Legal Issues Facing Professional Sports Teams

October 12, 2019 | 11:30 am – 1:00 pm

Program Description

In representing high-profile businesses, professional sports team lawyers face increased legal risks and the related public relations concerns that come with operating in the spotlight. Join our expert panel to learn more about the legal issues that face team lawyers on a day-to-day basis and some of the most pressing legal trends in the industry.

Lead Facilitator

Dan Werly, Nashville Soccer Club, Nashville, TN

Speakers

- Melissa Altman, Senior Counsel, AMB Group LLC (Atlanta Falcons, Atlanta United FC), Atlanta, GA
- Marissa Meli, Corporate Transactions Counsel, Green Bay Packers, Green Bay, WI
- Tamara Daniels, VP and General Counsel, Vegas Golden Knights, Las Vegas, NV

Program Materials

1. Legal Issues Facing Professional Sports Teams
2. The Changing Landscape of Taxing the Sports Industry by Jeremy Evans
3. Litigation Update by Michelle Wahl, Kyle E. Simmons, Mary McAllister and Tyler Corcoran
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Speakers

Melissa Altman, Senior Counsel, AMB Group LLC

Tamara Daniels, VP and General Counsel, Vegas Golden Knights

Marissa Meli, Corporate Transactions Counsel, Green Bay Packers

Daniel Werly, General Counsel, Nashville Soccer Club (moderator)
A Day in the Life…

• Team counsels are forced to wear many different hats but are there certain areas of law or your practice that you see coming up on a regular basis?

• If so, have these areas changed over time?

• Are you involved in any non-legal areas of the business?
Collective Bargaining

How does the Collective Bargaining Agreement (CBA) impact your day-to-day responsibilities?

Does this change in and around the time that a new CBA is being negotiated?

Current expiration dates for League CBAs:

- NBA – either side may opt out after 2022-23 season
- NFL – at the end of the 2020 season
- NHL – after the 2020-21 season
- MLS – January 31, 2020
Industry Trends

- Data Privacy
- Electronic Ticketing
- Stadium/Venue Issues
- Sports Gambling
- New Sponsorship Areas
- Social Media
- Ambush Marketing
- TCPA and Related Team Marketing Issues
Use of Outside Counsel

• What is one thing that successful outside counsel do well and one thing that they could improve upon?

• What are the most important factors for hiring outside counsel?

• How do you decide what work to keep and what to send out?

• In addition to outside counsel, do you use any practice management or related software?
The Changing Landscape of Taxing the Sports Industry

Jeremy M. Evans, ESQ., LL.M

I. INTRODUCTION
Waning are the days of non-profit professional sports league offices.1 Dying are the days of city, state, and county taxpayer-funded stadiums.2 Dead are the days of write-offs for tickets to college sports events.3 Prior to December 20, 2017, however, the day the majority in Congress passed the 2018 Tax Cuts and Jobs Act,4 the wheels were in motion on challenging the multi-billion-dollar sports industry.5 The sports industry brings in billions of dollars annually,6 but the industry is now facing legislative pushback, through limiting tax loopholes because of the changing public opinion on sports.8

This article will explore the tax implications and changes to collegiate, Olympic, and professional sports through the Tax Cuts and Jobs Act as well as other legislation. In any negotiation, the idea is to push the needle a little bit further in the direction that is more equitable and beneficial to the client. Labor negotiations in professional sports with the unions do this very thing when their collectively bargained agreements sunset. The players and their representative associations want a little more compared to the past, while the owners are maybe willing to give a little more, but not too much. Negotiations at their best, find two parties who have mutual interests (e.g., playing the game), but possibly finding a different way of getting back onto the field.

Change is inevitable in life and it just so happens that the sports industry, in all its forms, collegiate, Olympic, and professional, is being challenged to split the pie a little more. Regardless of your opinion on sports taxation, for or against, it is what is happening in the current sports market. In the end, the hope is that this article will allow participants in the sports industry to see where taxation has been, where it is today, and where it is going.

II. COLLEGE SPORTS
When Northwestern University student-athletes led the drive to unionize,9 it was on the heels of three major changes to college athletics, all financial in nature, and all benefitting the universities and their industry sponsors. The first event was the Power Five college conference realignment (i.e., the Pac-12, SEC, ACC, Big 10, and Big 12), based mainly on increasing television dollars for universities in each conference,10 while more changes are expected in 2023 as several conference television contracts expire.11 The second triggering event was the massive apparel deals between major universities with popular and successful athletic programs and well-known sports brands like Nike, Under Armour, and Adidas.12 The third event was the large television contracts for college teams and their conferences.13 The millions of dollars from college sports swayed the pendulum of public opinion. The result: litigation,14 an attempt at unionization,15 and now tax reform through the 2018 Tax Cuts and Jobs Act,16 which directly affects the college sports industry by taxing it through two provisions.

A. 2018 Tax Cuts and Jobs Act: Excise Tax on the Highest Paid Employees
Per Sporting News, “The bill requires that non-profit organizations, such as universities, pay the [21%] excise tax on any employee who makes above $1 million* or the top five highest-paid employees, even if their compensation [does not] exceed six figures."17 The dilemma and likely reason for the tax (e.g., to increase revenue) is “[b]ecause college football and basketball coaches typically are among the highest-paid employees at NCAA Division I schools . . . [and] USA Today reported that [in 2017] 90 head or assistant coaches in just football made more than $1 million.”18 Therefore, the 21% excise tax will be a new source of revenue for the federal government as taxes are reduced in other areas, specifically for American corporations from 35% to 21%, bringing the corporate rate in line with the rest of the industrialized nations.19

For example, “based on 2017 salaries, 65 public schools would have paid a combined $30 million in tax just for their football coaches.”20 To put the new 21% excise tax in perspective, the University of Alabama, the SEC football powerhouse, could pay an extra $2,340,450 in taxes for their head football coach Nick Saban, on top of his $11.145 million annual salary.21 Unsurprisingly, college coaches’ salaries have increased despite the new tax,22 possibly because the 21% excise tax does not outweigh the benefits from winning football games by hiring a winning coach and having a winning athletic program.23 Winning puts fans in seats, fans increase revenues, while allowing for large coaching contracts for the best coaches, and thus the circle of success in sports programs continues.24

B. 2018 Tax Cuts and Jobs Act: Tax Code Change
Secondly, the Tax Cuts and Jobs Act changed the tax code. Where donors once made financial gifts to athletic departments, tied to purchasing season tickets, which were tax deductible, the write-off/tax deduction has been removed from the tax code.25 Practically speaking, this means that if a donor once gave money and received tickets to games in return, the tax deduction that came from that is no longer available.

