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Golden State Warriors Sued Due to a Partnership with FTX Entities

By Jeff Birren, Senior Writer

The Warriors and FTX "launched a partnership in 2022" that put FTX's logo on the court at Chase Center, the Warriors' arena. FTX subsequently "imploded" in November 2022. Not only did the Warriors lose a sponsor, but the team has been sued in a class action case, only by people living outside of the United States, because of that sponsor's failure (*Elliott Lam, individually and on behalf of others similarly situated v. Sam Bankman-Fried, Caroline Ellison, and Golden State Warriors, LLC*, Case No. 3:22-cv-07336, U.S.D.C. N.D. Cal., ("Complaint"), (11-21-22)).

Background

According to the Complaint, "FTX Trading LTD and West Realm Shires Services Inc. d/b/a FTX US's" was "collectively valued at over $32 billion" and "was known for offering and selling unregistered securities in the form of yield-bearing accounts ('YBAs') to residents of the United States and other countries" (Id. at 2). FTX provided a platform on a mobile application that "allowed users to place cryptocurrency trade orders" and use "interest bearing or yield bearing

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District Court says NHL's Active Promotion of Fighting Preempts Claims Under Relevant Collective Bargaining Agreement

By Jon Heshka, Associate Professor at Thompson Rivers University

The estate of retired National Hockey League (NHL) player, Steven Montador, succeeded in September 2022 in having a concussion lawsuit against the NHL and its Board of Directors remanded to state court.

The suit was initially filed by Mondator's father, Paul, who was the representative for the estate in the Circuit Court of Cook County in 2015. The estate claimed that Mondator's death was at least partially caused by numerous concussions he suffered while playing professional hockey. The suit further alleged that the NHL negligently promoted violence by its players and failed to warn Montador of the risks of brain injury that the sport entails in violation of the Illinois Survival Act and the Illinois Wrongful Death Act.

The court dismissed most of Montador's claims saying the estate's allegations were completely pre-empted by the Labor Management Relations Act (LRMA) because those claims were inextricably intertwined with provision of the collective bargaining agreement (CBA) between the league and the NHL Players' Association. However, the court concluded that the NHL had unreasonably promoted a culture of violence and that the league implicitly misrepresented to Montador

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Kishner Shares Thoughts on Potential Sale of Manchester United

Irwin Kishner, co-chair of Herrick's Sports Law Group, recently shared his thoughts with the media about the potential sale of Manchester United, sharing his opinion about how long the sales process may take, the prospects for a full takeover and why the team is on the market now.

"It (United) is a very marketable, enticing potential investment for the right owner, not least its storied history and its ability to generate a fanbase," Kishner said. "This is a crown jewel a lot of folks will be very interested in trying to obtain. It will come down to questions of valuation."

He also responded to questions about the Raine Group, an investment banking firm, which is acting as United's exclusive financial advisor.

"Raine will handle this in a very professional way, they will try to get maximum sterling, dollar, euro for this asset," said Kishner. "Typically, you'll get a dozen or so declarations of interest, maybe more. They'll whittle it down to a handful or less, and make them each think the other guy, or girl, is going higher. As far as disclosing names, often you'll do that as part of the strategy to drive value."

The article goes on to discuss the potential valuation of the team and the potential purchasers. Kishner noted that "[b]ased on what Chelsea went for, and based on what you're hearing on this side of the ocean, I could easily see it establishing a record for a franchise." Kishner also believes that "American investors will be interested in getting a foot in the door at United, if that's what it comes down to." He expects the same individuals who went for Chelsea to look at the Manchester side.

The article further discusses the possibility of a minority investment. Kishner noted that "[t]he idea of selling minority stakes in these iconic clubs is not unheard of — it's done all the time in the US. Some of the most prestigious clubs have done it successfully. Sometimes, people will take a minority interest as a path to gaining control. It's a very viable way of raising capital."

