MusicWatch on teen listening. A summary follows in section VI.

III. THE CHANGING RELATIONSHIP BETWEEN RADIO AND RECORD LABELS

Radio has great reach, and most of what’s on radio is music.3 Music stations comprise about three-quarters of American commercial radio stations, and music drives about three-quarters of radio’s over-the-air advertising revenues.

In the past, radio along with television, print and in-store play exposed fans to new music. However, the music industry is now less dependent on radio as a source of music discovery and exposure. As the music market accelerates its transition from a sales model to a streaming-driven access model, radio’s contribution to music business revenue in the form of driving record sales in all formats has declined significantly.

Streaming now provides record labels the majority of their revenue, as well as directly impacting the Billboard Hot 100 chart.4 Radio is now less of a tastemaker and more of a validator of the biggest hits often discovered on streaming music platforms. Younger music fans are not turning to radio first for music discovery, and the music industry is responding.

The addition of streaming data to the Billboard Hot 100 chart, which both reflects and drives hit radio playlists, means that streaming is now playing an important part in determining which songs are played on radio rather than the other way around, reducing its status as a taste-making tool. In fact, streaming now accounts for 20–30% of the data that comprises the Hot 100, with sales at 35–45% and airplay at 30–40%.5 Streaming data was first added to the Billboard Hot 100 singles chart in 2007, when nascent streaming services like AOL Music and Yahoo Music were available in the U.S. After Spotify’s arrival in 2011, Billboard launched the On-Demand Songs chart and added Spotify, Rhapsody and others into the mix. The chart fed directly into the Hot 100 and was supplemented by the more comprehensive Streaming Songs chart in 2013, which added music video plays from YouTube and Vevo to the formula.6 Immediately following the new rules, Baauer’s “Harlem Shake” jumped to #1 on the Hot 100 driven by more than 100 million first-week views.7 “From then on, radio would have to compete with the Internet as the primary motor of pop stardom.” Pandora data was added to the Billboard formula in January 2017, immediately moving nine songs up the Hot 100 rankings by at least five places and breaking Callum Scott’s “Dancing on My Own” onto the chart for the first time.
2016 marked a tipping point for the music industry, with streaming overtaking sales as the single highest source of revenue in the U.S. Streaming accounted for 51% of all U.S. music industry revenue, up 68% from 2015 to $3.9 billion. It’s an astonishing turnaround, with streaming accounting for just 9% of revenue in 2011, only five years prior. In addition, 2016 marked the first double-digit revenue growth (11.4%) in the U.S. recorded music industry since 1998, driven primarily by a 114% increase in revenue from paid subscription streaming services to $2.5 billion.

Until now, AM/FM radio has remained the dominant force in U.S. music listening, and when the numbers are seen in aggregate, radio listening arguably remains relatively stable. But competition for audience and attention is mounting. Edison Research’s “Share of Ear” report for Q2 2017 shows that AM/FM radio is responsible for over half (51%) of all time spent listening to music in the U.S. among listeners 18 and older, with owned music at 12%, YouTube music videos at 8%, Pandora at 6% (paid and ad-supported), SiriusXM at 6% (paid and ad-supported), TV music channels at 5%, Spotify at 4% (paid and ad-supported), and podcasts at 3%.8

Importantly, radio’s audience is increasingly dissatisfied with the medium. Music Watch’s Music Monitor survey from January 2017 benchmarked AM/FM radio against streaming services regarding feature satisfaction. While AM/FM radio scored highly on ease of use in the car, with 53% of respondents saying they were “very satisfied,” the next highest rating was audio sound quality with only 27%.

Further, scores were low for features where broadcast radio would be expected to score well, such as keeping listeners in touch with what is happening locally (26%), helping listeners discover new artists and songs (22%), and having DJs/personalities/hosts that the audience relates to (18%). In addition, broadcast radio’s top feature satisfaction rating, ease of use in the car, was bested by both Spotify Premium, with 66% saying they were “very satisfied,” and Pandora One, with 75%.9

When examining radio use by the Generation Z, under-18 audience, the numbers drop even more dramatically. As we discuss in section V(c) of this paper, self-reported listening to AM/FM radio among teens 13+ declined by almost 50 percentage points between 2005 and 2016. Radio is being out-innovated by digital competitors.

Streaming services like Spotify have ascended in their importance to record labels as a vehicle for exposing fans to new music and changing the calculus of label promotion efforts. Historically, labels’ promotional focus was nearly exclusively on music radio. Currently, the traditional ROI on radio spins to sales is arguably less compelling to labels than streaming, where music discovery, consumption and monetization are integrated in one place.10 “Previously, in the era of the traditional customer journey, we generated discovery for 8 to 12 weeks (allowing customers to discover new music by promoting through intermediaries such as TV, radio and press), and then the purchase or ‘consumption’ of music would come afterwards,” wrote Samuel Potts, Head of Radio at Columbia Records UK. “In a world led by music-streaming, we are directly monetizing both discovery and consumption at the same time. We are monetizing the public’s engagement with music and the currency of that engagement is a ‘play’ on a streaming service.”11

Leading music industry analyst Mark Mulligan of Midia Research said “The power of music discovery used to lie in the hands of the radio DJ, now it lies in the hands of the playlist curator. And because streaming has melded discovery and consumption into a single whole, that means their power is becoming absolute.”12

Of course, “listening” is a form of “consumption,” even when the person listens to AM/FM radio. Indeed, the heaviest radio listeners actually generate less revenue for music companies by buying a physical CD or vinyl album, paid download or stream—than light listeners. According to the MusicWatch Annual Music
Study 2016, the most frequent radio listeners are 20–30% less valuable to the music industry per capita than the less frequent listener. For example, those who listen more than once per week spend $64 on recorded music and premium subscriptions; the less frequent, $80. This same dynamic holds true for music “products,” too—CDs, vinyl albums and permanent downloads, at $20 and $28 respectively. While radio consumption can translate into revenue for labels and digital music services, that revenue doesn’t come from obvious sources—heavy listeners—and that spending pattern doesn’t generate confidence in radio as the primary promotional tool for all genres of music.

The spin-to-sales conversion rate for radio is extremely low, according to David Touve, Director of the University of Virginia’s iLab and founder of music industry economics publication Rockonomic, calculating it at between .01% and .02%.13

And, of course, American radio does not contribute any direct revenue to the recorded music industry. U.S. radio is not required to pay royalties for the use of master recordings, an exemption unique in the developed nations with advanced intellectual property protection, and one that has been defended by the radio industry for its “promotional value.” It is beyond the scope of this paper to quantify whatever promotional value radio may provide (see Phoenix Center Study, “Promotional Effects and the Determination of Royalty Rates for Music”).14 But it is indisputable that radio’s role in the promotion of music is dramatically lower than it may have been five or ten years ago, especially among younger, active music consumers.

Music discovery as a whole is moving away from AM/FM radio and toward YouTube, Spotify and Pandora, especially among younger listeners. According to data from Edison Research and Triton Digital’s Infinite Dial 2017 webinar, AM/FM radio remained a top source for keeping up-to-date with music with 19% of all respondents citing it, second only to friends/family with 22%.15 However, this was a dramatic decline from the previous year, when 28% cited AM/FM radio. In the same report, Spotify saw the biggest increase (more than doubling from 4% to 10%), YouTube (14% to 15%) and Pandora (7% to 9%) also gained. Among new music fans making up 49% of the key age 12+ demographic (those who said keeping up-to-date with music is important to them), YouTube overtook AM/FM radio for the first time. Digging deeper into the younger generation (12–24 year olds) who find music discovery important, AM/FM radio (50%) becomes even less influential, trailing YouTube (80%), Spotify (59%), and Pandora (53%).16 This Infinite Dial insight indicates how musically—engaged young people who drive a tremendous amount of music discovery and consumption are moving away from radio at a significant rate.

Accordingly, many record labels are implementing promotion strategies that eschew radio and go directly to fans via streaming and social media. 300 Entertainment is among these labels, having achieved great success with hip-hop group Migos. After signing with 300 in 2014, the group doubled and then tripled their online imprint in just months thanks to the label’s social media tools and partnership with Twitter. They grew their fan base for three years through extensive touring and a steady stream of new music via singles, mixtapes and albums. In January 2017, Migos topped the Billboard Hot 100 chart for the first time with their single “Bad and Boujee” and followed up with their second album, Culture, which debuted at #1 on the Billboard 200 chart without relying on radio play.17 One need only look at today’s radio trade advertisements to see streaming’s impact on radio playlists, with labels promoting artists across radio formats, ranging from veteran alternative rock band Foo Fighters to hip-hop act Logic to pop singer Sigrid to country stars Dan+Shay touting their streaming figures in a bid to gain radio airplay for their latest tracks.

In June 2016, the GRAMMY® Awards changed their rules of eligibility, which previously required music to be made commercially available for sale. Now, music can be eligible for GRAMMY® nominations so long as the music appears on at least one major streaming service, such as Spotify or Apple Music.18
Music is most of what’s on radio and drives tremendous value in terms of ad sales and EBITDA for the radio industry, however the value record labels and artists get from radio is declining. Streaming is already the largest source of revenue in recorded music, and where the earliest music discovery happens. Radio programmers today are influenced by traction demonstrated by artists and songs performing well on streaming services. Record companies understand this very well.

Music fans today have many choices for access to music and are becoming increasingly dissatisfied with AM/FM radio’s traditional service offering.

It’s never been clearer. Radio has to innovate now to remain relevant as a source of music discovery.

IV. FALLING FURTHER BEHIND IN THE CAR AND HOME

Previously, radio was insulated from disruption by its stranglehold on in-car listening. According to the U.S. Department of Transportation, the typical car in the U.S. was 11.6 years old in 2016. This explains why radio hasn’t faced its disruption event yet: when it comes to in-car listening, you’re talking about technology that, on average, pre-dates the iPhone.

However, drivers are buying new cars at a faster rate than ever, with U.S. vehicle sales hitting 17.55 million in 2016, topping the previous record of 17.47 million in 2015 for a seventh consecutive year of sales gains. These vehicles come with more installed options for commercial-free satellite radio, hands-free connection to mobile devices, and installed digital music services in connected cars. The car is ceasing to be AM/FM radio’s exclusive, walled garden of captive audiences and limited choices.

The internet and the mobile phone were the first “in-home” challenges to radio, which responded to disruptive new technology in the form of cell phones with entertainment apps by fighting to force the inclusion of FM chips in cell phones. However, activation is a device manufacturer and carrier option, and so far, the nation’s largest carrier, Verizon, has withheld support while Apple has only recently allowed a downloadable NextRadio app in the App Store. AT&T, Sprint, and T-Mobile are activating chips in Android phones, but this initiative smacks of protectionism; as if buggy whips were being forced by regulation into the trunk of every new car in the early days of the automobile. Consumers didn’t demand FM receivers in their smart phones—that was the result of the broadcast lobby. Mexico recently mandated smartphone manufacturers to activate their FM chips, but “The rest of the world is not likely to follow suit...because there are too many forces arrayed against requiring FM chip activation on smartphones—especially carriers with a vested interest in consumers paying for streaming audio rather than listening free,” according to NextRadio President Paul Brenner. Time will tell whether carriers activate FM chips across the board—and whether consumers will notice or care.

Meanwhile, smart speakers present a much different challenge to radio, because smart speakers don’t have, and likely never will have, an FM chip at all. While it’s possible to listen to AM/FM simulcasts on smart speakers, the lack of real investment in simulcasting has led to a subpar listening experience.

Thus, it’s no surprise that early adopters of these devices, including the Amazon Echo and Google Home, tend to prefer digital services like Spotify and Pandora. Further, the technology titans offering these devices already have their own music services with well-developed playlists, delivering an even more refined listening experience to users, commercial-free and free for Amazon Prime members for a curated selection, and $3.99 per month for tens of millions of songs on Alexa via Amazon Music Unlimited.

A. The Connected Car
Radio believes the power of its strong, local brands will insulate it from digital competition. However, this may not be the case in the car as
the dashboard reconfigures around connectivity with advanced digital services. The car is currently the number one location for listening to radio, and automotive is the number one revenue category for radio. As such, the connected car and its multiple audio offerings may be the greatest threat to AM/FM radio broadcasting, with 75% of new cars expected to be connected by 2020.25

The interfaces controlling in-car media systems are becoming more standardized thanks to Apple CarPlay and Android Auto, which mimic drivers’ smartphone displays in-dash and come pre-installed across manufacturers, resulting in a more consistent user experience.26 Virtually every car manufacturer has made significant and potentially transformative investments in this space.

Car companies recognize the value in capturing user data and providing new telematics and entertainment offerings. Ford’s incoming CEO Jim Hackett previously ran the company’s Smart Mobility unit and has no qualms about investing in advanced digital services. In May, Hackett said “inside of our industrial businesses will be digital businesses, businesses that today have (financial ratios) a dozen times more than ours (manufacturing business).”27

Scott Burnell, global lead of business development and partner management for Ford, said the company is moving forward with a new vision of the car dashboard that includes AM/FM radio but also provides easy access to a variety of digital services via mobile phones. To that end, Ford has abandoned its proprietary Sync dashboard platform in favor of support for both Apple CarPlay and Android Auto. He urged radio broadcasters to embrace a new vision for their content that moves away from the one-to-many nature of broadcast and toward a more communicative experience in line with how Millennials and other younger generations consume content.28 “My message is evolve or die,” said Burnell.29

U.S. drivers appear to be on board with Burnell’s sentiments. According to McKinsey & Company data, drivers are increasingly more loyal to their phones than they are to their cars. In 2015, 37% of drivers responding to a McKinsey survey said they would switch to another auto manufacturer if it were the only one offering full access to apps, data, and media in their vehicles. It’s a marked change from 2014, where only 20% said they would switch manufacturers for better media access.30 This is an incentive for auto manufacturers to provide drivers with more ways to connect their phones to their dashboards, which will likely cannibalize radio’s in-car dominance as time goes on.

Furthermore, drivers are now more interested in in-car technology vs. driving performance of the vehicle when making automobile purchase decisions. In a recent Accenture study in which drivers were asked to state their preferences between in-car technology and driving performance, the most-selected answers favored a preference for better technology. Driving performance alone was the least chosen option. And when asked about importance of services for passengers (partner, children etc.), streaming music was the top answer with 63% of respondents; even higher than surfing the internet via a monitor in the car.

So car companies realize that music is a point of differentiation. Tesla, for example, is rumoured to be in talks with major labels to license a proprietary in-car music service for its Model 3 vehicle.31 Such a service would provide Tesla with two new revenue streams: one for the music subscription and the other for the usage data from its drivers. “The expectation in the auto industry is that car-related data could be a huge future business with double-digit margins (building and selling vehicles yields at best 10% in good times for most carmakers) and low capital costs.” A very real possibility exists for the in-car dashboard to be the stage of a new content battle in which radio might find it difficult to maintain positioning.