C. Reasoning for the Changes
Without knowing the history of colleges and student-athletes, there will be a lack of understanding as to why Congress would want to regulate non-profit universities. The simple answer is a logical one. The logical reasoning for closing the loophole is that universities have been non-profit (untaxable) entities which collect donations, and the people giving the donations were using their donations to
shield income for a cause they care about (i.e., college athletics, student success, etc.), in exchange for being able to attend collegiate games as a season ticket holder. This means that the donation on either side was not being taxed. Congress saw the loophole and closed it, thereby increasing government revenue.26

Have universities and their athletic departments outgrown their statuses as non-profits when it comes to college sports and the student-athlete? When Ed O’Bannon sued EA Sports and the NCAA, it was never about O’Bannon being upset about his playing time or experiences at UCLA with the 1995 National Championship basketball team.27 O’Bannon saw a different way to slice the pie years after his collegiate and professional career had ended. He saw a gaming company, EA Sports, his alma mater, and the NCAA raking in substantial profits off his and others’ images and that is what motivated him to sue.28

When Jackie Robinson was a four-sport athlete at UCLA, college sports were not involved with video games, merchandise, or television contracts. Robinson and the university were concerned about education, excellence, and non-sports related career prospects post-graduation. UCLA’s and other colleges’ missions have not changed, it is just that they make more money from those endeavors now and there is a substantial divide between those who earn (colleges) and those who do not (student-athletes who do not end up playing professionally). The O’Bannon litigation eventually moved the needle for student-athletes toward higher scholarships, at least for schools in the Power Five conferences, while tax reform takes some universities with highly paid coaches and significant donors to task.

III. OLYMPIC GAMES & SPORTS

Outside of the major issues in the various Olympic sports and the Olympic Games surrounding doping,29 international sanctions and corruption,30 and sex abuse,31 except for 2016 legislation, the tax issue has somewhat been ignored by the federal government. However, this seems logical because the Olympic Games are generally seen as a benefit to society and they only occur every four years. Moreover, Olympic sports do not bring in the annual spending and tax revenue compared to the five major American professional sports (football, baseball, basketball, hockey, and soccer) that do occur annually.

A. Introducing the 2016 Victory Tax

In 2016, U.S. Congressional legislation voided the Victory Tax on some medals for Olympians.32 The 2016 legislation eliminated the Victory Tax for “Olympic athletes who bring home the gold, silver and bronze for Team USA” as the IRS cannot now tax most medals or other prizes awarded to U.S. Olympians.33 As an example, “The U.S. Olympic Committee awards cash prizes to medalists, ranging from $25,000 for gold, $15,000 for silver and $10,000 for bronze. The cash prize comes on top of the value of the medals themselves: $600 for gold and $300 for silver; bronze medals [are not] worth much.”34

The “winnings” and medals were considered “earned income” under the former tax code making it taxable.35 “Lawmakers who objected to the tax passed legislation to eliminate it, citing the levy as an unfair burden on U.S. athletes who spend years sacrificing and training in their sport, often at great financial expense.” However, “not all Team USA medalists will be exempt. The tax will still apply to high-profile athletes who earn at least $1 million a year.”36

For example, Michael Phelps, who made more than $1 million and earned five gold medals during the 2016 Rio Olympics in Brazil, likely received a $55,000 tax bill.37 Gymnast Simone Biles, who also met the $1 million threshold and earned four golds and one bronze medal in Rio, likely received a $43,000 tax bill.38 Rep. Robert Dold, R-III., the sponsor of the Victory Tax legislation, added in response to the purpose for the bill: “Most of these athletes will never sign an endorsement deal or a professional contract, which is why [it is] so important that these athletes will no longer be forced to pay a big tax bill when they achieve their Olympic dreams representing the United States.”39 The legislation passed the U.S. House of Representatives in October 2016 by a 415-1 vote and the law applies retroactively to the 2016 Olympic and Paralympic Games in Rio de Janeiro.40 However, the legislation does not affect taxes on an athlete’s endorsement or sponsorship income, but where Team USA brought home 121 medals from the Rio Games, including 46 gold medals, but the government revenue in unlikely to be substantial relative to athletes in the $1 million+ earner range who win a lot of medals.41

IV. PROFESSIONAL SPORTS

The current marketplace is one filled with substantial revenue from television deals42 and controversy,43 with the National Football League removing its non-profit status.44 Nonetheless, where the Tax Cuts and Jobs Act does not directly affect professional sports as was once debated,45 state law, specifically tax exemptions,46 have increased despite some cities and citizens becoming more wise to resisting giving their taxpayer dollars to professional sports franchises to build new stadium homes.47

A. California Penal Code 320.6 (2014) and similar state laws

In the state of California, Penal Code Section 320.6 provides for legal gambling through “50/50” raffles inside professional sports venues, including at NFL, MLB, NHL, NBA/WNBA, MLS venues, at PGA/LPGA Tour and NASCAR events.48 The text of the legislation provides:

California Penal Code Section 320.6

“(a) Notwithstanding Section 320.5, this section shall apply to an eligible organization, as defined in subdivision (c).

(b) A raffle conducted by an eligible organization, as defined in subdivision (c), for the purpose of directly supporting beneficial or charitable purposes or financially supporting another private, nonprofit eligible organization, as defined in subdivision (c) of Section
320.5, that performs beneficial or charitable purposes may be conducted in accordance with this section.

(c) For purposes of this section, “eligible organization” means a private, nonprofit organization established by, or affiliated with, a team from the Major League Baseball, National Hockey League, National Basketball Association, National Football League, Women’s National Basketball Association, or Major League Soccer, or a private, nonprofit organization established by the Professional Golfers’ Association of America, Ladies Professional Golf Association, or National Association for Stock Car Auto Racing that has been qualified to conduct business in California for at least one year before conducting a raffle, is qualified for an exemption under Section 501(c)(3) of the Internal Revenue Code, and is exempt from taxation pursuant to Section 23701a, 23701b, 23701d, 23701e, 23701f, 23701g, 23701k, 23701l, 23701t, or 23701w of the Revenue and Taxation Code.

How this works is when fans attend a sporting event there are 50/50 team raffle employees who collect donations from fans and in return they are entered into a drawing where one fan can win 50% of the total monies collected. If more fans donate, the pot gets larger. What this also means is that a professional sports team may take 50% of the fan-donated proceeds, untaxed, from raffles hosted inside their venues and then donate the team’s share to a charity of their choice, generally a community-based charity or endeavor or the team’s own non-profit, while, again, the winning-fan takes home the remaining 50%.

In the state of Arizona, the NFL’s Cardinals and MLB’s Diamondbacks have taken the 50/50 raffle a step further by offering the 50/50 raffles from the comforts of people’s homes where television audiences can enter and win the raffle from their couches. In addition, all four professional sports teams in Arizona, including the Cardinals, Diamondbacks, NHL’s Arizona Coyotes, and NBA’s Phoenix Suns, offer 50/50 raffles to game attendees in their stadiums. Moreover, two universities, Arizona State and Michigan State, now offer 50/50 raffles at their college sporting events. Again, “eligible organizations,” like in California, are the nonprofit organizations affiliated with a professional sports team and also include universities. The total 50/50 raffle take home dollars vary by game and club, but it is in the millions of dollars for some, as measured by the MLB’s Los Angeles Dodgers, and separately where a Canadian Football League fan won $345,160 in July 2017, where the team received $345,160 in untaxed proceeds, or $690,320 between the fan and the team.