Kishner concentrates his practice in general corporation law with an emphasis on sophisticated transactional work, including mergers and acquisitions, sports law, private equity, securities law, corporate restructurings and reorganizations, new media law, venture capital, joint venture, entertainment law, corporate finance and lending, intellectual property and licensing, employment law, equity and debt offerings and syndications in both the public and private context.

Specific to his sports practice, he represents a number of professional sports franchises and has acted as primary counsel on several high profile team acquisitions and dispositions in all of the major sports leagues; cable television and radio contracts; internet and intellectual property rights; joint ventures; credit facilities; advertising and sponsorship contracts; gaming and wagering matters; development and naming rights agreements; franchise transfers and financings; major event and tournament promotions; and seat license agreements for stadiums and arenas. He has acted as lead counsel in all aspects of eleven major stadium transactions, most significantly the new Yankee Stadium, and also represents financial institutions and bond insurers in stadium finance matters and loans to teams and team owners.

Options and Non-Contract Contracts: Explaining Motorsport's Silliest Silly Season

By Kerri Cebula, JD

In sports with a collective bargaining agreement, the rules for negotiating a player contract are clear. There is a proscribed time for negotiations and a date when contracts can be signed. The uniform player contract, negotiated as part of the agreement, is generally available to the public either through a Player's Association or a leak. When a player signs with a team, the length of the contract and the player's salary are generally released. This means that fans know when a player's contract expires and when they will be a free agent, able to negotiate with another team.

It is different in motorsport. Driver contracts in all forms of motorsport tend to be confidential affairs. Typically, all that is publicly know is that a driver and a team have agreed to a contract and maybe the years involved. Occasionally comments will be made by a team about an attempt to sign a driver or by a driver discussing why he chose to sign with a particular team. Kyle Busch's contract negotiations during the 2022 season are an example of the usual way driver contracts are publicly handled in motorsport.

But the 2022 season also gave fans a fascinating inside look at how driver contracts are actually negotiated. First, in July, Chip Ganassi Racing (CGR) announced that it had extended 2021 IndyCar Champion Alex Palou's contract through the 2023 season; the press release included a quote from Palou (Malsher-Lopez, 2022a). A few hours later, Palou announced that he had not agreed to the contract extension, that he never gave the quote, and that he had signed a contract with Arrow McLaren SP (AMSP) to drive for their IndyCar team starting in 2023 (Malsher-Lopez, 2022b). In August, Alpine's Formula One team announced that Oscar Piastri would be their driver for 2023 (Duncan, 2022). Again, just a couple of hours later, Piastri announced that he had not signed a contract with Alpine, but instead signed with McLaren's Formula One team (Duncan, 2022).

While the two disputes seemed similar from the outside - a driver who was believed to be under contract for one team announcing otherwise - the two disputes had very different outcomes. Palou will drive for CGR in 2023 while Piastri will drive for McLaren. And that is down to the differences in the original contracts signed by the drivers.

Alex Palou's Option

In July 2022, CGR announced that it had extended Alex Palou's contract through the 2023 season. Palou disagreed with that statement and announced that he had signed a contract with AMSP to drive for them in 2023. It is believed that his contract with AMSP included an option to test a McLaren Formula One car, which is not an option available with CGR. Later that month, CGR sued Palou and his representatives for breach of contract (Brown, 2022b).

In the publicly available court records, Palou's contract is mostly redacted. This is not unusual. Unlike sports with a collective bargaining agreement and a uniform player contract, there is no collective bargaining agreement or a uniform driver contract in motorsport. The terms and conditions of every driver contract is confidential, even to other drivers on the team. It is known, however, that CGR and Palou had a contract through the 2022 season with CGR holding an option for the 2023, and possibly the 2024, season (*Chip Ganassi Racing v. Palou Montablo*, 2022; Benyon, 2022). On July 11, 2022, CGR exercised their option and extended Palou's contract through the end of 2023 (*Chip Ganassi Racing v. Palou Montablo,* 2022). CGR announced the extension the next day (Malsher-Lopez, 2022a). Palou disputed this release, saying he had told CGR that he was leaving at the end of the season and announced that he had signed a contract with AMSP (Malsher-Lopez, 2022b).