Radio finds itself relegated to a physical position further and further removed—several clicks away—from the center of the dashboard, notwithstanding limited use of single-station
In-car media screens allowing access to everything from Spotify to Pandora to iTunes are becoming the centerpiece for new models from virtually every manufacturer. AM/FM radio controls are often found below this screen, rendering them less prominent and less accessible than in the past.

**B. The Smart Speaker**

eMarketer estimates 35 million smart audio devices are already in use. According to Edison Research’s Infinite Dial 2017, 7% of Americans aged 12 and up now own a smart speaker, including both Amazon Alexa and Google Home. Edison’s Smart Audio Report, which examined smart speaker owners aged 18 and up, found that nearly three-quarters of owners (70%) said they are listening to more audio since they got the speaker—all kinds of audio. This included 65% more listening to music, 28% more listening to news/talk, 20% more listening to podcasts, and 18% more listening to audiobooks. An overwhelming 90% said they bought a smart speaker to listen to music, and 62% also said they purchased a smart speaker to “hear better music than on AM/FM radio.” AM/FM radio was also far down the list of use cases cited by smart speaker owners, with only 38% saying they regularly listen to AM/FM music radio on their device and 32% saying the same of AM/FM news/talk.

Radio believes that the smart speaker will reverse the decline in the number of radios in households. According to Fred Jacobs of Jacobs Media Strategies, “Most [millennials] don’t have a working radio where they live, so they listen to ‘radio’ on their smartphones, tablets, and laptops.” Now, we can add smart speakers to that list. But the Edison report shows that pureplay digital services have a big head start on the smart speaker platform.

Part of this issue is that, radio has not meaningfully invested in new programming or advanced digital services for smart speakers. With apologies to Curtis Mayfield, the smart speaker train is leaving the station, and it is time for radio broadcasters to get on board. AM/FM radio broadcasters need to develop a compelling digital presence in order to participate in the smart speaker revolution, but so far, there are few signs that they are doing so.

Ironically, broadcasters are uniquely positioned to take advantage of the smart speaker revolution. As Glenn Peoples of Pandora wrote, “The quick ascent of the VA [voice-activated] smart speaker is causing companies to re-think how a person engages with music in a voice-only environment. What happens when people aren’t scrolling through an MP3 collection, choosing from one of dozens or hundreds of playlists, or picking a CD to play on the home stereo? Recalling something specific can be tough.” This is where radio has the potential to shine: With established brands in local markets associated with certain genres and formats, radio stations could earn a key place in the smart speaker market by building out their digital presence.

But it won’t be easy. In addition to addressing the technical issues associated with streaming, they’ll need to adapt to the particular ways that consumers engage with smart speakers, and, importantly, to find a way to stand out. Local stations may find that their brands are confusingly similar (or identical) to the brands of other markets. And, listeners in smaller markets may decide they prefer the out-of-market options offered by big-market taste-making stations like New York’s Z100 or LA’s Kiss FM. Simply put, broadcasters will have to rely on more than their place on the dial to gain listeners; they’ll need a robust digital presence that users can identify with their voice.

Moreover, there is a significant risk that radio’s delay in entering the smart speaker market will mean missing out on the chance to shape consumer behavior. Amazon made waves in August 2017 when it added functionality to Alexa that allows it to play music for specific activities, such as running or meditation. It does so by connecting the command to a playlist created by Amazon’s editors, with over 500 activities supported and the ability to supplement them with a genre (i.e. rock music for a dinner party). In that vein, users can also ask Alexa to play music from specific genres, such as ‘90s pop,
alternative rock, and more. According to Amazon, these controls were designed around data gathered from the way Alexa users were requesting songs, and as this method takes hold, it stands to reason that someone looking for music to accompany almost any activity will ask for that playlist or activity directly, rather than a local broadcast radio station.

Broadcasters are uniquely positioned to build on their existing customer relationships and brand identities in the new smart speaker market. But if they don’t act, they will quickly lose whatever advantage they may have. If radio broadcasters aim to maintain relevance if not dominance of listenership on new and rapidly evolving platforms like the connected car and smart speakers, they will have to out-innovate and out-compete digital-born disruptors for hearts, minds and ears in a way they haven’t since the birth of their industry.

V. TO THE BARRICADES: LOSING LOCAL FAVOR AND FLAVOR

A. Radio’s Local Advertising Problem
Radio has long converted audience reach and engagement to local advertising revenue. However, indications are that radio’s favor with local advertisers and local audiences is declining, as mobile and digital options are better able to deliver accurately within local markets, with clearer ROI.

Indeed, radio’s reach might not be as large as it seems, as the standards for measurement of radio station ratings pale in comparison to the transparent and detailed audience segments delivered by digital. For example, Nielsen’s ratings system does not take into account the actual granular measurement of radio listeners. “A P1 [those listeners in the top quintile of reported listenership] can be someone who listens to a station for just a handful of quarter-hours throughout the week. Or it can be someone who tunes in to a favorite station six hours a day. A P1 is a P1. Except when they’re not,” wrote Fred Jacobs. Ratings can be manipulated to serve the narrative of those measuring them. “How many times have you heard someone say (or maybe you’ve said it yourself) that even though the numbers look bad, we have a good feeling about the format, a personality, a contest, or anything else? And so you end up acting against the cold, hard message the data is trying to deliver,” wrote Jacobs. This is not what brand marketers want to hear when defending an ad buy to their CEO or CFO.

The Personal People Meter (PPM) has now been collecting radio measurement data in top markets for over a decade. The PPM, a portable, pager-like electronic device, picks up encoded identifiers buried in broadcast audio signals. Fred Jacobs said in a blog post reflecting on 10 years of PPM use, “The great PPM hope was that listening and engagement would increase, accompanied by positive reactions from the ad community, leading to more sales and ultimately, greater credibility and respect for a medium that had fallen behind in the measurement game. Sadly, none of that happened.”

Like Arbitron before it, Nielsen has been challenged to recruit a radio measurement sample frame that mirrors the measured market. Historically, Nielsen and Arbitron relied on random-digit dialing to landlines for survey recruitment. Today, more than half of American households no longer have a landline and rely exclusively on cell phones. This has serious ramifications for accurate measurement of younger demographic groups that, along with people who rent their homes are even less likely to have a landline than the average household. Nielsen has responded by attempting to recruit participants in person, a costlier and more time-consuming approach as the number of panelists recruited by unsolicited home visits has increased to 25%.

Too-small sample sizes in smaller markets are typically addressed by overweighting, particularly in ethnic and young male households, which tend to be particularly difficult to recruit. This often leads to instability in audience estimates across rating periods when one diary can have an outsized influence on a station’s ratings.
“I just delivered a research project for a broadcaster in a relatively small market. The study contained the opinions of 600 people,” wrote consultant Mark Ramsay in “The Unfortunate Farce of Radio Ratings.” “Do you know how long it takes Nielsen to recruit a sample in this market as large as the sample in my research project? Two years. That’s right. The sample sizes in markets like this one—and markets like yours—are almost laughably small.” In fact, Nielsen is said to have deployed only 800 PPMs to cover the entire Kansas City, MO, metro area, which contains around 2 million people. "The more your clients understand about the intricacies of the ratings system, the more likely they are to be appalled—particularly in the presence of precise metrics from online radio players like Pandora and Spotify and digital natives like Google and Facebook," wrote Ramsay. "When I can go through Facebook's ad creation process and arrive at a specific number of consumers who will be impacted by my messaging with no estimates or random guesses required, what is the long-term effect of this on attitudes about media measurement?"52

Outside the roughly top 50 markets measured by PPM, radio is still measured by the paper and ink diary system in use for over 60 years, representing approximately half the country. Here too, sample size is a persistent issue. Former national radio sales executive and now consultant Gerry Boehme said “Radio is being terribly short-changed by a system that is totally incapable of measuring current broadcast channels, much less streaming and podcasting.”53

Underscoring this audience measurement failure, Nielsen’s radio rating system, dependent on Portable People Meters (PPMs), may be responsible for killing off an entire format of radio that wasn’t suited for the device. Although PPMs pick up inaudible audio signals hidden under radio broadcasts and ostensibly providing a more accurate accounting of which radio stations people are hearing on a regular basis, smooth jazz suffered tremendously under this system, as its soft sound left little room for the PPMs’ audio signal to hide behind without becoming audible. As such, 16 smooth jazz stations switched to noisier formats such as rock and sports immediately after the PPMs were introduced in 2013, and as of April 2015, the total number of jazz stations had dropped from 159 to 101.54

PPMs have also opened up new opportunities for radio stations to game the ratings. A new technology known as Voltair is now available for stations to purchase for $15,000 from equipment manufacturer 25-Seven, improving the encoding process to make their signal more discoverable to PPMs. “According to one radio-company executive I talked to whose company has used Voltair since February, it really works—spurring ratings increases in certain demographics by 20 percent to 80 percent,” wrote Carl Bialik of FiveThirtyEight. As this technology has not been adopted as an industry standard, it currently creates a ratings imbalance between the bigger stations that can afford Voltair and the smaller stations that cannot.

Spot radio revenue has been flat at roughly $15 billion since 2010. Digital radio revenues, which include online streaming of radio signals, crossed $1 billion for the first time in 2015 and is expected to grow faster than on-air revenue. But revenue accruing to radio from off-air events exceeded $2 billion for the first time in 2015.57

Radio is also losing its dominance in local advertising spend. According to BIA/Kelsey’s U.S. Local Advertising forecast 2016, radio ad revenues were at $15.4 billion in 2016, good enough to place it within the Top 5 for the year. However, 2017 is a different story. In BIA/Kelsey’s forecast for this year, radio was replaced in the Top 5 by mobile, which brought in $16 billion. “We are on the precipice of different advertising channels taking lead positions in the local advertising marketplace,” said BIA Chief Economist Mark Fratrik. “Although national and local businesses still utilize a mix of digital and traditional advertising platforms, the opportunities afforded by mobile, social and video advertising are incredibly valuable due to their measurability, adoption by consumers and enhancements by technologies such as beacons and data attribution that blend extraordinarily well with today’s mobile consumer.”59
Mobile’s ascendance is also seen in the 2016 IAB Advertising Revenue Report, up 77% from 2015 to $36.6 billion. Mobile advertising accounted for over half (51%) of the record-breaking $72.5 billion total spent on internet advertising, which was up 22% from 2015. Digital audio also earned enough internet ad spend to be measured by the IAB for the first time, bringing in $1.1 billion. The upward trend for digital advertising appears to be continuing into 2017, with total spend hitting $19.6 billion in Q1 2017, the highest Q1 earnings on record. Radio, perhaps the first mobile medium, is not remotely keeping up with the pace of innovation or revenue growth in competing mobile services.

B. Radio’s Losing “Favoriteness” Among Listeners
While radio’s reach is high, time spent listening to radio is fracturing.

Steve Goldstein, CEO of Amplifi Media and former EVP and Group Program Director of radio broadcaster Saga Communications wrote, “In 2007, radio’s TSL was around 20 hours. Today it hovers at 14 hours, and it is even lower among Millennials. While radio continues to have remarkable reach, time spent listening is shifting to other platforms. The move to mobile and on-demand is rapid. Radio needs to decide whether it is in the transmitter business or the audio business. The audience is already voting.”

Radio’s historical “favoriteness,” or the amount of people who consider radio to be their favorite medium for listening to music, declined significantly beginning with the rise of digital downloads by 2007.

“The trends are clear and from this long-range perspective broadcast radio may have missed its opportunity to take advantage of the available technology to transition listeners seeking different ways to consume music. According to a recent Bridge Ratings study, creation of alternative pure-play internet radio stations by broadcasters could have and can still capture listening that has funnelled to internet radio.”

The study also shows the change in broadcast radio “favoriteness” between 2001 when Bridge Ratings started these studies. By their estimates, broadcast radio has thus far seen a 33% attrition of “favoriteness.” 30% of the attrition has been attributed to on-line music streaming, which includes internet on-demand services like Spotify and YouTube. Internet Radio accounted for 15% attrition. This includes non-interactive services like Pandora and AM/FM simulcasts. Less than 2% of the attrition can be attributed to AM/FM simulcast streams.

Perhaps most importantly, radio is rapidly losing its audience of the future. The trend line is most pronounced among the youngest respondents to the Bridge Ratings survey, 18–34 year old adults, “few of which had a favorite (radio station) they could name.”

Few radio stations sell advertising specifically targeted for teens, which may account for the lack of teen audience studies by the trend analysts. But today’s teens are tomorrow’s 18–34’s and 25–54’s, and we thought it might be instructive to examine how today’s teens discover and consume music while they are still forming their media consumption habits and brand allegiances. The numbers are dramatic, but not surprising.

C. New Insights on Teen Listening
The rising “Gen Z” demographic is showing little interest in traditional media, having grown up in an on-demand environment as true digital natives. These individuals, defined as those born in 1995 or later, are projected to account for 40% of all consumers in the U.S. market by 2020. They currently make up 25% of the U.S. population, according to the U.S. Census Bureau, making them a larger group than either Baby Boomers or Millennials.

Teens have even more opportunity to engage with music than their post-Baby Boomer, Generation X parents. It is not only streaming that supplements radio, as teens also actively use search and social media tools and apps such as Musical.ly, Shazam and blogs to stay on top of music trends. Radio, though still important, is being challenged by these platforms as a source of music discovery.
We begin with new MusicWatch data on the overall percentage of teens that said they had listened to music on AM/FM radio in the past three months.69

This research shows that the percentage fell from the mid-70% range a decade ago in Q3 2007 to 56% by as long ago as Q4 2013, a 20 percentage-point decline. As teens continue to be presented with more digital options and grow increasingly literate in using online music services, we can expect this number to drop even further.

Not surprisingly, while teen music listenership on broadcast AM/FM was falling, the proportion of teens who listened to music on free non-interactive digital radio was on the rise. By Q4 2016 the same proportion of teens (58%) listened to music on AM/FM as online radio. It’s a remarkable transition, as online radio accounted for only 30% of teen listening in Q3 2007, compared to 73% for AM/FM. As today’s teens age into 18-34’s and beyond, broadcast radio could fall even further behind pureplay options among the audience demographic groups most sought after by stations and most highly valued by advertisers.