However, the 50/50 raffle should not be misunderstood here. The untaxed proceeds do go to registered 501(c)(3) organizations that are used presumably for legitimate, needed services, facility upgrades or community-based charities and endeavors. Moreover, one lucky fan always wins 50% of the donated proceeds, which could be significant.

Interestingly, the University of California, Los Angeles (“UCLA”) Bruins football team who play their home games at the Rose Bowl in Pasadena, California, finds itself in a peculiar situation, otherwise known as legislative purgatory, where UCLA plays its home football games in the legendary stadium, but UCLA cannot host 50/50 raffles because the California legislation is applicable only to professional teams. Essentially, colleges are not allowed to host 50/50 raffles in California. An imbalanced situation for UCLA, but until something changes, some states have 50/50 raffles, some do not, and some colleges do too. It is another source of revenue for professional sports franchises and universities in terms of community development or for improvement projects where the proceeds are donated to the teams or universities own a non-profit.

B. Jock Taxes and the California Workers Compensation Dilemma

In California, athletes are being taxed directly through Jock Taxes, and yet are being limited from obtaining workers compensation benefits in the state where they played during their professional careers. Jock Taxes, per SI.com, work as follows:

Of the 25 states with professional sports teams, 21 impose a Jock Tax. But this year, the stage for the Super Bowl [2016 Super Bowl between the NFL Carolina Panthers and Denver Broncos] happens to be in the state [California] with the highest income tax rate in the country at 13.3%—nearly three times the rate of Arizona, home to last year’s Super Bowl . . . In 2013, for example, California collected more than $229 million in income tax from athletes. Hosting Super Bowl 50 will only be an extra boost for state coffers.

When you add up [NFL quarterback Cam Newton’s] salary, signing bonus and postseason bonuses, the 26-year-old star quarterback will earn more than $20 million in 2016 [not including endorsement deals]. For the days Newton spends in Santa Clara [Super Bowl 50] for his employment as a Carolina Panther . . . Newton will owe [California] approximately $137,000 in taxes. Remember, Newton [is not] a resident of California and he [is not] employed in California. Yet the amount of money Newton will owe California in taxes more than doubles the median income in the U.S. (approximately $54,000).

However, the workers compensation legislation cuts the opposite direction of Jock Taxes as “[p]rofessional
would directly affect the trading of professional athletes. This is a significant loss for professional athletes as California is typically an employee-friendly state with its “broad rules on how long former athletes can file claims in California” and is “one of nine states that permit workers’ compensation claims on cumulative trauma injuries like those claimed by professional athletes.”

For some perspective, “the California Insurance Guarantee Association has paid nearly $42 million in claims to professional athletes since 2002.”

Seemingly, an unfair situation where the very athletes and high earners who are being taxed are conversely being limited on their injury recovery options in the very state where they pay the highest tax rates. In California, the legislative plan of action seems to be one of giving tax breaks to the professional sports franchises through the 50/50 raffles, while taxing and limiting injury-recovery options for the athletes that play for the professional sports franchises. One could make the argument that the unfairness of the tax towards out of state earners is a violation of the United States Commerce Clause as they are being treated differently from California residents. Essentially, out-of-state athletes are not getting the same benefit of the tax code and recovery options for injuries where not every athlete can play for a California-based franchise.

The Tax Cuts and Jobs Act did “repeal the exemption for interest earned on ‘advanced refunding bonds,’ which under previous law were used to refinance tax-exempt bonds issued by state and local governments and certain charitable activities of Section 501(c)(3) organizations.” However, “There has been no change to the exemption for interest earned on private activity bonds, or on bonds, the proceeds of which are used to finance or refinance professional sports stadiums.” A previous version of the legislation had proposed to repeal the exemption for these bonds,

but did not make it into the final version of the bill. Practically speaking, this means that team owners will continue to utilize public funding to build billion dollar stadiums. Right or wrong, the bonds are a benefit that professional sports franchises will continue to utilize.

The Tax Cuts and Jobs Act did not include language that would directly affect the trading of professional athletes and their contracts to another team. However, the addition of one word in the tax cut law passed by the 115th Congress, “real,” (for real estate) could do just that. Specifically, based on this change to the exempt transactions, when a professional athlete is traded to another team that transaction could now be subject to the capital gains tax. The capital gains tax is a tax levied on the profit from the sale of property or of an investment, but investments, including a professional sports team’s players, were exempt (as finding market value and profit from a trade is very difficult to determine). “With little clarification from the IRS or Senate Finance Committee on how the tax law changes would be specifically instituted for professional sports organizations, the situation remains a question mark.”

V. CONCLUSION

A dichotomy is presented here because on the one hand Congress has regulated college sports through two specific provisions in the Tax Cuts and Jobs Act, but at least through the current legislation has not increased taxes or closed loopholes with regard to professional sports. If anything, at least at the state level, some legislatures have passed legislation that has benefited professional and collegiate teams via exemptions to host 50/50 raffles, where the donated proceeds are untaxed. In some sense, a logical argument could be made that the money lost through the 21% excise tax on our universities’ high earners could be regained through 50/50 raffles (at least for colleges that can host the 50/50 raffles). Olympic athletes on the other hand, find themselves in a situation where some of their winnings have been made exempt from the tax code, but not for the highest earners/most successful Olympic athletes making over $1 million annually.

The needle has been moved towards higher taxes in the sports industry, at least at the federal level, levied against the highest earners in Olympic and employees in collegiate sports and for the largest donors in college athletics. Are professional sports next in line to be taxed? The future holds the key. For now, at the state level, some legislatures are giving professional sports franchises tax breaks through 50/50 raffles, and some colleges too, while the state of California has simultaneously reduced recovery options under workers compensation laws for professional athletes. On the other hand, the federal government has implemented taxes against the few existing highest individual Olympic athlete earners and removed write-offs from the tax code for the largest donors to Universities, supported team owners who might utilize public funding to build stadiums and also, imposed a capital gains tax on the profit from the sale of an investment, which may ultimately turn out to affect trades of professional athletes.

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65 United States Constitution (Article I, Section 8, Clause 3)


The Music Modernization Act – A Long Overdue Overhaul to the Music Copyright Licensing Infrastructure

The Music Modernization Act seeks to overhaul the music copyright licensing infrastructure, a daunting task that most would say, is long overdue. The bill is a bipartisan package incorporating several pieces of legislation, including the CLASSICS Act, the AMP Act, and rate standard parity provisions from the Fair Play Fair Pay Act.