Palou announcing that he informed CGR of his intent to leave at the end of the 2022 season is significant. It is believed that in driver contracts, even when a team holds the option to extend the contract, the driver must agree to the extension (Benyon, 2022). This was somewhat confirmed by fellow IndyCar driver Tony Kanaan, who is also under contract with CGR. In an interview, Kanaan suggested that options to extend are usually mutual and that this is normal practice in a driver contract (Benyon, 2022). But as the contract is redacted in the court filings, the actual wording of the option is not public information.

In September, the two sides agreed to a settlement. Terms of the settlement were not disclosed, but Palou will drive for CGR in 2023. He is allowed to test McLaren's Formula One car, which he was doing when the settlement was announced (Cleeren, 2022).

As an interesting side note, this is the second time that AMSP "stole" a driver from CGR. Felix Rosenqvist drove to the Rookie of the Year title for CGR in 2019 before announcing that he was leaving CGR for AMSP for the 2020 season (Fielding, 2022). Palou would have taken Rosenqvist's seat at AMSP.

Oscar Piastri's Non-Contract Contract

Oscar Piastri, the 2021 F2 Series Champion and a member of the Alpine driver training program, spent the 2022 season as a reserve driver for Alpine and rival

team McLaren. Throughout the season, it was believed that the team's 2022 drivers, Fernando Alonso and Esteban Ocon, would drive for the team in 2023; Ocon was already under contract and it was believed that Alonso was in the process of negotiating a contract extension with the team (Smith, 2022a). This would have left Piastri without a place at Alpine. Instead, Alpine had plans to loan him to Williams for the 2023 and possibly the 2024 seasons (Smith, 2022b; Noble, 2022).

In August, Alonso announced that he was leaving Alpine at the end of the season and would drive for Aston Martin for the 2023 season (Smith, 2022c). The next day, Alpine released a statement that Piastri would be driving for the team in 2023 (Noble, 2022a). Notably and unusually, the statement did not include quotes from Piastri and was released in the middle of the night in Australia, Piastri's home (Noble, 2022a). Piastri announced that he had signed a contract with McLaren in July, stating after the dispute was settled that Alpine had been told several times before the August announcement that he was leaving (Duncan, 2022; Noble, 2022a).

In Formula One, all contractual disputes between drivers and teams must be decided by the Contract Review Board (CRB); this is enshrined in both the Concorde Agreement between the teams and Formula One, the commercial rights holder, and in the International Automobile Federation (FIA) Sporting Regulations (Cooper, 2022). The CRB was introduced in the 1990s following the contractual dispute between Michael Schumacher and Jordan and Roberto Moreno's dismissal from Benetton to make room for Schumacher (Cooper, 2022). Their role is to tell the FIA which team has a valid contract with the driver and which team can hold the super license for the driver (Cooper, 2022). A super license is required by the FIA to race in Formula One and the license is held by the team, similar to the FIFA player registration held by football (soccer) teams. The driver must be under contract with the team for the team to hold the super license and the CRB must have a copy of that contract before confirming the team holds the driver's super license (Noble, 2022b; Cooper, 2022).