MusicWatch also evaluated data going back more than a decade for past-year listening to AM/FM radio among teens. In 2005, nearly 90% of teens reported that they had listened to AM/FM radio in the past year. That dipped somewhat from 2006-2008, the years that saw peak iTunes usage and increasing use of streaming platforms. Although radio engagement fell during the years that Pandora and YouTube were ramping up, a healthy majority of teens were still listening to AM/FM radio, with 2008’s 69% figure being the then-lowest percentage. However, once Spotify entered the U.S. market in 2011 and it along with Apple Music, and other premium on-demand services gained traction starting in 2014, many teens abandoned AM/FM radio. While teen listenership had remained relatively stable from 2009 to 2014, with increases in 2010 and 2012, it dropped sharply in 2015, reaching its then-lowest level of 68%, before plummeting further in 2016, dropping over 10 percentage points to 56%.

How teens listen to any music is important. However, the time that teens actually invest listening to specific platforms is a better indicator of the health and prospects for those platforms. According to MusicWatch, teens’ average weekly share of AM/FM listening hours was only 13%, far lower than streaming at 44%. These streaming figures include both pure-play music streaming services like Spotify and Apple Music and sites such as YouTube or Vevo that host music videos. While a significant percentage of teens still listen to broadcast radio, they are far more engaged with streaming options that give them some form of control over what they hear.

In the past, radio could rely on new generations of in-demo listeners to replenish and grow its audiences. However, with the advent of music and video streaming, connected devices, and an app economy, this reliance is being challenged. As MusicWatch’s research shows, many teens are abandoning radio. Some of them are completely bypassing the medium, with the number who listened both in the past three months and over the past year in decline. Even more concerning is the share of time teens spend listening to AM/FM radio, which pales in comparison to streaming. It’s worth noting that teens do not spend the same amount of time commuting in cars as their parents, but when they do enter the workforce, it will likely be in cars that are much better natively enabled for streaming.

VI. SUMMARY

Music is the lifeblood of the radio industry. It represents the vast majority of all content on AM/FM radio. And although radio continues to reach, engage and retain large audiences and generate annual revenues twice the size of the recorded music industry, the long-term trend is not radio’s friend. Today’s listener has access to virtually unlimited choices for audio and music consumption, of which radio is only one of a constellation of available platforms offering a galaxy of services from linear, lean-back and algorithmically driven to lean-forward, on-demand and self-curated—and everything in between. And while radio consolidated over the last 20
years, the industry under-invested in advanced digital music services and failed to anticipate the emergence and scale of new competitors.

The car provided a Maginot Line of defense for radio, insulating it from competition through the early years of the digital transition. But the explosion of smartphones in the last decade and the proliferation and growth of music and audio apps and pureplay digital services have weakened AM/FM radio’s dominance of in-car listening, especially among younger audiences.

What are the conditions for sustainability and growth? Unfortunately, it’s easy to describe and hard to do. But unless the industry is set to make peace with a long and inevitable decline, radio needs to invest in strong and compelling digital services. If it does, radio can look forward to a robust future built on the strong foundation it already has in the marketplace leveraging the medium’s great reach, habitual listenerhip, local presence and brands. If it doesn’t, radio risks becoming a thing of the past, like the wax cylinder or 78 RPM record—fondly remembered but no longer relevant to an audience that has moved on.

Music is everywhere, in everything, as far away as your smartphone and as close as the sound of your own voice. I’ve long wondered about the prognosis for AM/FM radio in general and music radio in particular during this long transition. Writing this paper gave me an opportunity to think about radio’s changing role in the American musical diet, and the sources and effects of that change on music, on radio and on us.

Special thanks to my friend and colleague Russ Crupnick of MusicWatch for his willingness to support this effort with several decades of consumer data, and to Laurie Jakobsen, Bill Greenwood, Madison Wiles-Hafner, Andrew Clark and Barry Massarsky for their excellent assistance, insight and advice. Thanks also to SoundExchange for the idea to crystallize my perspective in this form. Finally, thank you to the many broadcasters, business leaders, writers, analysts and academics whose work is referenced in mine. Their work served as a source of inspiration, confirmation and challenge during my research. Otherwise, the usual disclaimer applies.

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Entertainment & Sports Law

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MusicWatch’s Music Acquisition Monitor was a tracking survey which ran quarterly between 2007 and 2012, and semi-annually between 2013 and 2014. The study measured participation in various music activities including purchase of CDs and downloads, participation in piracy, streaming services used and time spent listening to music. Music Acquisition Monitor was an online survey fielded to ~5000 respondents aged 13 and older, and was weighted and projected to the US internet population. MusicWatch’s Monitor Study examines consumer usage of, and satisfaction with, a variety of audio options, including specific streaming services. The Monitor is conducted semi-annually to a sample of 3,000 music listeners aged 13 and older.

I had the opportunity to mediate a high value business dispute a few years back. The CEO of one of the parties, a globally recognized sports business, attended with his key people. He was quite engaged throughout the mediation, providing context, background information, and suggestions for the negotiation itself, including proposing possible areas of compromise. Far from letting his attorney speak for him, the CEO was front and center in the negotiations. He was very intense, intelligent, and was clearly a very successful businessman. However, what I remember most about him was his determination to get the case settled at mediation. As the mediation day wore on into the evening, when everyone else was tired and ready to call it quits, the CEO spoke up. He told us, “I’ll stay as late as it takes. Just me and the mediator, and we’ll stay and keep working with the other side.”

I look back now and realize that he was drawing on his background. Before building his international company, he was a high performing athlete. With that came qualities of determination, endurance, and a thirst to win. When I spoke at the joint session earlier that day—telling the parties that the goal of the mediation was not to demonstrate who had the stronger case, but rather the goal was to settle the case—he understood. He came to win. To settle the case meant winning. And he was not going to let his side—his team—down.

I wondered then if this sports ethic was a source of strength which could be tapped into during mediations.
Could a mediation be viewed by the participants as a contest to be “won” with a settlement? To understand how this can be done requires an appreciation for what the business of sports entails.

**Sports disputes beyond the stadium**

An athlete can see years of training and hard work evaporate in an instant. A dispute relating to eligibility, doping charges, or some claim of wrongdoing can kill an athlete’s career in a blink of an eye. There is no doubt that many “on the field of play” type disputes do not lend themselves to mediation. But what happens on the field is only the beginning of what we call the “business of sports.”

It’s not just about the athletes. Sports is a multi-billion-dollar industry. Globally, sports represents more than 3% of world trade. In the last edition of *Entertainment and Sports Lawyer*, Jeremy Evans notes that Fox pays $500 million per year to air Major League Baseball games, ESPN pays $1.9 billion per year to air Monday Night Football games, and SkySports pays $1.22 billion per year to air Premier League soccer games. That is not to mention that in 2014, the total merchandise sales figure from purchases by sports fans was $12.8 billion. And as Evans points out, this does not include other royalty and licensing agreements. These estimates also do not capture revenue from special events like All Star Games, Super Bowls, concerts and conventions; nor does this include third party revenue, such as advertising and sponsorships, as well as naming rights for a stadium.

So, when thinking about “sports disputes,” these disputes are not limited to simply those related to eligibility questions, doping charges, suspension and fines, or grievances arising out of the league rules or collective bargaining agreement. Sports disputes can involve ticket sales, venues, broadcasting rights, merchandising, video games, fantasy leagues, sponsorships, and endorsements. With increased television coverage, as well as an increase in leisure time, the numbers keep growing—including salaries. The athletes themselves have become celebrities, making sports now part of the worldwide entertainment industry.

As for how and where these disputes get resolved, they are not always contained within the confines of an arbitration mandated by the terms of a collective bargaining agreement between players and the league owners, e.g. the NFL, the NHL. Other institutions also have arbitration provisions, such as the Court of Arbitration for Sport (CAS), United States Olympic Committee (USOC), and Federation Internationale de Football Association (FIFA). But sports cases are not always arbitrated in the low key confidential venue of an arbitration room. There are claims of breach of contract, rights of publicity, trademark infringement or dilution, defamation, and a host of other claims between and among any number of stakeholders in the sports industry: the players, the leagues, the owners, the venues, the concessions, the broadcasters, the sponsors, and even the fans. These types of disputes, in the very public forum of the court system, can be splashed across the headlines of the local, national, and even international media. On top of that, a case can live on with social media, such as Facebook, Twitter, and any number of blogs. When a sports dispute arises, the level of media interest can be unpredictable and even a relatively small dispute can captivate the public’s attention.

Given the high dollar value of some of the disputes, high public interest in all things sports, as well as the high pressure nature of sports, disputes are inevitable.

**For many disputes, mediation can offer a path to resolution.**

A fair number of disputes are governed by the terms of a dispute resolution clause, contained in a collective bargaining agreement or in some other contract between the parties. Many dispute resolution clauses provide for arbitration as the means to resolve, although some simply identify a choice of law and venue for litigation purposes. Most dispute resolution clauses do not typically include a requirement to engage in mediation. In light of the many benefits of mediation, more
than one scholarly review has suggested that, in order to encourage the parties in a sports dispute to use mediation, future collective bargaining agreements should integrate a mediation step in dispute resolution clauses as a precondition to arbitration or suit.\(^5\)

For many field of play cases and similar disputes requiring an immediate—and unequivocal—decision, a quick arbitral decision is the only practical route.

Regardless of the type of dispute and venue of the dispute, most attorneys appreciate the benefits of mediation and are well familiar with its features. When any legal dispute arises, it is standard fare for most attorneys at some point—whether early on or well into the process, right up to the eve of an arbitration or trial—to suggest mediation. The culture of litigators is to consider the mediation avenue—regardless of whether it is mandated by contractual fiat. Attorneys will typically advise their clients about the benefits of settling rather than going all the way, looking for a win. To get that settlement, attorneys have long recognized that for their clients, mediation is a great tool. Estimates vary, but it can fairly be said that mediations end in settlement about 70–80% of the time, according to the American Bar Association.\(^6\) A study of Fortune 1000 companies revealed that mediation was the preferred method of dispute resolution above all others. The reasons given focused on time and cost savings, control over the issues to be resolved, the process and general satisfaction.\(^7\)

Almost all litigants find the legal process to be difficult, intrusive, and fraught with risk and uncertainty. Beyond the benefits of time, cost savings, and speed of resolution, mediation offers many other intangible benefits, like closure and finality.

Some of the advantages of mediation are particularly appealing in a sports case. A quick resolution can be invaluable to the shared financial interests of all the parties. For example, during the NFL lockout in 2011, as the season approached, both sides saw a loss of shared revenue looming. It was estimated that the revenue for each week of the preseason was approximately $200 million. With that much on the line, there was huge pressure and motivation to settle.\(^8\)

Another advantage of a mediated settlement well suited to sports disputes is confidentiality. Many disputes spill out into the press resulting in both sides exchanging damaging barbs. This damage is not restricted to the relationship between the parties. Given the huge public interest when there is a dispute, such as a lockout, a confidential resolution can be very appealing. A mediated settlement kept confidential is a much better choice when facing potentially negative publicity arising out of messy battle. The cloak of confidentiality is strengthened by the fact that, in a mediation, the specific conditions of the mediation process require that the parties agree to the confidentiality. Far from the public eye, the parties are free to negotiate without feeling the need to posture. And the team—with its brand—is spared paying the heavy toll which comes with an ugly fight. Sometimes the dispute itself may not be noteworthy, but for the identity of the parties themselves. I mediated a case in which a young man filed suit against a well-known sports apparel company. He was claiming that his image had been misappropriated by the company for commercial use. Had the case gone forward, the company would not likely have had to face a large damages verdict. However, given the David and Goliath nature of the case, it would likely have garnered attention, win or lose, had it been tried before a jury.

Although, not yet a staple of sports disputes as it is in other business cases, mediation is nonetheless gaining a toehold in sports. Most would agree that it is an emerging and effective method for many sports and sports related disputes. In the words of the late Judge Keba Mbaye, former President of the International Council for Arbitration for Sport and the Court of Arbitration for Sport, “[M]ediation can be used successfully in a wide range of sports disputes, including an increasing number of commercial and financial ones.”\(^9\)
The parties need to understand the rules of the game. Mediation is, above all, a voluntary process in which all participating parties must agree to the result. For it to be successful, both sides need to focus not on their positions, regardless of how firmly held. Rather, the parties must focus on their interests. And to serve those interests, for example, getting back to playing, all participants to a mediation must settle for less than the total victory everyone desires.

So, when agreeing to mediate a case, you need to convince your sports client steeped in a culture of excellence and winning, to settle for something less than a win. To take second best. From the Olympic Gold Medal to the World Cup, from the Super Bowl to the World Series, athletes—and all those in the sports world—know there is only one goal: winning. It is worth observing that this strong desire to win is not limited to active athletes. The business of sports itself is imbued with a culture of winning. Therefore, most of the stakeholders in a typical sports dispute, even if not athletes themselves, frequently harbor the same desire to win.

Your sports client will have no difficulty whatsoever absorbing the culture of litigation. The parties do battle, preparing ahead of time, gathering up ammunition for the big fight through discovery, and culminating in the big game, the arbitration or trial.

In sports, at the end of the game, we all know who the winner is. It’s right there on the scoreboard.

But what about mediation. How can we expect someone in the sports world to come to a mediation and give in? The cornerstone of mediation is compromise—settling for something less than a complete win. To those who live in the sports world, settling a case can feel like quitting, accepting second place—apostasy. Unlike looking up at the scoreboard to see who won, when a mediation is nearing an end, the attorneys can find themselves attempting to convince the client that settling at mediation—quitting before the big game—is a good thing.

There are certainly those bromides about a successful mediation being a “win-win.” But try to tell that to anyone who has spent time in competitive sports. There are two winners? Everyone gets a trophy? Athletes who take second place sometimes describe themselves as being “first place among the losers.” With a mindset like this, how can you possibly hope to have a successful mediation of a sports dispute?

Instead of trying to convince your client that going to mediation and settling the case is second place in lieu winning in an arbitration or trial, you need to reframe the game.

Reframe the Game. Mediation is not about giving up before the big game. Your client needs to see the mediation day as Game Day. Settling the case at mediation is the win.

Reframing the game is about applying the familiar sports paradigm of working together to win to the mediation. Too much time and effort gets spent by attorneys trying to convince their clients—that settling for less is a bitter reality the client has to accept. Instead, when you reframe the game, you are telling your client that settling the case during the mediation is the sought after goal.

Why should you reframe the game?

When you reframe the approach to mediation, you are tapping into the very DNA of your sports client: a drive to win. You are bringing them into familiar space. If you can set a specific goal for your client in anticipation of the mediation, you can motivate your client. If you do not reframe the game, it is inevitable that your client will view the mediation as a precursor to the big game.

Clients should be counseled that the game needs to be won at mediation because the benefits are great and the price of losing the mediation—not settling—can be heavy.