Among its proposed changes, the Act would fundamentally alter Section 115 of the U.S. Copyright Act, which regulates compulsory licenses in nondramatic musical works, or songs outside of a movie, television show, or play. Specifically, the bill seeks to reform Section 115 to ensure timely compensation to songwriters by ending the Notice of Intent process and instead creating a single Mechanical Licensing Collective funded by the digital services and providing a publicly accessible database for song ownership information. The bill further seeks to establish an agency devoted to licensing and royalties that would be led by a board comprised of individuals from various sectors of the music industry. This agency would be tasked with identifying rightsholders, issuing blanket licenses to digital services, and would collect and pay royalties to the appropriate rightsholders.

Additionally, the bill seeks to close the pre-1972 loophole by establishing federal copyright protection in nondramatic musical works, or songs outside of a movie, television show, or play. Specifically, the bill seeks to reform Section 115 to ensure timely compensation to songwriters by ending the Notice of Intent process and instead creating a single Mechanical Licensing Collective funded by the digital services and providing a publicly accessible database for song ownership information. The bill further seeks to establish an agency devoted to licensing and royalties that would be led by a board comprised of individuals from various sectors of the music industry. This agency would be tasked with identifying rightsholders, issuing blanket licenses to digital services, and would collect and pay royalties to the appropriate rightsholders.

The bill would also codify SoundExchange’s practice of honoring “Letters of Direction” from artists who wish to share royalties with producers and other creatives who participated in the creation of the works. It further provides a process whereby participants in recordings made before the digital performance right was established in 1995, can share in digital royalties for those sound recordings, and would further provide a “willing buyer, willing seller” rate standard requiring digital platforms to pay fair market value for music.

The bill also seeks to revamp the current rate court system who hears disputes over royalties paid by digital services. In other words, instead of having one judge hearing all rate court cases for ASCAP and another hearing the same for BMI, the Act would provide for a Southern District of New York judge being randomly assigned to each individual case. In so doing, the Act seeks to repeal Section 114(i) of the U.S. Copyright Act, and replace it so judges would have the ability to gauge market value for musical compositions.

The Music Modernization Act passed the U.S. House in April 2018 by unanimous vote and was introduced in the Senate on May 10, 2018 by Sen. Orrin Hatch (R-UT) and a bipartisan group of co-sponsors. The Act has received widespread support across the various industry groups and is expected to pass early.

HBO Prevails with the De Minimis Copyright Exception

HBO recently prevailed in Gayle v. Home Box Office, against allegations of copyright and trademark infringement involving its television series, Vinyl. The series, set in the 1970s and centered on record executives, included a scene of a woman walking down a New York City street with a dumpster tagged in graffiti art stating, “art we all.” Itoffee R. Gayle, the graffiti artist responsible for the artwork in that scene, claimed that HBO intentionally used the graffiti art in the background, that such use infringed both his copyright and trademark rights, and that HBO failed to license use of the work.

The Court disagreed with Gayle’s position and found that HBO neither needed a license, nor was required to pay a fee for use of the image, as not all copying is unlawful. The District Court for the Southern District of New York provided that Gayle had the burden of establishing that the allegedly infringing work was substantially similar to his and that the amount taken was more than de minimis. In other words, more than a “technical violation of a right so trivial that the law will not impose legal consequences” or “that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.”
Unfortunately, for Gayle, the basis of his claims focused on a barely visible, fleeting shot of some graffiti on a dumpster in the background of the scene at issue. The image appeared in the scene for just a few seconds, was never the focus of the scene, and played no role in the scene plot. The Court noted the difficulty in observing the graffiti art when pausing the scene, let alone the near impossibility to notice the graffiti when viewing the scene in real time. Given the same, the Court indicated that Gayle’s claims bordered on frivolous. The Court also held that HBO’s intent was irrelevant to the de minimis inquiry because the copying itself is not actionable.

While the burden of policing works and enforcing rights falls on the intellectual property holder, rightholder must consider limitations and exceptions, including the de minimis copyright inception, when considering infringement suits for use by third parties who also seek to produce and create works.


The Shape of Water Copyright Infringement Complaint

David Zindel filed suit on February 21, 2018 against Fox Searchlight Pictures, Guillermo Del Toro, and other Defendants, alleging: (1) copyright infringement; (2) contributory copyright infringement; and (3) vicarious copyright infringement, under the United States Copyright Act.

Plaintiff David Zindel is the son of Paul Zindel. Paul Zindel is the author of the 1969 play Let Me Hear You Whisper (the “Play”). The Play tells the story of a janitorial woman who works at a scientific research lab where animal testing is conducted. While working, she discovers the plan to kill one of the animal creatures, and plans to release him before this can occur. The Play had been reproduced for television and has been repeatedly re-published in different print works. The Play has gained a significant public following as a result. Paul Zindel passed away in 2003, leaving the copyrights to his literary works to his children, including David Zindel.

Defendants financed, produced, and distributed the Oscar-winning film The Shape of Water (the “Picture”). The story told in the Picture is noticeably similar to the one told in the Play. Some of the similarities include the main character (a janitorial cleaning woman who was employed at an aquatic lab), the aquatic creature, the time in which the story takes place, and certain scenes that appear in both the Play and the Movie.

Zindel believes that Defendant David Kraus, a producer on the Picture, came up with the idea for the Picture after seeing one of the television adaptations of the Play when he was fifteen-years-old. Zindel also alleges that Defendant Kraus was well aware of David Zindel’s work, and had acknowledged this awareness in the past in a previous article. However, Defendants never sought to obtain a license for the motion picture rights to the Play. Paul Zindel was also not credited in any way on the Picture.

Plaintiff alleges that all Defendants contributed to the copyright infringement of the Play. Plaintiff requests a preliminary injunction during the course of this action, and a permanent injunction, pursuant to 17 U.S.C. § 502. Plaintiff also requests compensatory damages, consequential damages, and an accounting and restitution of all profits Defendants made as a result of the copyright infringement of the Picture.

In light of the substantial number of similarities between the Play and the Picture, it is likely that the case will become more prevalent in the coming months, especially since it recently won numerous Oscars earlier this year.


IMDB.com v. Becerra Summary Judgment

The United States District Court for the Northern District of California granted summary judgment for IMDB on February 20, 2018. IMDB had previously claimed that a California state law prohibiting IMDB from publishing age-related information was unconstitutional.

In September 2016, California Governor Jerry Brown signed into law AB 1687. The law prohibited any “online entertainment employment service provider” from publishing any age-related information, if requested by the specific subscriber. The law was also sponsored by SAG-AFTRA. The goal of this law was to reduce age and employment discrimination in the entertainment industry, specifically in casting.

On November 10, 2016, IMDB filed suit, claiming the law violated their First Amendment right to free speech. IMDB also claimed the law violated the Commerce Clause because “California [was] attempting to police the internet . . . beyond the state’s own borders.” IMDB alleged in the original complaint that IMDB was the sole target of this California state law.