While proceedings before the CRB are to be confidential, this being Formula One, details have been leaked. The dispute between Alpine and Piastri appears to have centered around a "terms sheet" agreement for 2022 and beyond, which was labeled by Alpine as "subject to contract" (Noble, 2022b). Alpine believed this was a binding contract, while Piastri did not (Noble, 2022b). Piastri and Alpine began negotiating a driver contract in November 2021, with Piastri and his team set to receive the proposed contract by the end of November 2021 (Rencken & Nichol, 2022). Alpine did not send a proposed contract for the 2022 season until March 2022, four days before the season was to begin (Noble,

2022b; Rencken & Nichol, 2022). This was the contract submitted to the CRB to secure Piastri's super license for the 2022 season (Noble, 2022b). They waited until May 2022 to send the 2023 and beyond contract (Rencken & Nichol, 2022). However, this contract was not for Piastri to drive for Alpine as Alpine was attempting to sign a contact with Alonso to continue as their driver (Smith, 2022a; Nobel, 2022b). Instead, the contract stated that Piastri would be loaned to the Williams team for the 2023 season, with a possibility of extending the loan though the 2024 season (Nobel, 2022b). Alpine argued to the CRB that the terms sheet for the 2022 season was a valid contract for 2023 and beyond (Rencken & Nichol, 2022). The CRB disagreed, finding that Piastri had a binding reserve driver contract for the 2022 season with Alpine but that the terms sheet did not extend beyond the current season (Rencken & Nichol, 2022). They found that Piastri has a valid contract with McLaren for 2023 and beyond (Rencken & Nichol, 2022). While Alpine sent a contract for 2023 through 2026, Piastri never signed the contract (Rencken & Nichol, 2022). Therefore, McLaren had the valid contract with Piastri for 2023 and beyond.

Conclusion

The summer of 2022 was a banner time for those who always wanted to know how driver contracts work. It could also serve as a lesson to both drivers and teams - make sure you read and understand the contract.

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Professor Cebula's research interest focuses on the intersection of motorsports and the law with a special interest in intellectual property protection in the motorsports industry.

NFL Linebacker Sues, Alleging Dangerous Sideline Conditions Led to His Injury

Aaron Patrick, a linebacker for the Denver Broncos, has sued the NFL, ESPN, Los Angeles Chargers and others, claiming they were negligent for sideline conditions, which led to a season-ending knee injury.

The injury, a tear of his anterior cruciate ligament (ACL), occurred on October 17, 2022 during an overtime loss to the Chargers at SoFi Stadium in Los Angeles.

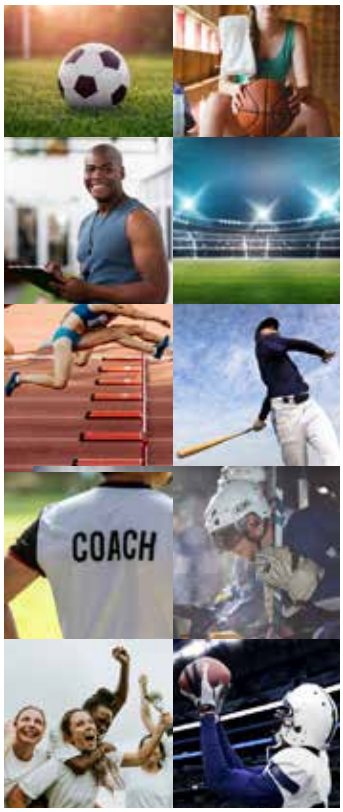
Patrick, who filed the lawsuit in California Superior Court, suffered the injury when he veered out of bounds, collided with an "improperly situated" NFL TV liaison, and stepped on a mat near the sideline, which was there to cover cables connected to an NFL instant replay monitor.

The lawsuit is similar to litigation brought by former NFL player Reggie Bush, who slipped on concrete after running out of bounds at Edward Jones Dome in St. Louis in 2015 and suffered a knee injury. Bush was awarded $12.5 million by a St. Louis jury in 2018.

The lawsuit is similar to litigation brought by former NFL player Reggie Bush.

In the instant case, Patrick alleged negligence on the part of every named defendant, citing California Civil Code § 1714, which "holds negligent parties financially liable for damages suffered by those injured as a result of the negligence."