• Sports clients need to remain focused to be successful in their endeavors, whether those endeavors are on the field of play.
or in the boardroom. Having a competing focus—a legal dispute—is distracting.

- By resolving the dispute, your client will be better able to maintain good relationships into the future—with players, management, the league, sponsors. For example, it will hardly benefit an athlete to remain in litigation with a valuable sponsor to the bitter end. Better to resolve the dispute quickly and work together toward future lucrative deals.

- Fans are a fickle customer base. Strikes, lockouts and litigation swirling around a sport do little to improve the fan experience. To the contrary, these disputes can potentially erode fan enthusiasm. It has been suggested that when league officials cancelled the 2004–2005 season due to a dispute with the players, the NHL never really recovered.\(^\text{10}\)

- Going through to an arbitration rather than settling a dispute can have a deleterious effect on a player. A 2012 report done by Baseball Prospectus, a media outlet that conducted an analysis of the MLB, found that players who went through arbitration were less likely to re-sign long-term deals with their teams.\(^\text{11}\) Another study of MLB statistics from 2001–2004 found that 62% of players who went through arbitration performed “worse” or “substantially worse” compared to the previous season. Of those who performed better, many had switched teams.\(^\text{12}\)

- The harm is not just limited to a particular player. In the wake of a hail of personal attacks made by both sides during the 2012–2013 NHL contract dispute, both the players and owners were harmed. But the damage went further than those particular parties in the dispute. In fact, a brand analysis study was conducted on this very point. The results were, in the words of the head of the firm conducting the study, “quite alarming.” The damage to the NHL brand was found to be at a level greater than that suffered by BP from the 2010 Gulf of Mexico oil spill.\(^\text{13}\)

Therefore, your client should realize that keeping a dispute alive, and going forward to an arbitration or trial can come at a steep cost—even when you win.

**How do you reframe the game?** Those in the sports world understand the value of preparation. Certainly, preparation should include spending time learning the facts and legal arguments which support a position. But a successful mediation is not simply about both sides advocating their positions. So, preparation must be more than just knowing your own case. Much has been written about confirmation bias and the refusal of either or both sides to recognize strengths in the other side’s case or weakness in your own. Preparation, which includes a hard assessment of any weaknesses in the case, is crucial. Preparation, which includes a recognition of the strengths in the other’s side position, is similarly necessary. It is important that your client be engaged in this preparation process. A prepared client, like a prepared athlete, will perform better.

**Do it for the team.** If working together toward a shared goal sounds familiar, it is because that is what sports is about. When Bill Russell spoke of his ego demanding a victory for his team, it reflected the source of a team’s true greatness: the legends in sports have always sought victory not for simply for themselves. Rather, they do so because they want victory for their team. Teamwork is not just about working together, it is about working in a way to help fellow teammates. The group effort dynamic at work reveals that when people think others are counting on them, they work harder.

Experiments done relating to this group effort dynamic have yielded very interesting results. For example, in studies done of a group of people all pulling a rope together, the individual effort of each one participating in the group effort is less than when that person is pulling alone. Researchers have called this “social loafing.” Similar experiments involving test subjects shouting, demonstrated that those shouting as
part of a group did not shout as loudly as when they shouted alone. The conclusion is that when people are anonymous in a group, they do not work as hard. However, there was one exception to this phenomenon of social loafing. That exception was when the experiment utilized just a pair of people. For example, given the information that the fellow shouter was a “high effort performer,” the other shouter suddenly shouted even louder than when shouting alone. This has led researchers to the conclusion that when armed with the knowledge that someone else is counting on a fellow participant, a team member will give more of himself.\(^\text{14}\) I believe that this group effort dynamic, at work in successful sports teams, such as the Boston Celtics who won eleven NBA championships in thirteen seasons, can be mobilized when at mediation.

Make your client feel that coming to the mediation is being part of a team. Your client will not want to let down the team. Instead, your client should enter a mediation determined to be part of the team and wanting to make the effort to get the case settled.

\textbf{The team takes the field in the new game.} In this newly reframed game, your client comes to the mediation understanding that by working together, victory can be achieved: the case can get settled.

In a mediation, the team obviously consists of the attorney, client, and others such as an agent, spouse, the CEO or CFO, or inside counsel. The shared goal is not to simply advocate the team’s position. Rather the effort should include acknowledging weaknesses, asking questions, and suggesting areas of compromise.

Too many attorneys bring their clients to mediations to serve simply as props. The clients sit there, saying nothing, while the attorney makes the presentation and responds to the mediator’s questions or comments. To have buy-in for a settlement, the client needs to be engaged and to be heard. The “day in court” which is necessary for clients to get closure will not be experienced if the client simply sits by and listens to the attorney speak. It is healthy and helpful for clients to say their peace. Your client cannot feel like part of the team without getting into the game. In 2011, just before the current collective bargaining agreement was set to expire, the NFL and the NFL Players Association, began what was to be a series of three mediations. Set among a host of legal proceedings, the level of suspicion and hostility between and among the various stakeholders was high. Two mediations failed to achieve a settlement. But after months of contentious negotiations, the last mediation resulted in a signed contract. One of the factors which made the difference was no doubt the increased use of face-to-face dialogue. In the earlier mediations, there were many private caucus sessions, with the mediator engaging in shuttle diplomacy. While the practice of shuttle diplomacy is certainly a staple of any mediation, this practice does not always permit the level of engagement a sports client needs and wants. One of the players who participated in the NFL mediation, expressed his frustration at having minimal contact and interaction with the other side, stating that even though the players were there for about 17 days, they spent an aggregate total during the mediation of about twenty hours in front of the owners.”\(^\text{15}\)

But it is not enough to simply be face-to-face with the other side. It is about being an active part of the team dynamic. Because the players further complained that when there were face-to-face discussions, just the attorneys spoke.\(^\text{16}\) To have your client invested in the result, your client needs to be in the game. Do not sideline your client for fear they will say something wrong. Their active participation will be worth the risk because they will be invested in getting the settlement, getting the win.

\textbf{A new team roster.} This is the hard part. When you are at a mediation, the goal of a mutually agreeable resolution is obviously shared with the other side. An unusual paradigm for those in sports: working with the opponent. But to get a case settled, this must be done. Each side must try to see the other’s side perspective, and must be willing to offer concessions: “What if we did this...would that help?” or “We do not absolutely

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have to have that. So, what if we compromise on this item?” These are exchanges that get cases settled. And that can most likely happen if your sports client is part of the group effort dynamic, actively working toward success.

Once both sides understand the value of working together, negotiations can be more fruitful. Looking at the successful third round of the NFL mediation in 2011 is instructive on this point. In the earlier rounds of mediations, various members of both sides spoke to the press regarding their side’s views and the status of the negotiations. However, in the third mediation several months later, the parties working together, maintained a united front in responding to the press. They issued joint statements during the pendency of the mediation and the parties refrained from talking to the press separately. In other words, the parties began acting together as a team. Once they all determined that together they could tackle the problem—how to resolve the dispute—a signed collective bargaining agreement was not far behind.

**Teamwork requires that no one quit.** When parties end a mediation by walking out or announcing that it looks hopeless after a long day and that the two sides are too far apart to justify further effort, this is exactly when your sports client can shine. The mediation day is the opportunity for the parties to be asked to meet the challenge of a difficult dispute. They do not quit on the field or pitch, on the ice, or on the court. If they are reminded that the goal of the day is to win—that is settle—the case, they will not quit.

**Win the Mediation.** Sports disputes usually involve people steeped in the culture of sports. A culture of not quitting, a culture of winning. These people know that if they quit, they will let down their teammates. They do not want to take second best. So, ensure that your client understands the huge benefits of settling at mediation, so they can appreciate that a settlement is not second best, but rather a big win. Ensure that your client is prepared to work hard by cooperating and compromising. Ensure that your client knows the risks ahead if the case does not settle. If you do these things, your client is more likely to arrive at a mediation ready to be part of the winning team.

When you reframe the game, mediation day is Game Day.

**About the Author**

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2 IAN BLACKSHAW, MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES (T.M.C. Asser Press 2002).


4 BLACKSHAW, supra note 2, at 1.


7 Thomas Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict*
Songwriters – Grab a Fork and Dig into the Spotify Settlement Pie

In May 2017, individual lawsuits filed against Spotify by David Lowery and Melissa Ferrick (and later joined) reached a settlement to the tune of $43.5 million. The suit arose after Spotify allegedly failed to compensate songwriters with publishing income deriving form mechanical licenses. From the start, Spotify maintained its denial of any wrongdoing in that respect, but to no avail. Spotify’s valiant attempts to derail the litigation were unsuccessful, ultimately leading Spotify to settle.

Songwriters, do you qualify for compensation under the Settlement Agreement? Here is what you need to know: First, do you qualify as a Class Member? You do if you own a musical composition copyright (actually registered with the U.S. Copyright Office before June 29, 2017), for which Spotify made available for downloading and/or interactive streaming, without a license, and did so between December 28, 2012 and June 29, 2017. Parties and/or entities exempt from the Settlement Agreement include Spotify and its affiliates/employees, government entities at all levels, members of the NMPA and other parties to a “Participating Publishing Pending and Unmatched Usage Agreement” between Spotify and NMPA.

Second, if you do qualify, you must submit your claim form to Garden City Group, LLC, who is tackling administration of the settlement funds. Forms are available at www.SpotifyPublishingSettlement.com. The form
is self-explanatory: name, contact information and the musical compositions you claim are subject to the Settlement Agreement (pursuant to the above conditions). In addition, you will need to identify the “Track Identifier” for each recording on Spotify featuring that composition and can utilize Spotify’s Track Database (www.SpotifyPublishingSettlement.com) to help you determine that information.

Hearing on final approval of the Settlement Agreement is scheduled for December 2017. If approved, however, Spotify will also have the opportunity to appeal and unfortunately, settlement funds may not be paid to Class Members until any such appeal(s) are resolved. Presuming the Settlement Agreement is approved and either no appeal is taken or an appeal is decided in favor of the Class Members, those Class Members will essentially take a percentage of the funds based on the number of streams of their compositions as well as payment of mechanical royalties for future compositions. In other words, payment could be substantial, depending on the number of plays in question for a respective Class Member. If you believe you may qualify as a Class Member under the Settlement Agreement, it is certainly in your best interest to investigate and take the appropriate steps to ensure your proper compensation. (See generally, https://www.digitalmusicnews.com/2017/08/08/spotify-songwriter-settlement/, August 9, 2017)

Watch Out ASCAP & BMI, SESAC Just Stole the Limelight!

Although it seems social media has been saturated with posts, articles and blogs detailing ASCAP’s and BMI’s journey in challenging their respective Consent Decrees, SESAC may have stolen the limelight (albeit, temporarily), in light of its landmark U.S. radio deal with the Radio Music License Committee (“RMLC”). By way of reminder, arbitration between SESAC and the RMLC has been ongoing since 2015. The result is in and according to SESAC, the rates reflected in its RMLC arbitration award are approximately 50% higher than the rates ASCAP negotiated via its deal with RMLC in December 2016. The SESAC decision derives from a panel of three independent arbitrators who determined the rate SESAC can charge terrestrial radio stations represented by the RMLC, between January 1, 2016 and December 21, 2018 (e.g. over 10,000 commercial radio stations). Before this decision, no independent panel had set the rates paid by U.S. radio stations to a performing rights organization. This gives hope to those currently struggling with RMLS to come to a resolution on fair and reasonable rates, including Irving Azoff’s, Global Music Rights.

As most of us are aware, ASCAP and BMI are governed by Consent Decrees, which determine how fee disputes are resolved. By voluntarily signing its deal with RMLC, ASCAP avoided the risk of legal fees that would ultimately decrease member royalties. SESAC, on the other hand, has the ability to resort to commercial arbitration in resolving its license fee disputes thus better allowing its rightsholders to “realize the fair market value of their works.” In fact, Chairman and CEO of SESAC Holdings, Inc., summed it up himself “…the panel’s decision is a resounding affirmative of the fact that ASCAP rates in radio do not reflect fair market value.” Luckily, for SESAC members, private shareholders will be fronting the arbitration costs instead of shifting those costs directly to its members.

Others affected by the deal include SOCAN and APRA, who represent a share of U.S. radio play. (See generally, http://mailchi.mp/musicbizworldwide/SESAC-strikes-landmark-US-radio-deal?e+000a25ccc8, on July 31, 2917).

Licensing Transparency – Within Arm’s Reach?

ASCAP and BMI may be joining forces again, but this time, to better ensure transparency in music licensing. However, the notion of combating transparency concerns only as the same relates to their repertoires has raised concerns for many, particularly in light of a new bill introduced to Congress that is geared to addressing licensing concerns for all parties affected. Specifically,
In July 2017, the Transparency in Music Licensing Ownership Act was introduced by U.S. Congressman, Jim Sensenbrenner. The legislation is intended to address three main points:

1. Require the Register of Copyrights to create and maintain a database compiled of musical works and sound recordings, and to hire individuals and spend funds necessary to help carry out these functions;

2. Ensure public access to the database, free of charge, in real-time, using up-to-date technology; and

3. Limit remedies available to copyright owners to bring infringement actions for violation of performance, reproduction or distribution rights, if that owner/authorized party failed to provide or maintain the information required by the database for the works at issue.

As mentioned earlier, following introduction of this bill, ASCAP and BMI announced they too would be creating a similar database, set to launch in late 2018. However, that announcement was met with some controversy, including from Representative Sensenbrenner, who stated that such a database would be incomplete given its failure to encompass all PROs. The ASCAP/BMI combined repertoire database was also met with criticism from The Music Innovation Consumer Coalition who vocalized their support for the Congressional bill in light of what it deems would be a “neutral, reliable and comprehensive database.”

In other words, a complete resolution is better achieved via the Transparency in Music Licensing and Ownership Act, since it includes all PROs and the works governed by each PRO. Currently, the PRO databases are incomplete and each PRO disclaims accuracy of and liability resulting from use of their databases. In light of the same, it would seem the new legislation would serve all interested parties and provide the kind of transparency needed to not only protect rights, but to also ensure proper compensation for usage of a work.

Singh v. PGA TOUR Order on MSJ

In May 2013, Vijay Singh, a professional golfer and a lifetime member of the PGA Tour (the Tour), filed suit against PGA Tour, the organizer of the main men’s professional golf tours and events in North America. Singh claimed that Tour unfairly suspended him for using deer-antler spray before it consulted with the World Anti-Doping Agency (WADA). The WADA previously ruled that the deer antler spray was not a violation so long as the player did not fail a drug test. Singh admitted to using the spray in a Sports Illustrated article back in January of 2013. The article suggested that the deer antler spray was a banned substance. Upon publication, Singh contacted the Tour to address the allegation. The bottle of deer antler spray was sent in to be tested. The bottle tested negatively; however, “IGF-1” or insulin-like Growth Factor-1, was identified in the substance. IGF-1 is listed as a prohibited substance by the WADA. Per the results, the Tour informed Singh that he was to be suspended for a period of 90 days and his earnings from competitions would be held in escrow until the court ruled on the issue. Shortly after, WADA issued a letter announcing deer antler spray is not considered prohibited.