IMDB also alleged that subscribers to IMDBPro have been allowed to remove age-related information for a number of years. Casting directors also use IMDBPro to access age-related information, and not the public IMDb website.
In the original complaint, IMDb sought a declaratory judgment that the California law was unconstitutional. In February 2017, a preliminary injunction was ordered preventing enforcement of the statute while the lawsuit was pending. Finally, in February 2018, the Court granted summary judgment for IMDb and permanently enjoined California from enforcing the statute.

In granting summary judgment for IMDb, the Court stated that, when applying strict scrutiny, California failed to show the law furthered the stated goal. In other words, the law is “not narrowly tailored” to achieve the overall governmental purpose of combating age discrimination. The Court specifically said that the law was “underinclusive” and the age-related information could still be found elsewhere. The law also applied to only certain age-related information (that of subscribers who requested the information be removed) but not others. When looking at all of these factors collectively, the Court determined that the statute did in fact violate the First Amendment.

Interestingly, the Court also acknowledged that the bigger issue at play was the objectification of women, not merely an age discrimination problem. The Court emphasizes the fact that the objectification of women has been a long-standing problem, with women often losing out on roles unless they are significantly younger than the leading actors involved in the project. The Court believed this should be addressed more by California, and was essentially ignored when the statute in question was passed.


**Redbox v. Disney Legal Battle Continues**

On February 20, 2018, the United States District Court for the Central District of California recently denied an injunction requested by Disney Enterprises. Disney had requested the Court grant an injunction against Redbox in order to enjoin them from offering digital download codes for Disney movies.

In the original complaint, Disney alleged that Redbox purchased DVDs, including combo-packs, packaged originally by Disney that included digital download codes. On any Disney DVD or combo-pack with these codes, language on the box clearly indicates the codes are “not for sale or transfer.” This is also stated on insert located within the combo-pack that had the code listed. After purchasing the combo-packs, Redbox would then make the code available at any Redbox kiosk. Disney alleged this resale of the codes constituted contributory copyright infringement, as well as a breach of contract with specifically the Buena Vista subsidiary of Disney Enterprises. Redbox did not have a vendor agreement of any kind with Disney at the time they began distributing the codes for resale.

As to the breach of contract claim, Disney argued that Redbox entered into a contractual relationship with Disney when the DVDs and combo-packs were purchased and opened. The main issues the Court addressed in its review of the Motion was whether the language on the combo-pack constituted a license and whether Redbox’s opening of the combo-packs constituted acceptance of the license. The Court decided that no license existed because the language does not indicate that opening the combo-pack would be an acceptance or specify that the language constituted an offer. Therefore, the Court concluded that Disney failed to meet its burden of demonstrating the likelihood of success on its claim.

As to the contributory copyright infringement claim, Disney claimed Redbox encouraged consumers to violate the license in the terms of service of the digital download services. In turn, Redbox argued that Disney could not show a likelihood of success on the merits of its contributory copyright infringement claim, due to their own copyright misuse.

In the end, the Court agreed with Redbox and said that Disney had not met their burden of demonstrating the likelihood of success of its claim. The Court reasoned that, while the terms of service did equate to restrictive licenses, anyone who purchased the combo-packs must either (1) forego their statutory right to sell their copy of the work, pursuant to 17 U.S.C. § 109, or (2) exceed the scope of the license. Disney could not go beyond the scope of its copyright to control the consumer’s right to sell or transfer the product once it was purchased.

Because of the above-stated reasons, the Court denied the injunction. However, on April 9, 2018, Disney filed an amended complaint, addressing some of the concerns mentioned by the Court.


**The NCAA Is Going To Court For Its Antitrust Problem Yet Again.**

In March 2018, the National Collegiate Athletic Association ("NCAA") reported that the governing entity generated $106 million dollars in profit on $1.6 billion dollars in revenue during the 2017 fiscal year.¹ College sports’ governing body will need every dollar as it prepares for yet another fight over its unique brand of “amateurism” in the federal courts.

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¹ fountainforchange.org/page/2018/03/revenue-statement

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After the landmark O’Bannon v. National Collegiate Athletic Association decision in 2015, which held that the NCAA rules prohibiting its members from offering athletic scholarships (otherwise known as ‘grants-in-aid’) equal to the full cost of attendance were unreasonable restraints on trade and thus violated Section 1 of the Sherman Act—a litany of challenges to the NCAA’s governing model have been filed. In 2014, two such cases challenging the NCAA’s amateurism restrictions on antitrust grounds were consolidated, for discovery purposes, into the case known as In Re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation. The two underlying cases, Alston v. National Collegiate Athletic Assoc., et al., and Jenkins et al. v. National Collegiate Athletic Assoc., et al., both targeted the NCAA’s caps on athletic grants-in-aid as unreasonable restraints on trade and included claims for both injunctive relief and damages. However, in February of 2017, the NCAA reached a $208.7 million-dollar settlement with the parties in the Alston case, who primarily sought damages on behalf of student-athletes competing in Division I football and basketball based on the difference between the value of an athletic grant-in-aid prior to the O’Bannon decision and the full cost-of-attendance post-O’Bannon.

Still, this settlement did not affect the more ambitious Jenkins claims with its plaintiff-class of current and former student-athletes in the sports of men’s Division I Football Bowl Subdivision (“FBS”) football and men’s and women’s Division I basketball seeking to permanently enjoin the NCAA’s amateurism rules that place a wage ceiling on student-athlete compensation. In fact, after Judge Wilken denied the NCAA’s motion for summary judgment over the remaining Jenkins claims on March 28, 2018, she scheduled a bench trial for December 2018. Accordingly, the Jenkins trial will proceed under an antitrust rule of reason analysis, as provided by Section 1 of the Sherman Act.

Indeed, in her summary judgment ruling, Judge Wilken held that the plaintiffs met its initial burden under a rule of reason analysis by presenting sufficient evidence to show that the challenged NCAA restrictions have anticompetitive effects on interstate commerce (meeting the first prong of the analysis). Furthermore, Judge Wilken’s ruling also limited the NCAA to just two justifications for the challenged restrictions, thereby requiring the NCAA to come forth with credible evidence proving the challenged NCAA restraints either serve the procompetitive purpose of “integrating academics with athletics” or work to preserve “the popularity of the NCAA’s product by promoting its current understanding of amateurism.”

Thus, under the rule of reason analysis, Judge Wilken narrowed the scope of issues to be litigated during December’s bench trial to “whether the current, challenged rules have the two procompetitive benefits remaining at issue in this case” and, if so, whether the plaintiffs can prove that “substantially less restrictive alternatives to those rules exist.”