In a statement released to the media, Patrick's attorney, William M. Berman, said, "Player safety should be the foremost of importance to the NFL and its owners. The NFL is a multi-billion-dollar sports enterprise and business, and it needs to do everything possible to protect its players from non-contact game injuries. As for Patrick's injuries, Sofi Stadium was built at a $5,000,000,000 expense; the stadium should have the state-of-the-art equipment to protect for player safety, and not use the type of $100 mats that you would expect to see in a restaurant kitchen."



How Many Lawsuits Does It Take to Make a First Down? The Washington Commanders May Soon Find Out

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

Within a week's time, the District of Columbia, through its Attorney General, Karl A. Racine, filed two separate lawsuits in the Superior Court of the District of Columbia involving the National Football League's Washington Commanders.

In the first action, filed on November 10, 2022, the Attorney General alleges that the Commanders and its owner Daniel Snyder, together with the NFL and Commissioner Roger Goodell, are accountable for creating and allowing a toxic and hostile work environment to permeate throughout the team's front office, while simultaneously providing misleading statements and failing to disclose material information related to the Wilkinson Investigation, all of which are violations of the District's Consumer Protection Procedures Act (CPPA).[1] In the second lawsuit, filed on November 17, 2022, the District of Columbia's Attorney General summed up in his one count complaint how the Washington Commanders again violated the CPPA, this time by intentionally misrepresenting various conditions concerning its season ticket program that were available to fans and perspective buyers who live or have lived within the District of Columbia.[2]

Regarding the November 10, 2022 lawsuit, the District of Columbia's Attorney General claims that from around the time that Dan Snyder became the owner of the Washington D.C. franchise, he has knowingly and repeatedly concealed allegations of sexual harassment and abuse of team employees from the Commanders' ticket and merchandise purchasing fanbase. In addition, since the summer of 2020, when the NFL and Dan Snyder agreed to hire Beth Wilkinson to oversee an internal investigation into the franchise regarding these issues (Wilkinson Investigation), the Attorney General contends that the two entities conspired to deceive the Washington D.C. fans when they jointly and publicly stated, "that this dysfunctional and misogynistic conduct was limited and that they (the Commanders organization) were fully cooperating with an independent investigation."[3] These statements, according to the lawsuit, distorted the truth and misled consumers, translating into increased ticket and merchandise sales, which is a 'no-no' when it comes to the D.C.'s consumer protection laws.

"For years the team and its owner have caused very real and very serious harm and then lied to dodge accountability, to continue making profits," A.G. Karl Racine stated. "So far, they seem to have gotten away with it, but that stops today."[4] Both the NFL and the Washington organization could potentially be held liable to pay financial penalties of up to $5,000 for each time they are found to have lied or mispresented their efforts to prevent and investigate sexual harassment or abuse within the organization.[5]

Moreover, the second lawsuit filed by the District of Columbia on November 17, 2022, involves the Washington Commanders' front office failing to return refundable deposits to season ticket holders who live or at one time lived within the District of Columbia. The complaint outlines how the Commanders "deceptively" held onto deposits beyond the 30-day holding period as agreed to per the season-ticket contracts, while at the same time imposing burdensome conditions that needed to be followed before receiving the money back from the organization. Again, the Attorney General's position is that the team's failure to return these deposits violated the CPPA since the franchise "prioritized its own revenues over fairness and deceived District consumers by wrongly withholding their security deposits that should have been automatically repaid under consumers' contracts, and improperly using those deposits for the Team's own purposes."[6]

However, the D.C. Attorney General's office did comment that the Commanders "have returned some of the money to ticket holders but, as of March 2022, they still held nearly $200,000 in unreturned security deposits paid by District consumers. They have also forfeited thousands of dollars from District consumers' security deposits and converted that money into revenue for the team, to use for its own purposes."[7]

In a response to this second lawsuit, the Washington organization's front office stated that it has not accepted security deposits for luxury suites in over ten years, nor has it accepted them for premium tickets for over twenty years. The Washington Commanders also claim that it began returning any and all monies associated with season-ticket deposits in 2014.[8] This may be true, and the franchise may have 'begun' returning the deposit money in 2014, but it is now 2022, isn't it time to make certain that 'all' of the deposit money is returned?