Singh then commenced this suit claiming that the Tour recklessly administered its anti-doping program, exposing Singh to ridicule and humiliation. Singh asserted causes of action for negligence, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, intentional infliction of emotional distress and conversion.

After almost five years of back and forth, the Supreme Court of the State of New York Denied Singh’s Motion for Summary Judgment and Granted in Part and Denied in Part the Tour’s Motion for Summary Judgment.

The Court agreed with the Tour and stated that the Tour acted reasonably when they suspended...
Singh considering the article. The Court argued that it was not necessary for an organization of their stature to consult the WADA prior to the suspension. Furthermore, the Tour acted reasonably when they revoked the suspension upon the determination from the WADA regarding the deer antler spray. Ultimately, the Court gave it to a jury to determine whether the Tour’s decision not to consult the WADA and/or ignore WADA studies and findings prior to Singh’s suspension concerning such substance constituted an “appropriate” investigation.

The Court granted summary judgment as to whether the Tour breached its duties of good faith and fair dealings by testing the very bottle provided on Singh’s behalf for purposes of testing. Singh knew the Tour’s intention when it asked for the substance he had been using.

The Court left the issues of (1) whether the Tour breached the implied covenant of good faith and fair dealing by publicly speaking through the then Executive Vice President—Ty Votaw and (2) what, if any, damages did Singh suffer as a result of the Tour’s public discussion of the deer antler spray and its alleged prohibition and whether such discussion breached the implied covenant of good faith.

Finally, the Court dismissed the Cause of Action for Conversion arguing that because there was a potential violation of an anti-doping rule violation, the Tour was entitled to escrow all of Singh’s funds.

**Lochte v. Ember Therapeutics Petition**

Ryan Lochte, an Olympic Gold Medalist, agreed to be sponsored by Ember Therapeutics, a headache medicine. The sponsorship was born just weeks after the Olympic swimmer was suspended from competing for 10 months due to falsely asserted claims. Lochte claimed that he was held at gunpoint at a Rio gas station during the 2016 Olympics. In response to the fairy tale, Lochte was dropped by high profile sponsors including Speedo and Ralph Lauren.

However, Ember Therapeutics believed that in spite of his past Lochte still had an outstanding career ahead of him. Therapeutics also had skeletons of their own. In 2014, Ember had filed bankruptcy but was bought out by another pharmaceutical company the following year.

Shortly after they struck the deal, Ember breached its obligation to pay Lochte his dues. The deal required Lochte to pursue such dispute through the American Arbitration Association in New York. On April 5, 2017, after considering all submissions of Lochte and Ember, the Arbitrator entered the Award for $125,000 in Lochte’s favor. Lochte filed a Verified Petition to Confirm Arbitration Award on April 7, 2017. The Court Confirmed the Award; Granted judgment in the amount of $128,250.00, and granted any further relief the Court deemed just and proper.

**Evans v. Cardinals SJ Order**

In 2015, twelve retired National Football League (NFL) players and the estate of a thirteenth filed suit against 32 member clubs of the NFL. The retired players and estate asserted three main allegations against the NFL clubs. First, general managers, coaches, and media attention allegedly pressured players to return to play as soon as possible despite injury or pain. Second, the clubs allegedly pressured players to return to play through non-guaranteed contracts that could be terminated at any time (also known as being “cut”) if players failed to perform. Third, club doctors and trainers allegedly provided injured players with prescription medications in lieu of adequate rest to return them to play as soon as possible. Furthermore, they alleged that the clubs colluded together.

The players claimed that they were given medications after games without knowledge of what they were taking. The team doctors would beat around the bush when asked about what medicines they were taking or the possible side effects or long term effects. Moreover, the doctors failed to inform the players of health risks associated with mixing certain medications, or
with mixing medications with alcohols provided by the clubs.

On July 21, 2017, the U.S. District Court for the Northern District of California filed an Order Granting Motion for Summary Judgment for the remaining two defendants. At this time only three claims remained: (1) By plaintiff Reggie Walker against defendant San Diego Chargers, based on allegations that (a) the club misrepresented that it cared about and prioritized players’ health and safety when in fact it prioritized getting players to return to play, even when injured, at the cost of their health and safety; (b) in reliance on those misrepresentations, Walker sprained his ankle during a game in 2014 but continued to play every game thereafter for the rest of his career with Toradol injections from the club doctor; and (c) as a result, Walker continues to experience pain in his ankles; (2) By plaintiff Alphonso Carreker against defendant Denver Broncos, based on allegations that (a) the club misrepresented that it cared about and prioritized players’ health and safety when in fact it prioritized getting players to return to play, even when injured, at the cost of their health and safety; (b) in reliance on those misrepresentations, Carreker regularly consumed enormous quantities of anti-inflammatory drugs; and (c) as a result, Carreker underwent heart surgery in 2013 to drain inflammation from a heart infection after anti-inflammatory drugs proved ineffective due to the resistance he had built up during his playing career; (3) by plaintiff Carreker against defendant Green Bay Packers, based on the same allegations as against the Broncos.

The Chargers, Broncos, and Packers moved for summary judgment asserting that all three remaining claims were barred by workers’ compensation exclusivity. Not wanting to diminish the underlying societal issue, the court made note that player injuries are a serious and inevitable evil and proper care of such injuries is a paramount need. However, the Court granted Summary Judgment based on the conclusion that there is no dispute of fact nor is the remedy sought by the players available under law.

Hernandez v. MLB Complaint

Hernandez filed suit against Major League Baseball (MLB) claiming that (1) discrimination in Violation of Title VII of the Civil Rights Act of 1964; (2) discrimination in Violation of Section 1981; (3) Discrimination in Violation of O.R.C. § 4112.02; and (4) Declaratory Judgment.

Hernandez, an umpire employed by MLB, has been an umpire for the MLB since at least 1993. The MLB regularly conducts evaluations of its umpires. Generally, these evaluations are conducted in the middle of the season and the seasons’ end.

From 2002 to 2010, Hernandez received multiple “exceeds standards” ratings in the areas including hustle, fraternization, four-umpire mechanics, demeanor, style and form of calls, reactions to developments of plays, situation management, official baseball rules and interpretations, and focus. His accuracy was frequently praised by the Office of Commissioner, MLB’s front office. Year after year Hernandez received commendable evaluations. In 2011, Hernandez did not receive any “exceeds standards in his evaluations. Hernandez claims that this was due to the Front Office change naming Joe Torre as the Executive President for Baseball Operations. Hernandez further claimed that such bad reviews were from the history of animosity between himself and Torre. In 2012, Hernandez received multiple praises from individuals; however, his evaluations did not reflect such praises. The 2013 season reflected the same issues. In 2014, Hernandez presented interest in a crew chief position for the World Series; however, the Office of Commissioner repeatedly higher other less qualified umpires for the position. Hernandez believes that he is fully qualified to be assigned to the World Series.

Hernandez has applied for the position of crew chief at least four times since 2011, including this past season. If an umpire expresses written interest in the position of crew chief but is not promoted to that position, the Office of the Commissioner must, upon request by that umpire, give a written explanation of the
reasons why that umpire was not chosen for the position of crew chief. That explanation must be provided to the umpire by the beginning of the championship season. Hernandez alleges, both Hernandez and the World Umpires Association requested a written explanation from the Office of the Commissioner as to why Hernandez was not promoted to crew chief for the 2017 season. On or about March 27, 2017, Torre responded to these requests on behalf of the Office of the Commissioner. In the March 27, 2017, letter, Torre stated that Hernandez needed to “gain greater mastery of the Official Playing Rules and Replay regulations, continue to improve [his] situation management, and display an ability to refocus and move forward after missing calls or receiving constructive feedback from the Office.”


**Miranda v. MLB 9th Cir Opinion**

The 9th Circuit Court affirmed that minor league baseball players are exempt from federal antitrust laws. Major League Baseball (MLB) is an unincorporated association of thirty MLB franchises. Within each franchise is approximately 40 baseball players on its “40-man roster” with up to twenty-five players on its “active roster,” who may play at the major league level. Each franchise has its own “farm system,” which employs 150 to 250 players who compete at the minor league level. MLB requires all franchises to use its Uniform Player Contract when hiring minor league players. Once executed, all contracts are filed with the MLB Commissioner for approval. Within the player contracts, the MLB franchises receive exclusive rights to their minor league player for seven championship seasons. This eliminates the ability for players to play for any other team during such contract period. The MLB franchises do have the opportunity to transfer amongst themselves their exclusive rights to a player at the end of each contract season.

On February 5, 2015, the Players filed a complaint against the Office of the Commissioner of Baseball, former Commissioner Allan Huber “Bud” Selig, and the MLB's thirty franchises (the Owners). Seeking declaratory and injunctive relief as well as damages, the Players allege that MLB’s hiring and employment policies have violated federal antitrust laws by “restrain[ing] horizontal competition between and among” the MLB franchises and “artificially and illegally depressing” minor league salaries. In response, the Owners filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the business of baseball has long been exempt from federal antitrust laws, and Congress specifically declined to take minor league baseball out of the scope of the exemption. The district court granted the Owners’ motion to dismiss and the Players timely appealed.

The Supreme Court first exempted the business of baseball from these federal antitrust laws almost a century ago in Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). In Federal Baseball, the Supreme Court held that the business of baseball does not constitute “trade or commerce among the several States,” 15 U.S.C. § 1, and therefore is not bound by antitrust laws because the “business is giving exhibitions of baseball, which are purely state affairs.” Federal Baseball, 259 U.S. at 208. Comparing the baseball league to a law firm sending a lawyer to another state to argue a case, the Court reasoned that the need for baseball teams to cross state lines to attend competitions was
“mere[ly] incident[al]” to the business itself. Id. at 209.


Conversely, the Players argue that the baseball exemption does not apply to minor league baseball because Federal Baseball, Toolson, and Flood did not decide the issue of “whether major league baseball and its constituent clubs could conspire to fix the salaries paid to minor league players.”

The Court understood the farming system to be synonymous as being hired directly with the Franchises, therefore, the minor leagues fall into the same exemption as major league players. That being said, the Court affirmed the minor league exemption from federal antitrust laws.


Spielman alleges that he nor any other of the former or current student-athletes transferred or conveyed their rights in the licensing or use of their image or likeness to OSU or IMG/WME or their Co-Conspirators. Spielman claims that there are less restrictive alternatives other than OSU’s “zero compensation” policy on licensing rights.

Spielman requests a jury trial and awaits the Courts decision on such allegations.

**Spielman v. IMG College, OSU Complaint**

Spielman on behalf of himself and former and current student-athlete who competed for Ohio State University’s (OSU) football program. Spielman alleges that those who participated in the Program had their images licensed or sold or distributed by OSU, their Co-Conspirators, or their licensees preceding the filing of this Complaint (the “Class Period”), and will continue in the future. Plaintiff also brings this action on behalf of current student-athletes competing in the Football Program, as well as former and current student-athletes of the Football Program, for purposes of the injunctive relief class only, as both groups’ future compensation rights are impacted by the anti-competitive practices.

**FCC Moving Towards Reversing Title II of the Communications Act**

In May of 2017, the Federal Communication Commission moved forward on a proposal that would reverse the 2015 decision to classify broadband as a utility under Title II of the Communications Act. The agency made its final proposal, known as a Notice of Proposed Rulemaking, available to the public on May 23, 2017. That proposal kicked off the official period
for public comment, with all comments due by mid-July.

The 2-1 vote to move forward with this proposal could result in a change to the net neutrality principles which prohibit Internet Service Providers (ISPs) from blocking or prioritizing traffic. Essentially, net neutrality assures open and consistent access to all content that comes over an ISPs network.

The goal of the proposal is clear, as the proposal itself states that the 2015 rules “put at risk online investment and innovation, threatening the very open Internet it purported to preserve.” It proposes to eliminate the general conduct standard and suggests not adopting any alternatives to the rules. The proposal also asks whether net neutrality principles are even necessary and indicates a preference of no rules.

There has been concern that this new proposal will backfire and instead of keeping the Internet open, it will allow ISPs to exact a toll from content providers in order to get their content passed through equally. There have also been First Amendment concerns, as net neutrality rules currently prevent ISPs from blocking content of their choosing. Companies that refuse to pay more, or are unable to pay more, for faster speeds will likely lose viewers, as customers tend to visit sites that load quickest, which could give ISPs the power to drive traffic, or block traffic, from sites. The proposal does discuss that other sources of authority, such as Section 706 of the Telecommunications Act, may be able to implement rules moving forward. The next vote is expected to be near the end of August.

Is a License Needed to Show Tattoos?

In August of 2016, Solid Oak Sketches, LLC brought a claim against 2K Games, Inc. and Take-Two Interactive Software, Inc. asserting copyright infringement. 2K and Take-Two had recently released the latest version of the popular NBA 2K video game series, a game called NBA 2K16. The new game featured players in significant detail, including the tattoos the players sported. Solid Oak’s copyright claim is based on the fact that it had copyrights in several of the tattoo designs that were shown in the game. The two companies have been in court over this copyright issue for more than a year.

Take-Two has gone on the defensive with counterclaims that sought a judicial declaration that its use of the tattoos is both fair use and de minimis use. This past May, the District Court allowed those counterclaims to proceed, noting that resolution of this issue would be useful to the community in general and would relieve uncertainty.

Tattoo copyright is not a new issue, but the majority of cases involving tattoos and copyrights have been settled and therefore, there is not a decision to be cited as precedent. Take-Two’s attorney argues that if Take-Two’s use were considered infringement, “anyone appearing in public, on a television program, or in an advertisement would need to license the display of their tattoos,” which he called an “encroachment on basic human rights.”

As the case proceeds, with Take-Two’s counterclaims included, it has potential to be the first time a court has decided the issue of copyrights and tattoos and will ideally clear up confusion around the increasingly common issue.