However, on April 28th, 2018, Judge Wilken granted a motion to exclude the use of certain expert opinions at trial. In her order, Judge Wilken granted the plaintiff’s motion to exclude the testimony of Dr. Elzinga—one of the NCAA’s expert witnesses—in its entirety. The Court reasoned that Dr. Elzinga’s proposed testimony, which related to the “definition of the relevant antitrust market in this matter and Defendant’s power within,” was moot in light of the March 28th summary judgment ruling, which adopted the O’Bannon single-sided market definition (e.g., “market for a college education combined with athletics or alternatively the market for the student-athletes’ athletic services”). Dr. Elzinga’s testimony additionally argued that NCAA amateurism rules promoted competition among schools, and thus justified the compensation limits; but Judge Wilken ultimately concluded these arguments are irrelevant to the present matter, as “[Dr. Elzinga’s] opinion does not provide any support for Defendants’ argument that the NCAA’s current rules restricting student-athlete compensation preserve the popularity of the NCAA’s product by promoting its current understanding of amateurism,” nor do the defendants “contend that it supports their argument regarding the integration of academics and athletics.”

Thus, Judge Wilken has taken tight control over the expert opinions and arguments that are allowed at trial: her court will only hear experts advancing one of the two procompetitive justifications, within the relevant market, that made it through the summary judgment stage. In Judge Wilken’s court, it appears that the NCAA will be forced to bear the full weight under a rule of reason analysis. However, given that procompetitive justifications were found in O’Bannon, the crux of the case will likely hinge on whether the plaintiffs can show that their sought-after remedy—essentially a free market for student-athlete services—is a substantially less restrictive alternative to the status quo that will still achieve the same goals: preserving the popularity of the NCAA’s unique product or the integration of academics and athletics.

Jenkins et al. v. National Collegiate Athletic Association et al. (Case No. 4:14-cv-02758-CW—U.S. District Court California Northern District (Oakland).
The Courtroom Quarrel Between The NFL and The City of St. Louis

In 1995, the City of St. Louis, Missouri, persuaded the National Football League’s Rams to relocate their franchise to a new home, the soon-to-be-finished Trans World Dome. A mere 23 years later, the Trans World Dome—now known as the Edwards Jones Dome—sits empty today and is the cause of not only massive heartache to fans of the franchise formerly known as the St. Louis Rams, but also of a lawsuit between a major American municipality and the National Football League.

In 1995, three public entities—the State of Missouri (the “State”), the County of St. Louis (the “County”), and the City of St. Louis (the “City”)—agreed to issue $258 billion dollars worth of bonds to build the Edward Jones Dome.16 In 2016, when the Rams franchise formally requested to relocate from St. Louis back to Los Angeles, the public still owed over $78 million dollars in stadium bonds.17 That debt will not be paid off until 2021.18 More egregiously, the deal for the stadium in St. Louis included a contract provision that granted the tenant the right to leave for another city if the Edward Jones Dome ever failed to be maintained as a “first-tier” stadium (e.g., within the top 25% of all stadiums).19 In effect, the provision granted the owner of the St. Louis Rams—Stanley Kroenke—with the leverage to demand public assistance in funding upgrades to the stadium by threatening to relocate the franchise. Maintaining the Edward Jones Dome at a “first-tier” rate proved to be an incredibly difficult proposition for the City of St. Louis, with major market teams like the Dallas Cowboys opening brand-new stadiums that cost over $1.5 billion dollars. And so, after failing to maintain the Edward Jones Dome as a “first-tier” stadium, Kroenke filed to relocate the Rams to Los Angeles in January 2016.20 Then, in April 2017, the St. Louis Regional Convention and Sports Complex Authority, the City of St. Louis, and the County of St. Louis (collectively, the “Plaintiffs”), filed suit against the Rams Football Company, LLC (“Rams”), the National Football League (“NFL”), and the owners of the NFL’s member teams (“Franchise Owners”).21 The plaintiffs’ complaint alleges breach of contract, unjust enrichment, fraudulent misrepresentation, and tortious interference with business expectancy.22

Although the provision to relocate the franchise was ultimately contained in the contract between the parties, the case centers on allegations that the defendants breached their contractual obligation of diligence and good faith—to the detriment of the plaintiffs—by misleading the plaintiffs into believing the City had a realistic chance at keeping the franchise. The complaint also alleges that the NFL failed to follow its own relocation procedures, again to the detriment of the plaintiffs.23 To support these allegations, the plaintiffs cite public and private statements made by Kroenke, his business associates, and NFL executives.24

The plaintiffs ultimately seek to recoup the $16.2 million dollars spent by local authorities in an effort to keep the Rams in St. Louis, as well as to recover the estimated $15 million dollars in lost annual state revenue.25 In late December 2017, St. Louis Circuit County Judge McGraugh denied motions to dismiss nearly 85 defendants from the action and refused to grant the NFL’s motion to send the case to arbitration.26 However, Judge McGraugh did dismiss the fraudulent misrepresentation claim against all of the Franchise Owners class of defendants—except Kroenke—for failure to state a claim upon which relief can be granted.27 Then in April 2018, the Missouri Supreme Court denied the NFL’s motion to have the suit dismissed on jurisdictional grounds.28

The parties are currently in the discovery process in preparation for trial, and all signs indicate that this case will be litigated on the merits. Accordingly, the resolution of this case will be pivotal to the overall climate of publicly financed sports stadiums in America, especially as it gets more difficult for cash-strapped municipalities to service their debt obligations in light of both rising interest rates and municipal bonds, which seemingly mature over a longer period than the lifespan of stadiums themselves.

St. Louis Regional Convention, et al. v. National Football League, et al., Case No. 1722-CC00976 — Missouri Circuit Court, 22nd Judicial Circuit, City of St. Louis County

Ohio Wants To Use Art Modell’s Legacy To Save The Columbus Crew

As a millionaire owner of an American professional sports team, what do you do when your city refuses to build a brand new stadium, on the public dime, for your franchise? You threaten to relocate the franchise to another city, of course. That is precisely why the State of Ohio passed Ohio Revised Code § 9.67, better known as the “Art Modell Law.”

In the late 1990s, the owner of the NFL’s Cleveland Browns at the time, Arthur Bertram “Art” Modell, moved the team to Baltimore, Maryland. In response, the General Assembly of Ohio passed Ohio Revised Code §9.67, thereby placing restrictions on owners of professional sports franchises that utilize tax-supported facilities.29 Nevertheless, because the State
of Ohio has yet to have to enforce the Art Modell Law in court, there is a paucity of case law on the statute.