1 https://www.documentcloud.org/documents/23296955-2022-11-10-commanders-complaint

2 https://oag.dc.gov/sites/default/files/2022-11/DC-v.-Commanders-Complaint-.pdf

3 https://www.documentcloud.org/documents/23296955-2022-11-10-commanders-complaint

4 https://www.nytimes.com/2022/11/10/sports/football/dan-snyder-commanders-civil-suit.html

5 Id.

6 https://www.washingtonpost.com sports/2022/11/17/dc-attorney-general-washington-commanders/

7 Id.

8 Id.

Lawsuit Against NFL Agent Demonstrates Financial Challenges of Industry

By Christopher R. Deubert, Senior Counsel, Constangy, Brooks, Smith & Prophete, LLP

On September 22, 2022, Opes Capital Fund I, LP, a private equity fund, filed suit against NFL player agent Damarius Bilbo in the United States District Court for the Northern District of Georgia (22-cv-3823). The suit alleges that Bilbo has failed to repay loans totaling $1,325,000 which were intended as "short-term working capital for Mr. Bilbo's professional sports agency enterprise."

The lawsuit, regardless of its outcome, speaks to the challenges of the sports agent business. Bilbo is a former NFL player with, according to Spotrac.com, ten clients, including Denver Broncos running back Melvin Gordon and Washington Commanders defensive end Chase Young, both former first round picks. While Bilbo formerly operated independently, according to his LinkedIn profile, he is now the Head of Football for Klutch Sports Group, a sports agency founded by LeBron James and his agent, Rich Paul.

The lawsuit raises questions as to why Bilbo, with such an accomplished resume, would have ever required such a loan. Nevertheless, such loans are common in the NFL agent business.

The annual calendar for a typical NFL agent demonstrates why and also the challenges of the job. Beginning in the summer each year, NFL agents identify and begin to recruit college players across the country. Recruiting begins by developing a relationship through any connection possible and engaging in as many telephone and text conversations as the player is willing to have. As soon as possible, agents will send recruiting books and brochures to the players which summarize the agents' achievements and capabilities. This is tedious but not terribly costly work.

If the communications are progressing, the agent will want to go and visit the player to make their sales pitch in-person. This aspect of the job requires many agents to be crisscrossing the country all fall, particularly on weekends when the agent can see the player play. Moreover, with the opportunity to represent student-athletes in name, image, and likeness deals, agents are having to recruit younger players, even if they are not yet eligible for the NFL Draft. These aspects of recruiting are bemoaned by many agents, particularly as they get older and have families.

Despite these efforts, agents will only

successfully sign representation agreements with a small minority of their recruits. Many agents begin the season with 100 or more players to recruit and end up signing only a few of them, if any. There are many competent and capable agents out there and thus the competition is fierce.

Closing the deal with clients often requires significant amounts of cash. While the NFLPA Regulations governing agents prohibit agents from "providing or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services," this rule has an enormous loophole.

The loophole requires some background explanation. The NFLPA has the authority to regulate agents due to its status under the National Labor Relations Act as the "exclusive representative[]" of the players "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment." 29 U.S.C. § 159(a). Consequently, agents' primary responsibility is to negotiate their clients' contracts with NFL clubs.

Nevertheless, agents often provide a variety of other services in addition to player contract negotiations. Most notable among those other services are securing marketing and endorsement opportunities. Moreover, while the NFLPA Regulations cap an agent's commission from negotiating a player's contract with an NFL club at 3%, there is no cap on marketing agreements since such agreements do not concern a player's terms of employment and thus are not within the NFLPA's jurisdiction. Consequently, many agents nominally charge between 10 and 20% commissions on marketing agreements they are able to secure for their clients.