Virtual Hotspots May Mean Real-Life Trespass

Niantic, Inc. is facing a class action lawsuit over the popular game, Pokemon Go. The game sends users out into the real world to “catch” Pokemon and visit hotspots, also known as Pokestops and Gyms. The problem? Those Pokemon, Gyms, and Pokestops may be in someone’s backyard. A group of homeowners who are frustrated with Pokemon Go players invading their space have filed a lawsuit against the game’s developers, alleging violations of trespass and negligence laws. Niantic, one of the game’s creators, fired back, arguing that players are required to agree to “Terms and Trainer Guidelines” which specifically note that players
should not break the law to play the game. That argument was not enough to satisfy the homeowners who note that Niantic specifically put Pokemon, Pokestops, and Gyms on private property, even though it should have known that players would go to them, resulting in trespass and a nuisance to the property’s owners. The brief filed goes as far as to argue that landowners should have a right to refuse the placement of virtual objects on their property when the virtual objects offer an incentive for people to come to the location. Niantic stuck with their argument that trespass does not extend to virtual objects, but only tangible objects, and has moved to dismiss the homeowner’s claim.

Another defendant, The Pokemon Company brought its own motion to dismiss in April of 2017, arguing that the Japanese-based company is not subject to jurisdiction, and further that the unlawful acts are attributed to the other Defendants, who had more of a role in placing the virtual objects. The case is currently still pending in the Northern District of California.

The outcome will be closely watched by video game makers and any other companies hoping to create in the virtual world. If the defendants are held liable for trespass or negligence, it will likely affect how games that merge virtual and real life are created in the future. On the opposite side of the coin, a victory for the defendants may open the doors for more games akin to Pokemon Go, and more frustrated homeowners.

Facebook and Twitter Defeat Patent Claims on Web Publishing

In May of 2017, Twitter won a ruling that will bring an end to the patent infringement cases brought against the company by Easyweb Innovations LLC. Easyweb has also brought infringement suits against Facebook, which are expected to end as a result of this decision as well. The patent lawsuits brought by Easyweb are based on a family of patents relating to internet publishing that Easyweb obtained in 2006 from a software developer based in New York.

Prior to suing Facebook and Twitter, Easyweb sued photo-sharing services Photobucket.com Inc. and SmugMug Inc., along with the social network Myspace Inc. All of those cases settled. Easyweb’s latest lawsuits, against Facebook and Twitter, began in 2011.

In March of 2016, the District Court judge granted Twitter’s motion for summary judgment and ruled that the five patents asserted by Easyweb all relate to the abstract idea of authenticating messages. Easyweb appealed the ruling and agreed that if it lost the appeal it would also drop the case against Facebook.

Easyweb argued that the District Court failed to address the patents in their entirety and that the patents are directed to a specific message publishing system. That argument did not hold up. The Federal Circuit Court held that all the claims were directed to an abstract idea and that they fail to transform the abstract idea into a patent eligible invention.

Supreme Court Tightens Patent Suit Rules

In the recent case TC Heartland v. Kraft Food Group Brands, the Supreme Court tightened rules for where patent lawsuits can be filed. The decision is expected to make it harder for “patent trolls” to “shop” in an attempt to bring their cases in friendly courts.

In an 8-0 decision, the Court held that patent suits can be filed only in courts located in the jurisdiction where the targeted company is incorporated. This decision directly overturned a prior ruling by the U.S. Court of Appeals for the Federal Circuit and upended over 20 years of patent law.

The decision is applauded by high-tech companies such as Apple, Google, and Microsoft, who have frequently faced patent lawsuits and have been vocal about the need for reform. Many believe the Court’s decision is a positive step in curbing shaky patent litigation and may address the amount of poor-quality patents that will be
enforced. At the very least, it gives the companies being sued a potentially valuable home court advantage.

Federal District Court Orders Former NFL Player to be Paid Full Disability Benefits (Solomon v. Bert Belle/Pete Rozelle NFL Player Retirement Plan)

The U.S. Court of Appeals for the Fourth Circuit addressed whether the plan administrator for the Bert Belle/Pete Rozelle National Football League (NFL) Retirement Plan and the NFL Player Supplemental Disability Plan, abused its discretion by denying disability benefits to Jesse Solomon, former NFL player. The court ultimately held that the NFL’s disability plan administrators ignored compelling evidence of a retired player’s Chronic Traumatic Encephalopathy (CTE). CTE is a disease associated with trauma usually related as a result of helmet to helmet contact.

Jesse Solomon played for nine seasons as a linebacker in the NFL. Over the course of Jesse Solomon’s NFL career, “it was estimated that he sustained approximately 69,000 full-speed contact hits.” After retiring from football, Solomon began as second career as a teacher and football coach. Unfortunately, this did not last long as a result of the injuries sustained while playing in the NFL. Solomon began to experience pain throughout his body including intense headaches, dizziness and blurred vision. Medical tests conducted revealed that Solomon’s brain showed signs of CTE and as a result he struggled to concentrate and remember things. As a result of Solomon’s injuries he sought to claim benefits under the Bert Bell/Pete Rozelle NFL Retirement Plan and the NFL Player Supplemental Disability Plan.

The Bert Bell/Pete Rozelle NFL Retirement Plan and the NFL Player Supplemental Disability Plan provides disability benefits to retired players who become disabled as a result of their football career. Solomon applied for Total and Permanent Disability (TPD) benefits with the Bert Bell/Pete Rozelle Player Retirement Plan twice. The first time he based his claim on orthopedic injuries but his claim was denied.

Solomon’s second application came in 2010. This application claimed that football-related neurological and cognitive impairments caused him to become TPD. This application contained a number of new medical reports describing the severity of his CTE-related disability. A two-person Committee denied Solomon benefits under the terms of the Plan. Solomon appealed and a Social Security Administration Administrative Law Judge (ALJ) granted Solomon disability benefits. Nonetheless, the Board stated that the record did not support a finding of total and permanent disability prior to the 15-year cutoff date after Solomon’s retirement. The Board’s denial functioned as a final decision under ERISA. Solomon timely filed the instant suit to recover Football Degenerative benefits.

The issue before the district court was whether the Board’s decision that Solomon became TPD after the March 2010 cutoff constituted an abuse of discretion. The district court concluded that Solomon was entitled to Football Degenerative benefits because of ALJ’s decision to use the date of when the CTE began to manifest clearly was before the fifteen year cutoff and alternatively, the Board’s Inactive determination constituted an abuse of discretion.

The appeals court stated, “[a] decision is reasonable if it is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence.” To aid in making a determination if a decision is reasonable some factors to consider are the language of the plan; the adequacy of the materials considered making the decision and whether the fiduciary’s interpretation was consistent with other provisions in the plan. The appeals court held, “[a] fiduciary must rely on substantial evidence to sustain its denial of benefits and thus abuses its discretion when it ignores unanimous relevant evidence supporting an award of benefits.” The Board failed to submit any evidence to contradict the claims of Solomon. Moreover, there was evidence of several reports with descriptions of serious neurological impairments linked to
Solomon’s football career dated months before the plan cutoff.

As a result, the appeals court affirmed the ruling of the district court and held that the Board abused its discretion in its arbitrary denial of Football Degenerative Benefits. This case is important because for starters it serves as precedent for future cases dealing with potential CTE claims. Moreover, this issue is likely to be addressed by the owners in the next round of collective bargaining negotiations. Furthermore, the mere fact that the collective bargaining agreement pertaining to disability and retirement has three owners on the determination panel appears to be a conflict of interest. Owners will routinely rule against claims to keep costs low especially when the disability and retirement plans are funded by them. This is an issue that needs to be reviewed some more.


Minor League Baseball Players Loses Antitrust Appeal Based on Baseball Exemption (Miranda v. Selig)

The U.S. Court of Appeals for the Ninth Circuit addressed whether professional minor league baseball holds the same exemption from federal antitrust law as does major league baseball (MLB). The complaint of the players was that while employed in the minor league, they worked an average of fifty to sixty hours per week and earned less than $10,000 per year. Furthermore, the players allege that MLB’s hiring and employment policies violated federal antitrust laws by artificially and illegally depressing minor league salaries. The Owners filed a motion to dismiss arguing that the business of baseball has long been exempt from federal antitrust laws, and Congress specifically declined to take minor league baseball out of the scope of the exemption. The district court granted the motion to dismiss and the players timely appealed.

The issue before the court is based on whether minor league baseball is exempted from federal antitrust law. As a result, the court felt it was imperative to review the business of baseball in a historical context. The first antitrust legislation that was passed was the Sherman Act and it was aimed at “preserving free and unfettered competition as the rule of trade.” Moreover the Sherman Act states, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” However, cases pertaining to baseball were construed in a different light. For that reason, it is necessary to have an understanding of how the courts have ruled on similar issues.

The business of baseball was first exempted from federal antitrust laws as a result of the Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Base Ball Clubs case. In Fed. Baseball, the court held that “the business is giving exhibitions of baseball, which are purely state affairs and although made for money would not be called trade of commerce in the commonly accepted use of those words.”

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In *Flood v. Kuhn*, the court held that the baseball exemption to antitrust laws should remain valid.\(^\text{10}\) In fact the court stated, (1) “professional baseball is in fact interstate commerce”; (2) “baseball is an anomaly with regard to its exemption from federal antitrust laws”; (3) the Supreme Court previously emphasized that Congress allowed for baseball to develop unhindered by federal antitrust laws; and any change to this should be made by Congress and not the courts.\(^\text{11}\)

In 1998, Congress enacted the Curt Flood Act.\(^\text{12}\) The Curt Flood Act established that the “conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players are subject to the antitrust laws.”\(^\text{13}\) However, the act also explicitly maintained the baseball exemption relationship between organized professional league baseballs.

The players unsuccessfully argued that the baseball exemption does not apply to minor league baseball because the previous court cases did not address minor league baseball or the ability of MLB to conspire to fix salaries of minor league baseball players. The argument of the players rested on the notion that MLB and the minor leagues were two separate entities. However, MLB was able to demonstrate that the farming system of the MLB was inclusive of the minor leagues and served as a place to develop players for MLB. As a result, MLB and minor league baseball are not two separate distinct organizations.

To that end, the U.S. Court of Appeals for the Ninth Circuit held that in light of Supreme Court precedent, decisions of various other courts and the Curt Flood Act, minor league baseball falls within the business of baseball exemption from federal antitrust laws. The reasoning is because employment contracts of minor league players relate to the business of providing public baseball games for profit between clubs of professional baseball players. Furthermore, both the courts and Congress have made it clear that they intend to maintain the baseball exemption from antitrust law.

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The Supreme Court of the United States will rule on Sports Betting

On Monday, June 26, 2017, the Supreme Court of the United States agreed to review New Jersey’s bid for legalized sports betting. The Professional and Amateur Sports Protection Act of 1992 (PASPA) prohibits 46 states from licensing, sponsoring or authorizing sports betting. The exceptions are Nevada, Delaware, Oregon and Montana as they were exempt from PASPA since they had already adopted sports betting practices in 1991.\(^\text{14}\) New Jersey has been waiting to add sports gambling to the casino industry which has been failing as of recently.\(^\text{15}\) It is estimated that hundreds of millions of dollars are gambled illegally and states like New Jersey would like to tap into this untaxed funding from leaving the state.\(^\text{16}\)

The controversy started approximately six years ago when Governor Chris Christie of the State of New Jersey implemented a state law that would allow casinos to offer gambling on sports. Opponents to this law consisted of the National Football League (NFL), National Basketball Association (NBA), Major League Baseball (MLB), National Hockey League (NHL) and the National Collegiate Athletic Association (NCAA) which collectively argued that the state law being
implemented in New Jersey was incompatible with the PASPA.\textsuperscript{17}

There are two legal issues being presented in this case. The first one suggests that PASPA violates the doctrine of anti-commandeering. The anti-commandeering doctrine “bars Congress from ordering states to adopt a particular regulatory scheme when the federal government has not adopted the scheme itself.”\textsuperscript{18} The second issue is that PASPA violates the equal sovereignty doctrine because four states are given preferential treatment from the federal government when it comes to sports betting.\textsuperscript{19} The equal sovereignty doctrine declares that states are owed equal treatment from the federal government. The Department of Justice and the sports leagues (both professional and collegiate) disagrees that PASPA obligates New Jersey to adopt a regulatory scheme, but rather blocks New Jersey from legalizing sports betting. That rational addresses both issues. The federal government also indicated that sports betting crosses state lines and as a result is governed under the Commerce Clause.

Although, the outcome of this case is unknown, a victory for New Jersey could be epic. For starters, the impact of New Jersey winning would mean that other states could also pass legislation and have the gambling of sports legalized. In fact, “Connecticut, Maryland, Michigan, New York, Oklahoma, Pennsylvania, South Carolina and West Virginia have introduced sports betting legislation in 2017.”\textsuperscript{20} Moreover, the stronghold grip that Nevada has over the ability to bet on sports would decrease due to more states being able to compete. However, the NCAA and sports leagues could begin to hold tournaments and huge sporting events that could generate significant income for both the collegiate and professional leagues as well as Nevada.

In the event, that New Jersey does not win, there is still hope for ending PASPA.\textsuperscript{21} That hope rests in the hands of Congress. Fortunately, in May 2017, legislation was drafted that would repeal PASPA. In addition, the American Gaming Association serve as strong advocates for the repeal of PASPA and they are lobbying Congress to make the repeal of PASPA a reality, especially now that President Trump is in power and is in favor of legalizing sports betting across the country.\textsuperscript{22} Time will tell.


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15 U.S.C.A. § 1 (West)


Id. at 208-209.


15 U.S.C. § 26b (West)

Id.


New Jersey could have opted into PASPA but failed to pass the referendum in time (https://www.duanemorris.com/articles/static/soriano_njlawyer_0413.pdf)


*All Bets are Off: Supreme Court to Review Sports Betting Ban* at 2.

Id.


The Ball Is in Your Court: An Update on Trademarks (and Copyright) in Sports

by Scott M. Sisun

I. Introduction

“MAKE VINE GREAT AGAIN,” “THAT’S A CLOWN QUESTION BRO,” “VEGAS GOLDEN KNIGHTS,” blue football fields, announcer sounds, and hand gestures, are some “traditional” and “non-traditional” source-identifying trademarks and trade dress that are used by athletes, teams, merchandisers, announcers, and others in the multi-billion dollar sports industry. A review of current trademark, trade dress, and copyright matters reveal that individuals and entities, from quarterbacks to franchises to boxing announcers (online, off the field, and virtually), are becoming more creative in protecting, monetizing, and enforcing their brands and copyrights.

II. Team Names and Other “Traditional” Trademarks

As a bit of background, Section 43(a) of the Lanham Act defines protectable trademarks as “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”

The protectability of trademarks and trade dress depends on distinctiveness and consumer recognition. Marks are classified along a spectrum of distinctiveness and are classified as either generic, descriptive, suggestive, arbitrary or fanciful—with generic marks on the
non-distinctive side and fanciful on the most distinctive end of the spectrum. Marks inherently distinctive by their nature are (1) fanciful, having no known meaning and relation to the goods or services being sold; (2) arbitrary, having a known term with a dictionary meaning not related to the goods or services being sold; and (3) suggestive, needing imagination to reach a conclusion of the nature of the goods or services. These marks “identify a particular source of a product” and are almost always inherently distinctive.