In October 2017, Anthony Precourt of Precourt Sports Ventures, the operator of Major League Soccer’s Columbus Crew SC (“Crew” or the “Club”) franchise, made a public statement expressing the Club’s desire to relocate the Crew to Austin, Texas.\(^{30}\) In that statement, Precourt expressed dissatisfaction with the Crew’s MAPFRE stadium and effectively said that the team would move to Austin, Texas in 2019 if the Crew cannot finalize a downtown soccer stadium within the next year.\(^{31}\) Additionally, it is claimed that the Precourt Sports Ventures has refused offers to sell 50% and 100% of the company.\(^{32}\) Accordingly, the City of Columbus and the State of Ohio (the “Plaintiffs”), filed a lawsuit in the Court of Common Pleas in Franklin County, Ohio, against Precourt Sports Ventures, LLC, and Major League Soccer, LLC (the “Defendants”), seeking declaratory judgment and injunctive relief against the proposed franchise relocation.\(^{33}\)

The complaint seeks relief under the Art Moddell law, which provides, in pertinent part, that “no owner of a professional sports team that uses a tax-supported facility for most of its home games and receives financial assistance from the state . . . shall cease playing most of its home games at the facility and being playing most of its home games elsewhere.”\(^{34}\) The Art Moddell law does, however, allow a team to stop playing home games at its facility and move somewhere else if the team’s owner “gives the political subdivision in which the facility is located” at least “six months’ advance notice of the owner’s intention to cease playing most of its home games at the facility” and “during the six months after such notice, gives the political subdivision or any individual or group of individuals who reside in the area the opportunity to purchase the team.”\(^{35}\)

The plaintiffs argue that the Crew, as a professional sports team both utilizing a taxpayer-supported facility and receiving financial assistance from the state, fall within the Art Modell law’s purview for three reasons.\(^{36}\) First, the plaintiffs contend that the Crew leases state-owned land for parking purposes at below-market rates. Second, the plaintiffs assert that the land beneath MAPFRE Stadium was leased to the Crew at below-market rates in 1996, and was designated as tax-exempt land explicitly for the Crew’s benefit. Finally, the plaintiffs argue that in 2009, the State provided $5 million for parking upgrades at the Ohio Expo Center, where Crew fans utilize lots that are just south of the stadium, and that these upgrades were made specifically for the Crew’s benefit.

In their motion to dismiss the case, the defendants advance two primary arguments.\(^{37}\) First, the defendants argue that O.R.C. § 9.67(A) does not apply to the Crew because the club has not received taxpayer support. The defendants’ theory asserts that the Crew’s lease is not only pegged to inflation, but is actually above the market rate charged to other tenants in the fairgrounds area, and that the State of Ohio gets 30% of the parking revenue generated during Crew games. More importantly, however, the defendants argue that O.R.C. § 9.67, “discriminates against interstate commerce by attempting to impermissibly restrict professional sports teams from moving out of state and interfering with business operations” and is therefore unconstitutional under the Commerce Clause.\(^{38}\)

In any case, Precourt Sports Ventures officially gave unambiguous notice of its intent to move to Austin, Texas, in a March 2018 letter to the Mayor of Columbus, thereby officially starting the six-month notice clock as required under the Art Moddel law.\(^{39}\)

However, because the Ohio Rev. Code § 9.67 law has never been challenged in court before, there is no clear precedent for how the court will rule. However, municipalities and sports teams alike should be keeping a close eye on how this case proceeds, as the case raises critical issues in the debate surrounding publicly financed stadiums.

**Rentmeester v. Nike, Inc.**

This is a copyright infringement action brought by the renowned photographer Jacobus Rentmeester. In 1984, photographer Jacobus Rentmeester shot an original and iconic image of Michael Jordan at the University of North Carolina for Life Magazine. That image is known today as the Jumpman logo. Soon after the photo was published, Nike contracted with Rentmeester to license the transparency of the photo and then ultimately to use the photo for two years on billboards. Nike also hired a photographer to produce its own photograph of Jordan using the Rentmeester photo as inspiration. In 1987, Nike created its Jumpman logo and has used that logo over the last 30 years. Rentmeester filed an action in 2015 alleging that Nike infringed on his copyright of the Jordan photo. The District of Oregon granted Nike’s motion to dismiss and Rentmeester filed an appeal with the Ninth Circuit.\(^{40}\)

To prevail on a copyright infringement case, two things must be proven. The first is that there is ownership of a valid copyright and that the opponent
The second element of a copyright infringement case has two distinct components: copying and unlawful appropriation. In the event that the plaintiff lacks direct evidence of copying, if the plaintiff can prove that the defendant had access to the plaintiff’s work and that the two works share similarities, a presumption of copying will be made unless the defendant can prove that there was independent creation. The other element is unlawful appropriation: “[t]o infringe, the defendant must also copy enough of the plaintiff’s expression of those ideas or concepts to render the two works ‘substantially similar.’”

In this matter, Rentmeester owns a valid copyright in his photograph of Jordan. As a result, Rentmeester is able to plausibly allege the first element for a copyright infringement case. The pivotal issue is whether Nike copied protected aspects of the image’s expression. As indicated above, the second element rests upon whether there was both copying and unlawful appropriation. Rentmeester can sufficiently show that Nike did in fact copy his image in that they were aware of his image evidenced by Nike contracting with Rentmeester to license his image. Although, Nike hired a photographer to take a photo similar to the Rentmeester photo, the fact that they had access to the Rentmeester photo does not protect Nike on the copying claim.

The basis of the case all comes down to whether Nike unlawfully appropriated the image that Rentmeester created in 1984. “To prove this component of his claim, Rentmeester does not have to show that Nike produced an exact duplicate of his photo, but rather show that Nike copied enough of the photo’s protected expression to render the works substantially similar.”

The Ninth Circuit makes determinations of substantially similar works based primarily on an extrinsic test and that application may be decided by the court as a matter of law. The court dissected the photo captured by Rentmeester versus that of Nike. They acknowledged that the photos are similar in the subject matter they depict; however, the series of creative choice and arrangement of elements were not substantially similar. The creative choices involve lighting, camera angle, depth of field and selection of foreground and background elements. The pose of a person, on the contrary is not protected. Nike borrowed the concept and idea of the photo but made different creative choices in how the image would be captured and as a result, the court decided that Nike did not unlawfully appropriate the Rentmeester image, as the image Nike created was not substantially similar.

North American Soccer League v. United States Soccer Federation Update

Over the past seven years, the United States Soccer Federation (USSF) has classified the North American Soccer League (NASL) as a Division II league. The NASL was recently informed by the USSF that it would not be approved as Division II league moving forward. As a result, the NASL has filed a complaint against the USSF alleging antitrust violations that in denying the NASL from being approved as a Division II league, the USSF has in fact illegally protected the monopoly position of its business partner: Major League Soccer (MLS). NASL moved for a preliminary injunction, seeking a Division II designation for the duration of this litigation.

In order to be awarded a preliminary injunction a party must establish, “(1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; (3) that the balance of hardships tips in its favor; and (4) ‘that a preliminary injunction is in the public interest.’”

However, a heightened standard is appropriate where: “(i) an injunction is ‘mandatory,’ or (ii) the injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.” As a result, the court held that the heightened standard would apply because the request is to alter the NASL’s status rather than maintain the status quo.

The most important element that needs to be established is that there is in fact irreparable harm. NASL attempts to cite several reasons as to why they are facing irreparable harm but the most convincing to the court was the loss of potential investors. NASL had evidence of letters of intent for six new teams based on a Division II status as well as evidence that the league was on shaky financial grounds otherwise.

The next critical element is that there is evidence of a concerted action. A conspiracy in violation of Section 1 of the Sherman Act “requires proof of a conscious commitment to a common scheme designed to achieve an unlawful objective demonstrated by direct or circumstantial evidence that tends to exclude the possibility of independent action.”