The degree to which agents actually collect on their marketing efforts is debatable. Agents often provide their new clients with "marketing advances." These are advance payments for marketing agreements the agent claims they will be able to secure on behalf of the player. For example, an agent may advance their new client $50,000 and then collect the first $50,000 the player is owed pursuant to apparel or other endorsement agreements. In reality, many agents never actually collect the amounts they advanced. Indeed, many players will never even enter into marketing agreements sufficient to repay the amounts advanced. Consequently, in many cases, the agent has simply provided a prospective client with a large payment for becoming a new client. Nevertheless, the arbitrator responsible for enforcing the NFLPA Regulations has previously ruled that such advances do not constitute impermissible inducements. See, e.g., *Rosenhaus v. Jackson*, 14-cv-3154, 2016 WL 4592180, at *3 (C.D. Cal. Feb. 26, 2016).

While the NFLPA Regulations governing agents prohibit agents from "providing or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services," this rule has an enormous loophole.

The expenses continue. Agencies pay for their clients to train for the NFL Combine at elite facilities. Such training costs $50,000 or more. Related expenses include housing, coaching, nutritionists, medical specialists, and more.

Consequently, agents frequently spend $100,000 or more on a client before ever collecting a dime. At a 3% commission, a player would need to make at least $3.33 million in his career to owe commissions sufficient to cover those expenses. Yet, intense competition has pushed most commissions down to 2%, which requires $5 million in career earnings for an agent to make more than $100,000 in commissions.

As a result of these enormous upfront expenses, agents do not earn a profit on most of their clients. Agents typically need a client to sign a "second," free agent contract in order to pay enough in commissions for the agent to recoup their investment in the player. Most NFL players never make it to a second contract.

In addition to the above-described financial challenges, there is the intense competition within the industry, from both reputable agents and questionable characters. For example, in *France v. Bernstein*, 43 F.4th 367 (3d Cir. 2022), the Third Circuit excoriated Todd France, one of the most successful agents in the business, for what the court believed was a pattern of fraudulent conduct designed to cover up that France had stolen another agent's client. It is thus not surprising that approximately half of NFL agents have zero or one client.

In an effort to make it in the industry, agents often borrow money to fund their recruiting efforts and to sustain their businesses. Yet if the agent is unable to bring in high-paying clients, they will end up in trouble with their lender, as Bilbo may have.

Native American Names, Mascots, and Images in Professional Sports

(Editor's Note: What follows is an excerpt of Understanding Sports Law, written by Timothy Davis and N. Jeremi Duru and recently published by Carolina Academic Press recently published. You can learn more about the book here: https://cap-press.com/books/isbn/9781531019846/Understanding-Sports-Law)

Professional sports has no NCAA analogue; no single administrative body with broad-based oversight. Instead, professional sports leagues are entirely independent of each other. Moreover, the clubs in most leagues are individually owned, and while league commissioners likely have authority to issue league-wide regulations with re- spect to the use of Native American names, mascots, and images, none have done so. potentially offensive Native American names, mascots, and images are conse- quently more prevalent in professional sports than in collegiate sports. Indeed, some professional teams' current and past names, mascots, and images — were they used in college — would certainly have been deemed "hostile and offensive" under the NCAA policy. MlB's Cleveland Guardians (until 2021 called the Cleveland "Indians") and the NFl's Washington Commanders (before 2020, called the Washington Red- skins, and from 2020 to 2022, called the Washington Football Team) are prime ex- amples. The Cleveland Indians' name would not likely run afoul of the policy (as Catawaba College, referenced above, successfully petitioned to continue using the name "Indians"). Its longtime logo — a caricatured red-faced Native American with an exaggerated nose, oversized teeth, and a feather in its hair named Chief Wahoo— certainly would. As would the Washington Football Team's former name— the "Red- skins" — which dictionaries define variously as "disparaging" and "offensive."[219] Be- cause the NCAA policy has no application in professional sports, however, those opposing such names and mascots have had to resort to legal challenges.