In contrast, descriptive marks are common terms that are used to describe the goods or services. While not inherently distinctive, descriptive marks can acquire distinctiveness and trademark protection through establishing secondary meaning—evidence that consumers identify the source of the product or service with the mark.

Last on the spectrum are generic marks, which are terms that are too common to describe the product or its source. Generic marks are not inherently distinctive and cannot acquire trademark protection by acquiring distinctiveness through secondary meaning.

A. Vegas Golden Knights and Washington Redskins

In the past five or so years, teams, players, and coaches have attempted to achieve federal trademark registrations and enforcement for new team names, slogans, and phrases, while others have found themselves losing long-held federal registrations for their sports franchises.

i. Vegas Golden Knights

On the trademark spectrum, “VEGAS GOLDEN KNIGHTS” appears to be a distinctive mark, but with four months before the start of the professional hockey season, the team still had no federal trademark registration for their name.

With the NHL preparing to expand in the 2017-2018 season, Black Knight Sports and Entertainment, LLC, the consortium that owns the new Las Vegas NHL franchise, applied for various trademarks for their new team name with the United States Patent and Trademark Office (“USPTO”).

Federal registration of a trademark provides substantive and procedural rights not necessarily afforded to unregistered marks. These rights include the right to use the registered trademark symbol, ®; receive monetary remedies in lawsuits, including treble damages and attorneys’ fees; serve as the priority basis for an international trademark application; and the right to the exclusive ownership rights, including constructive notice, nationwide priority, and incontestability after five years of use. It goes without saying that it is in a team and player’s interest to file and acquire federal trademark registration.

On August 23, 2016, Black Knight Sports applied for trademarks for their team name, “VEGAS GOLDEN KNIGHTS” and “LAS VEGAS GOLDEN KNIGHTS,” based on an intent to use the marks in commerce for the following goods and services: “Clothing, namely, bandanas, beach cover-ups, belts, body suits, boxer shorts, caps, cloth bibs, coats, dresses, footwear, ear muffs, gloves, hats, headbands, hosiery, housecoats, jackets, jerseys, leggings, leotards, mittens, nightshirts, pajamas, pants, rain coats, rain wear, robes, scarves, shirts, shorts, skirts, socks, suits, sun visors, suspenders, sweaters, sweatpants, sweatshirts, swimsuits, swim trunks, t-shirts, ties, toques, underwear, vests, warm-up suits and wristbands,” and “Entertainment services, namely, professional ice hockey exhibitions.”

After reviewing the “VEGAS GOLDEN KNIGHTS” and “LAS VEGAS GOLDEN KNIGHTS” trademark applications, the USPTO responded with Office actions based on, among other things, a likelihood of confusion with a registration owned by The College of Saint Rose in Albany, New York, for “GOLDEN KNIGHTS THE COLLEGE OF SAINT ROSE,” and design.

The College of Saint Rose’s wording and design trademark registration features a stylized knight above the wording “GOLDEN KNIGHTS” in large letters and “THE COLLEGE OF SAINT ROSE” in smaller letters, and is registered since 2002 for
“clothing, namely shirts, t-shirts, jackets, shorts, pants, caps, hats, baseball hats, sweatshirts, and golf shirts,” “decorative metal ornamental novelty pins,” and “educational services, namely providing courses of instruction at the college level; Entertainment services in the form of intercollegiate sports exhibitions.”

The College of Saint Rose does not have a hockey team, but it does have various other collegiate sports teams. With approximately four months before the start of the 101st NHL season, the Vegas franchise had only until June 7, 2017, to file responses to the Office Actions. In a statement sent to SI Now in December of 2016, the Las Vegas Golden Knights noted that other professional and collegiate teams share sports names, including “Vegas Golden Knights and Clarkson Golden Knights, UCLA Bruins and Boston Bruins, U of Miami Hurricanes and Carolina Hurricanes, etc.” In the meantime, the Las Vegas Golden Knights may have to start the season without a federal trademark registration for their team name. However, they are not without all trademark rights. The Las Vegas Golden Knights will still receive common law protection for the use of their trademark in commerce, even without the federal registration.

ii. Washington Redskins Update

It is also the case that a well-known professional team name’s federal registration may be canceled for various reasons, including, that it has been found to be disparaging under section 2(a) of the Lanham Act.

The disparagement provision of the Lanham Act, provides that no trademark shall be refused registration on account of its nature unless, inter alia, it “consists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”

In Blackhorse, et al. v. Pro-Football, Inc., the USPTO’s Trademark Trial and Appeal Board (“TTAB”) canceled six of the Washington Redskins federal registrations containing the mark “REDSKINS,” finding the word to be disparaging. The team appealed the TTAB’s decision to the district court, which upheld the decision, explaining that “the marks consisted of matter that ‘may disparage’ a substantial composite of Native Americans and bring them into contempt or disrepute.” The court noted, however, that although the marks were canceled, the franchise was free to continue to use the marks. The Supreme Court denied the team’s request for appeal.

However, on January 18, 2017, the Supreme Court heard arguments in the case of Matal v. Tam, which addressed the issue of whether the disparagement provision of the Lanham Act should ultimately remain valid or whether it is invalid under the Free Speech Clause of the First Amendment. The Court has not yet issued its opinion. (Editor’s Note—At the time of writing and editing, the decision was still pending; it has since been released.)

Is this the end of the Redskins team name, and its apparel, merchandise and other fan gear bearing the mark? Will Tam open a new door for the Redskins or will they choose to rebrand? If the Redskins do go through with a name change and rebrand, it is estimated that a rebrand of the Redskins team name could cost upwards of $15 million.

Meanwhile, likely attempting to stay ahead of the game, third-parties have filed marks presumably in anticipation of a bidding battle for the new team name. Prospective team name marks filed to date include, “WASHINGTON WARRIORS” and “WASHINGTON BRAVEHEARTS.” Since 2014, Washington Brave Hearts, LLC, applied for “WASHINGTON BRAVEHEARTS” for football game entertainment services and various printed matter, and successfully cancelled two prior “WASHINGTON BRAVEHEARTS” registrations.

B. “MAKE VINCE GREAT AGAIN”—Player and Coach Names and Slogans

Federal protection of names, nicknames, and slogans are frequently sought by players, coaches, and teams. For example, Pat Riley famously registered variations of “THREE-PEAT”
and “3-PEAT” under the owner name Riles & Company, Inc., for various goods including jewelry, clothing, and bumper stickers. Riley’s marks have held up numerous applications for similar marks including “THREE-PETE,” which was rumored to be applied-for by University of Southern California fans in honor of their football coach Pete Carroll. Moreover, the free-agent Darrelle Revis, owns a federal registration of “REVIS ISLAND” for clothing and related goods after his success as cornerback for a number of years with the New York Jets. Additionally, the Patriots worked hard on the field in an attempt to achieve a perfect season, and ultimately did achieve registration for the marks, “19-0” and “PERFECT SEASON.”

While athletes of all types have sought federal trademark protection for their own names, including “LEBRON” and “JORDAN,” eSports athletes are likely to be the next wave of athletes to protect their personal brands. eSports consist of multiplayer video game competitions between professional players. In 2015, it was estimated that eSports was reportedly worth $748 million and was projected to reach $1.8 billion by 2018. When participating in an eSports competition, eSports athletes typically use nicknames called “gamertags” to identify themselves to their fans and their competitors. Nicknames, like personal names, are protectable under trademark law. eSports athletes are likely to be among the more popular players in sports and will see value associated with their names, gamertags, and slogans in the future.

Athletes known for their creative statements or non-statements (think Marshawn Lynch), have generally sought federal protection for off-hand quotes. For example, New York Jets linebacker Bart Scott obtained registration for “CAN’T WAIT” for clothing, retail services, including “automotive accessories,” fan clubs, and football camps, after making the comment “can’t wait” during an interview with reporter Sal Paolantonio following the Jets playoff upset of the Patriots. Similarly, following a reporter’s question regarding whether Bryce Harper would partake in a beer following a win in Toronto in 2012, Washington Nationals MVP Bryce Harper attempted to register “THAT’S A CLOWN QUESTION, BRO,” but ultimately allowed the application to abandon.

Shawne Merriman, through his company Lights Out Holdings, LLC, is the owner of a series of federal registrations for “LIGHTS OUT” for various goods and services, including footballs, clothing, retail services, and others. In February 2017, Lights Out filed a lawsuit against Baltimore-based retailer Under Armour for trademark infringement of “LIGHTS OUT.” Lights Out alleged that Under Armour infringed trademark rights in the mark “LIGHTS OUT” via use of the “LIGHTS OUT” wording in a new Stephen Curry sneaker named “CURRY 3 LIGHTS OUT,” and use in an associated mobile application game under the mark “LIGHTS OUT.” The matter is still active and pending before the court, but according to court papers, Merriman and Under Armour have a history of matters concerning the disputed mark.

Unrelated to the Lights Out case, in 2015 Under Armour obtained a consent judgment against the owner of the brand ASS ARMOR for protective shorts. The owner of the trademark “ASS ARMOR” brought a declaratory judgment action asking that its mark did not infringe Under Armour’s trademark and requested the cancellation of various Under Armour registrations. Under Armour subsequently filed a counterclaim for trademark infringement and trademark dilution, among other claims, based on the tarnishment of its brand. Making matters worse, Ass Armor also promoted its brand via the slogan “PROTECT YOUR ASSETS,” which was alleged to also be confusingly similar to Under Armour’s “WE MUST PROTECT THIS HOUSE” mark. The parties ultimately settled, with Ass Armor conceding that its marks infringed the trademark rights of Under Armour and agreed to stop using or registering any trademark, logo or name with either “armor” or “armour.”

III. Non-Traditional Marks—Team Colors, Hand and Arm Symbols, Poses, Sounds, and Beyond

As trademark law has evolved, so has the protection and definition of “source-identifier.” Such matter was held not to be limited to merely
conventional or “traditional” trademarks and the theory of trade dress was formed. The Supreme Court in *Two Pesos* addressed a case involving competing interior design schemes between two Mexican restaurants and held that section 43(a) also provides protections and claims for trade dress.\(^{33}\) Trade dress, it was found, “involves the total image of a product and may include features such as size, shape, color, or color combinations, texture, graphics, or even particular sales techniques.”\(^{34}\) However, only those elements of a design that are nonfunctional are protectable and the design must be either inherently distinctive or have acquired secondary meaning.\(^{35}\)

Acquiring distinctiveness through secondary meaning is only present when, “in the minds of the public, the primary significance of [a mark] is to identify the source of the product rather than the product itself.”\(^{36}\) In other words, secondary meaning arises when the public comes to associate the design with the source of that design’s product or service.

### A. Color

Of the non-traditional trademarks, colors lead the list of source-identifying matter that sports institutions, fans, and companies utilize most often. Following the Supreme Court decisions in *Two Pesos* and the subsequent *Wal-Mart* case, courts have extended the protection of team colors as trade dress for athletic team services and related goods.

For example in 2008, the Fifth Circuit held that school colors are protectable trademarks as long as the colors have the associated secondary meaning and are nonfunctional.\(^{37}\) Louisiana State University, University of Oklahoma, The Ohio State University, and the University of Southern California, brought suit against Smack Apparel for the sale of unlicensed t-shirts bearing an association to the school.\(^{38}\) Smack Apparel, presumably having enough understanding of trademark law to be dangerous, creatively used team color schemes on apparel without mentioning the schools themselves.\(^{39}\) Both the district court and the Fifth Circuit found that the school colors, especially when used in connection with other indicia identifying or suggesting the schools, had acquired distinctiveness through secondary meaning.\(^{40}\)

The factors considered by the Fifth Circuit for a finding of secondary meaning in the school colors, included the duration of use of the colors as source-identifying, the sales and advertising amounts associated with the colors, and the defendant’s bad faith intent.\(^{41}\) The court ultimately found Smack’s design to infringe the schools’ trademark rights in the colors and held that confusion was likely.\(^{42}\)

i. Boise State and its Blue Football Field

Taking color to the field, Boise State University registered the color blue on its football field on the Principal Register based on acquired distinctiveness the trade dress for “Entertainment services, namely, the presentation of intercollegiate sporting events and sports exhibitions rendered in a stadium, and through the media of radio and television broadcasts and the global communications network.”\(^{43}\) The description of the mark, as identified in the federal trademark registration, is as follows: “The color(s) blue is/are claimed as a feature of the mark. The mark consists of the color blue used on the artificial turf in the stadium. The matter shown in broken lines on the drawing shows positioning of the mark and is not claimed as a feature of the mark.”\(^{44}\) Capitalizing on the creativity of its field color, Boise State has noted that they review requests for non-green fields and generally considers the requests “as long as it doesn’t prevent Boise State from getting the best students and the best student-athletes that [they’re] looking for.”\(^{45}\)

### B. Arm Symbols, Hand Symbols, Poses and Mascots

Fans have also come to associate motions, movements, poses, and hand symbols with their favorite teams and players. In 2013, The Ohio State University acquired design trademark registrations via assignment that featured human silhouettes spelling out O H I O with their arms for apparel, stickers and other related items.\(^{46}\) In 2016, The Ohio State University sued Café
Press, a successful manufacturer and seller of t-shirts online, before the U.S. federal court district southern district of Ohio based inter alia on trademark infringement for making and selling t-shirts bearing the O H I O human arm silhouette. Café Press has since countered with a cancellation action against The Ohio State University’s silhouette registrations before the USPTO’s Trademark Trial and Appeal Board. The TTAB actions are currently suspended pending the disposition of the underlying federal court action.

Hand symbols are frequently used by fans of a school’s athletic team to show recognition and devotion to the team. Schools, in turn, have registered those hand symbols. For example, the University of Texas and its well-known “hook ‘em horns” hand symbol is registered with the USPTO on the Principal Register based on a claim of acquired distinctiveness for various goods and services, including clothing and decals.

The description associated with the University of Texas registration is: “The mark consists of the representation of a human hand with the index and small fingers extended upward and the thumb closed over the middle and ring fingers.”

Designs of team mascots, presumably with humans posing inside, have been considered inherently distinctive and registrable on the Principal Register as source-identifying indicia for years. Design featuring humans posing (without costumes) are also protectable trademarks. Of note is Usain Bolt’s registration for his signature Bolt pose, which Bolt registered for various goods and services including clothing, beers, bags and entertainment services.