The plaintiffs at the very least have to prove that there was an agreement to agree to vote a certain
way and thus compromising the independent decision making of each board member. This does not happen although the plaintiff does offer circumstantial evidence in support of a concerted action alleging that conspiracies may be proven through inferences from the behavior of the alleged conspirators. Unfortunately, the evidence does not exclude the possibility of independent action and thus the court indicated that the plaintiffs failed to establish a likelihood of success on the merits.

It is likely that this case will continue as the NASL has filed a lawsuit against the United States Soccer Federation Board of Directors on grounds that they breached their fiduciary duty. I am not sure if this will be successful unless the NASL can prove that there was concerted action.

**Ezekiel Elliot Case(s) against the National Football League**

Last year, Ezekiel Elliot, running back for the Dallas Cowboys, was served with a six game suspension for domestic violence. As a violation of this personal conduct policy, the commissioner of the National Football League ("NFL"), Roger Goodell, issued this penalty. Before discussing the legal matter of the case it is important to know the background.

**Background**

On February 12, 2016, a woman called the Aventura Police Department in Florida and alleged that Elliot pushed her against a wall, which hurt her shoulder. She said that Elliot put his hands on her because she was communicating with one of his old teammates. Between July 17th and July 22nd of 2016, Elliot's accuser reported five different instances of violence.

On September 6, 2016, the City Attorney's Office in Columbus, Ohio, issued a statement stating that no domestic violence charges against Elliot would take place due to conflicting and inconsistent statements. However, the NFL indicated that it would have an investigation to determine if the Elliot violated the league's personnel policy.

On August 11, 2017, the NFL announced that Elliot would be suspended for the first six games of the 2017 season based on the yearlong investigation with the league determining that Elliot had in fact been physical with his accuser at least three times in July 2016.

The NFL released a statement regarding the Elliot suspension. The NFL said that after an extensive investigation including consultation with medical experts, league investigators, and examining all available evidence that the decision to suspend Ezekiel Elliot was for the Commissioner of the NFL to make. “Pursuant to the Personal Conduct Policy, Commissioner Goodell sought the views of four external advisors to assist in evaluating potential violations.”

The National Football League Players Association and representatives for Elliot commented that the decision by the NFL is unwarranted especially because both the Columbus Prosecutor's Office and the NFL Investigators expressly concluded that at least on one occasion the accuser was lying and that the alleged incident was undermined by the accuser's friend's affidavit.

On August 15, 2017, Elliot officially files an appeal. Commissioner Goodell appointed Harold Henderson as the arbiter of the appeal hearing, and Henderson affirms the decision by Goodell. Prior to the issuance of the decision, the attorneys for Elliot filed a lawsuit in Texas to vacate the results of the appeal on the grounds that the NFL was hiding critical information such as the NFL's Director of Investigations' reporting that the accuser was not credible in the allegations and recommended no suspension for Elliot. That information was not part of the investigation report used in determining the outcome of Goodell's decision. The Texas court found that the hearing was not fundamentally fair and granted the preliminary injunction.

**Case**

Ultimately, this case was decided in New York. The NFL argued that the district court lacked subject matter jurisdiction under the Labor Management Relations Act ("LMRA") because "a lawsuit for violations between an employer and a labor organization must satisfy the following three elements: (1) a claim of violation of, (2) a contract, (3) between an employer and a labor organization."

The NFLPA argued that Elliot's attorneys stated a claim that satisfied those elements and thus vested the court with jurisdiction. The NFL responded that jurisdiction under the LMRA exists only if, Elliot "exhausts his contractual remedies and that the lack of a final arbitral decision at the time of filing the complaint is a fatal jurisdictional defect." The court held that the NFLPA's lawsuit on Elliot's behalf was premature because the procedures set forth in the collective bargaining agreement between the NFL and the NFLPA were not exhausted because the contracted arbitrator had yet to make a final decision.

There are a number of issues in the NFL. The first is the power of the Commissioner to institute
discipline and the ability for the Commissioner to appoint arbitrators to hear appeals. In traditional labor relations settings, it is customary for the parties to mutually select a neutral arbitrator to hear a case. These two issues will be paramount when the NFL and NFLPA renegotiate their collective bargaining agreement in 2021, as it is likely that a long lockout will ensue.

**Turner v. Wells, et al.**

In the middle of the 2013 National Football League season, Jonathan Martin departed from the Miami Dolphins, citing that he was the victim of bullying and harassment by his teammates. The defendant in this case, Theodore Wells, a partner at Paul Weis, conducted an investigation into the matter and authored a report to the NFL concerning the issues of workplace conduct within the Miami Dolphins franchise. In the report, Wells included facts and conclusions as to Martin’s teammates and even the plaintiff, then offensive line coach James Turner. It is from that report that this case is being tried. Turner has alleged that Wells’ report to the NFL contains false statements and accusations that have defamed him, as well as led to the termination of his employment with the Miami Dolphins. Turner has sued Wells claiming defamation. Wells has filed a motion to dismiss.

A motion to dismiss in accordance with Federal Rules of Civil Procedure 12(b)(6), states, “a claim must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face, meaning that it must contain factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”

Under Florida law, “[t]o state a claim for common law defamation, a plaintiff must allege that (1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) that the falsity of the statement caused injury to the plaintiff.”

True statements and statements of pure opinion are protected from defamation actions by the First Amendment. Florida law states, “[c]ommentary or opinions based on facts that are set forth in the article or which are otherwise known or available to the reader or listener are not the stuff of libel.” Furthermore, an important piece in analyzing whether the speaker accurately depicted the facts depends on whether the writer presents the facts at the same time that the commentary is presented. Independent commentary provided in this matter usually results in a finding of being purely opinion based.

Turner challenges the Defendants’ recitation of the blow-up doll incident and the characterization that Turner was somehow taunting Martin among other statements. The court held that since the facts were presented in the report before any commentary was made that the conclusions made by the Defendant was opinion based and thus under Florida law is an exception to defamation as it is protected under the first amendment. As a result, the motion to dismiss by the Defendant was granted by the court.

The case was appealed to the Eleventh Circuit. The court agreed with the lower court about the statements being opinion based and in arguendo added that Florida law states that a dismissal of a complaint on any ground supported by the record is permissible, even if that ground was not considered by the district court. The court found little difficulty coming up with the conclusion that Turner would be considered a public figure when an assistant professional basketball coach was considered to be a public figure. Moreover, other jurisdictions generally consider coaches from professional and collegiate sports teams to be public figures. Turner also availed himself to being a public figure when he appeared on HBO’s 2012 Season of Hard Knocks, a television program that features one National Football League team during its pre-season. Since Coach Turner is a public figure, he must establish actual malice on behalf of the author of the report and that means that the author made the false statement with knowledge of its falsity. As a result, Turner could not prove that standard and the case was affirmed.

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