Whether one can enforce rights in a design pose against fans or others simulating the pose pushes the limits of trademark law. However, Tim Tebow did capitalize on his famous pose and the misuse of the term “TEBOWING” for a prayer pose on the field by registering numerous TEBOWING marks with the USPTO for various goods and services.

C. Sound

Among some of the non-traditional marks, sound is often used to associate a connection with the team, player, or sports announcer. Sound marks are registrable with the USPTO and are protectable form of trade dress, provided there is a showing of acquired distinctiveness through secondary meaning. To register a sound mark, one must include a digital copy of the sound in its application. Two of the more popular sounds registered to announcers, for example, are “ONIONS!” by Bill Raftery and “LET’S GET READY TO RUMBLE,” the famous catchphrase by the boxing announcer Michael Buffer to Ready to Rumble, LLC. At least one collegiate sports team, the University of Arkansas, has registered its fan call “WOOOOOOOO. PIG. SOOIE! WOOOOOOOO. PIG. SOOIE! WOOOOOOOO. PIG. SOOIE! RAZORBACKS!” for “Providing collegiate athletic and sporting events.”

D. Scents

Scent marks are also registrable in the U.S. under a similar theory provided the mark is non-functional and has acquired distinctiveness through secondary meaning. A bottled scent is not required for registration, but instead a detailed written description must be included.

The well-known scent case in the U.S. involved the smell of Plumeria blossoms for “sewing thread and embroidery yarn.” On our last review, no scent mark in the sports capacity has
been registered to date in the U.S. However in 1999, the scent of grass for tennis balls was sought before the former Community Trade Mark Office (CTM)\textsuperscript{57} which refused the application, but ultimately resulted in an appeal allowing registration after it determined the scent of fresh cut grass to be distinct and recognizable for tennis balls.

IV. Copyright—Team Uniforms—Varsity Sports

The Supreme Court’s recent decision regarding the protection of cheerleading uniform designs in Star Athletica, LLC v. Varsity Brands, Inc., posed the question as to whether Varsity Brands, the largest U.S. manufacturer of cheerleading uniforms, had a protectable interest in its uniforms’ stripes and chevrons that were allegedly copied by Star Athletica.\textsuperscript{58} Star Athletica claimed that the uniforms’ designs are functional because they identify the wearer as a cheerleader and help make them look slimmer and taller.\textsuperscript{59} In its counterargument, Varsity Sports maintained that because the patterns on the uniforms are capable of existing in their own tangible medium, they are “conceptually separable” and thus not a functional requirement of the uniform.\textsuperscript{60}

Justice Sotomayor’s line of questioning in particular focused on the impact that would be felt by the sports teams that contract with Varsity Sports for their uniforms: “[D]o the universities that contract with you know that they have to buy their uniform from you for 99 years plus whatever? Every university that you sell these cheerleading uniforms to, do they know that under your copyright they are stuck with you forever?”\textsuperscript{61}

Establishing a test for determining the copyrightability of designs, the majority opinion ultimately narrowly held that the chevron graphics on the cheerleading uniforms at issue were copyrightable.\textsuperscript{62}

“A feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.”\textsuperscript{63}

According to the Court, Varsity Sports’ uniforms satisfied both criteria of the test and thus were capable of copyright protection.\textsuperscript{64}

V. Domain Names and Social Media

ICANN’s Uniform Domain Name Dispute Resolution Policy (“UDRP”) is a faster and cheaper way to resolve a domain name dispute. Social media entities like Facebook and Twitter generally have trademark infringement policies to assist in the suspension and take-down or transfer of a social media name or “handle,” especially where the handle is confusingly similar to an existing mark and a federal registration is present.

To prevail in a UDRP dispute, the Complainant is required to prove the following three elements: (1) the domain is identical or confusingly similar to the Complainant’s mark; (2) registrant has no legitimate interest or rights in the domain name; and (3) the domain name was registered in bad faith. Evidence of “Bad faith” can include acquiring the domain name for the purpose of sale or transfer of the domain, prevention or blocking of the owner from acquiring the domain, and a pattern of similar conduct in the past, disrupting the business or attracting others to the domain for financial gain.\textsuperscript{65}

One important UDRP case involves the domain name dispute with the soccer player Freddy Adu for the domain name “freddyadu.com.”\textsuperscript{66} Here, the infringing registrant repeatedly contacted Adu’s people in an attempt to sell or to offer the creation of a fan site in exchange for monetary and non-monetary contributions.\textsuperscript{67} Even though Adu reached out to registrant for the domain name, the registrant’s ransom techniques were found to be black hat methods in the eyes of the
In the social media landscape, registration of a username does not present the same financial barriers as seeking federal trademark registration, which can lead to individuals quickly scooping up identical or confusingly similar handles before the player or team. Most social media sites, including Twitter, allow usernames on a first-come, first-served basis. In 2009 during the early days of Twitter, Tony La Russa brought suit against Twitter in the District Court for the Northern District of California, in which he claimed that the fake Twitter page using the handle “Tony LaRussa,” constituted trademark infringement and dilution, and cybersquatting. The case was ultimately settled and Twitter’s policies have made takedown of infringing member names to be more swift, especially where there is a federally registered trademark, but attempting to remove a member name is not without its hurdles.

Twitter’s current rules read that the following is not a violation of Twitter’s policy: “using a trademark in a way that is outside the scope of the trademark registration (e.g. territory, or goods and services identified in the registration)… Nominative and other fair uses of trademarks are protected uses under our trademark policy, so long as the account is clearly distinguished from the trademark owner. This includes use by resellers in certain regions and accounts engaging in parody, commentary, or news.” However, Twitter policies do allow that “[u] sing another’s trademark in a manner that may mislead or confuse others about your brand affiliation may be a violation of our trademark policy” is a violation of their policy.

Having a federally registered trademark is typically the first helpful step in taking down or transferring a member name that is misleading or confusingly similar.

VI. Conclusion

From field colors, uniforms, sounds, slogans and poses to social media handles, domain names, gTLDs and beyond, entities and individuals in the sports world have protected and monetized, enforced and defended, the icons, words and symbols that serve to identify the source with their fans and consumers. Regardless of the sports industry players, all will likely continue to find ways to push the boundaries of trademark and copyright law in unpredictable ways.

About the Author

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1 Special thanks to Cameron Meindl of the Benjamin N. Cardozo School of Law, Class of 2018, for all of his help on this article.


4 Id. at 10-11.

5 Id. at 10.

6 Id.

7 Id. at 9.

8 Id.


10 VEGAS GOLDEN KNIGHTS and LAS VEGAS GOLDEN KNIGHTS, Registration Nos. 87147236, 87147239, 87147269, and 87147265.

11 GOLDEN KNIGHTS THE COLLEGE OF SAINT ROSE, Registration No. 3188463.


Id.


Id. at 490.


WASHINGTON BRAVEHARTS, Registration Nos. 86113300 and 86094004.

Variations of THREE PLEAT and 3-PLEAT, Registration Nos. 1552980, 1878690, 1886018, 1977620, 2831367, 4051757, 4139135, 4758665, and 4758666.

REVIS ISLAND, Registration No. 4407286.

19-0, Registration No. 5100521; and PERFECT SEASON, Registration No. 5095619.

Jeff Grub, Esports is already worth $748M, but it’ll reach $1.9B by 2018, VENTURE BEAT (Oct. 28, 2015, 8:00 AM), https://venturebeat.com/2015/10/28/analyst-esports-is-already-worth-748m-but-itll-reach-1-9b-by-2018/.

CANT WAIT, Registration No. 4247527.

THAT’S A CLOWN QUESTION, BRO, Application Serial No. 85651210.

LIGHTS OUT, Registration Nos. 2885212 (terminated), 3990916, and 4242170; Application Serial Nos. 85968807, 85968815, 86613418, 86705594, 86743803, and 86888080.


Id.


Id.


Id. at Footnote 1.

Id. at 766.


Board of Supervisors for LA St. Univ., et al. v. Smack Apparel Co., et al., 550 F.3d 465 (5th Cir. 2008).

Id.

Id.

Id.

Id.

Boise St. Univ. Image trademark for the color blue on a football field, Registration No. 3707623.

Id.

O H I O arm silhouettes, Registration Nos. 4104956 (cancellation pending) and 4297349 (cancellation pending).


Design Trademark for Hook ‘em Horns Hand gesture, Registration No. 4535612.

Id.

Bolt Pose Design, Registration Nos. 3895896 and 4177904.

TEBOWING, Registration No. (U.S. Reg. No. 4263370).


“ONIONS!” sound mark, Registration No. 4839818.

“LETS GET READY TO RUMBLE” sound mark, Registration No. 4775241.

Univ. of Ark. Fan Call sound mark, Registration No. 4558864.


CTM is now the European Union Intellectual Property Office.


Id.

Id.

Letter from the Chair

Dear Forum Members,

This is my first column as Chair of the Forum on the Entertainment & Sports Industries. I am honoured to be leading the Forum and following in the footsteps of my immediate predecessor Janine Small and past Forum Chairs and industry luminaries such as Jay Cooper, Michael Rudell and Joel Katz. I am proud to be the first Canadian lawyer to Chair the Forum since it was established almost 40 years ago in 1978.

I have been involved in the Forum for a number of years as a member, as a Vice-Chair and Chair of the Licensing Merchandising & Branding Division, as Chair of the Forum’s Strategic Planning Committee, and as a moderator and speaker on a number of panels and webinars over the years. I owe a debt of gratitude to Past Chair Kirk Schroder for creating the Vice-Chair positions and my first leadership opportunity in the Forum, to Cydney Tune, Past Chair of the Licensing Merchandising & Branding Division, who invited me to be her Vice-Chair, and to immediate Past Chairs Janine Small, Richard Idell and Christine Lepera who have steered the Forum through some challenging times and paved the way for the positive momentum we are now enjoying. To me, the Forum is more than just a professional association of fellow entertainment and sports lawyers. It is a family of colleagues and friends who have worked together, travelled together and had a lot of fun all while pursuing excellence in the practice of entertainment and sports law. As I write this, I am looking forward to seeing a number of Forum colleagues who are in Toronto for the Toronto International Film Festival.

In Janine’s spring column, she gave a quick overview of what the Forum has been up to so far this year. We have been at the Grammys as a sponsor of the GRAMMY Foundation’s Entertainment Law Initiative Writing Competition, at SXSW, at our leadership meeting in Chicago where we had an opportunity to meet and forge stronger relationships with ABA staff, at the University of Miami Law School for our annual Spring Conference, at UC Hastings for our annual Video Games and Digital Media Conference and at the ABA Annual Meeting in New York in August where our music division presented a panel entitled “The Rules of the Road – Current Issues in Touring in the Entertainment Industry”. I represented the Forum at the ABA’s Annual Section Officers Conference (SOC) in Chicago in September, which is attended by all of the Chairs and other section officers of the ABA’s Sections, Divisions and Forums. Building on the contacts I made at the 2016 SOC conference, I believe the stage has been set for continued and increased collaboration between our Forum and other Sections, Divisions and Forums.

Since last year’s Annual Meeting, the Planning Committee has been hard at work planning this year’s Annual Meeting in Las Vegas. Janine and I and our Planning Committee Co-Chairs Mark Tratos and Casey Schwab, and Planning Committee members Henry Root, Gary Greenstein, Daniel Werly and Laura Warren have put together our biggest and best program to date. We have three amazing keynote speakers – Senator Harry Reid, the Democratic Senator from Nevada from 1987 to 2017 who served as Senate Minority Leader, Senate Majority Leader, Minority Whip and Majority Whip during his distinguished political career; Kelly Costello Pekar, the Executive Vice President of Business & Legal Affairs at Broadway Video, the media and entertainment company founded by Lorne Michaels and producer of Saturday Night Live, The Tonight Show starring Jimmy Fallon and Late Night with Seth Meyers; and Travis Tygart, the CEO of the United States Anti-Doping Agency, who has worked tirelessly during his career to protect the rights of clean athletes and has
been recognized by Sports Illustrated as one of the 50 Most Powerful People in Sports. We have assembled a great lineup of speakers for this year’s program including speakers from the Archer Law Firm who successfully represented The Slants in their big trademark win at the US Supreme Court, the Arizona Coyotes, Arent Fox, Azoff MSG Entertainment, LLC, the Digital Media Association, Glaser Weil, Greenberg Traurig, Jenner & Block, the NFL Players Association, Nixon Peabody, O’Melveny & Meyers, Reynolds & Associates, Sheppard Mullin, SXSW, The GRAMMY Foundation, Twitter, Ultimate Fighting Championship (UFC), Universal Music Publishing Group, the USPTO, Winston & Strawn, Wilson Sonsini and WME-IMG. There is also a stellar lineup of social and networking activities including behind the scenes tours of The T-Mobile Arena, The Park Theater, The Colosseum at Caesar’s Palace and Picassos at the Bellagio (for the foodies in the crowd). We also have a nightcap at the Cosmopolitan on Thursday night and the Ted Reid/Morgan Stanley reception on Friday night. A special congratulations to Henry Root for receiving the Ed Rubin Award, named after the Forum’s first Chair, in recognition of Henry’s many years of dedicated service to the Forum.

Henry and Richard Rappaport are again leading the Planning Committee for our 2018 Spring Conference in Miami. We are moving back to the Palms Hotel from April 4 – 6, 2018 so please hold these dates and plan to be there. If you want to get involved in the Spring Conference, please reach out to Henry or Richard and I am sure there will be an opportunity for you to get involved.

Other ways to get involved in the Forum are to write articles for our marquee publication the Entertainment and Sports Lawyer, so ably helmed by our Editor-in-Chief Brian Rosenblatt, and to participate in Forum webinars. Please submit any proposals you have for articles to Brian and webinar ideas to our Webinar Co-Chairs Bob Pimm and Steve Weizenecker. We are always looking to add people to our leadership roster so if you would like to become more involved in the Forum, please reach out to me at the Annual Meeting or otherwise.

A special shout out to our Sponsorship team of Neeta Ragoowansi and Gray Coleman who have been tirelessly chasing down sponsors and important sponsorship dollars for the Forum and a big thank you to all the sponsors of our 2017 Annual Meeting as of the date of writing this column – Wilson Sonsini Goodrich & Rosati, Cassels Brock & Blackwell, Dickinson Wright, Davis Wright Tremaine, Leavens Strand & Glover, BMI, SESAC and JAMS.

If you have any questions, feel free to contact me directly at 416-869-5993 or lglickman@casselsbrock.com or contact our new Forum Manager Bernadette Steele at 312-988-5658 or Bernadette.Steele@americanbar.org. Look forward to seeing you in Las Vegas!

Best regards,
Len Glickman