"Cleveland Indians"

Since the Cleveland Indians (now, the Guardians) began using the Chief Wahoo logo in the mid-twentieth century, opponents of its use have challenged it through grass roots efforts and — as early 1972 — through the courts.[220] Although legal action was not successful in forcing a logo change, it did, together with the grass roots ac- tivism, raise awareness and bring attention to the concern. The team's 2016 run through the playoffs to the World Series, however, brought the issue to a head. After defeating the Boston Red Sox in the Wild Card round of the playoffs, the Indians faced the Toronto Blue Jays in the American

league Championship Series (AlCS). In advance of Game 3, the first game of the series to be played in Toronto, a Canadian citizen and member of the Blackfoot Tribe named douglass Cardinal brought suit against the Indians and MlB. The suit in an ontario Court sought to enjoin the Indians from using their name or the Chief Wahoo logo on their uniforms while playing in Canada.[221] he alleged the team's use of its name and logo constituted racial discrimination against indigenous Canadians under both ontario provincial and national human rights legislation, causes of action not available under United States law.[222] The suit elevated to the international level concerns activists had long raised. Although the injunction was denied,[223] controversy around the name and mascot clouded the AlCS as well as the World Series, to which the Indians advanced but ultimately lost. Moreover, Cardinal continued to press his case, which despite jurisdictional challenges, progressed through the Canadian legal system and increased pressure on MlB and the team.[224] At the same time, local activists, including a coalition called the Cleveland American Indian Movement (CAIM), intensified protests against the team's name and logo.[225]

In 2018, under mounting pressure, MlB Commissioner Rob Manfred persuaded the team's owner paul dolan to remove the Chief Wahoo logo from team uniforms for the 2019 season.[226] dolan had long resisted doing so, trumpeting the logo's nostalgic pull: "you can't help but be aware of how many of our fans are connected to Chief Wahoo. We grew up with it. I remember seeing the little cartoon of The Chief in the paper each day, showing if the Indians won or lost."[227] Although dolan acceded to strip the uniforms of the Chief Wahoo logo, the team continues to welcome fans' use of the logo in cheering the team at home games.[228] CAIM continued to protest the team, arguing that the team name, continued prevalence of the logo, and culture surrounding them both will continue to inspire the "racism that happens at the stadium with the red-face and the people dressing up as natives and the hooping and hollering."[229] In 2020, with pressure intensified by the nationwide protests against systemic racial discrimination that summer, dolan finally relented and committed to changing the name.[230] In 2021, the club announced its new name: the Cleveland Guardians.

The challenge to the Chief Wahoo logo illustrates the power of lawsuits in chal- lenging the use of Native American names, mascots, and images, even if not ini- tially— or ever— successful in court. Cardinal's initial goal of preventing the Indians from wearing the team name and Chief Wahoo logo during the 2016 American league Championship Series failed, but his continued litigation operated as an activist tool, raising awareness and applying pressure.

"Washington Redskins"

The legal attack on the Washington Redskins' name — the most intense and sustained legal challenge to a Native American name, mascot, or image in United States history — also raised awareness despite failing to compel the club to change.

Two sets of plaintiffs, one after the other, sued pro-Football, Inc. (pro-Football), which owns the Washington Redskins football team, over the course of twenty years in an effort to make pro-Football change the team's name.[231] They took a novel legal approach, petitioning the United States patent and Trademark office's Trademark Trial and Appeal Board ("TTAB") to cancel pro-Football's trademarks of the term "Redskins" and several derivations thereof pursuant to Section 2(a) of the lanham Trademark Act of 1946, which prohibits trademarks on words or phrases that are "scandalous" or "may disparage" a person or group of people.[232] Trademark cancel- lation would not force pro-Football to change the name, but it would mean pro- Football could not prevent other entities from using the name in producing and selling merchandise.[233] This would economically disadvantage the club, and, it would seem, incentivize a name change.[234]

The first group of plaintiffs, in *Harjo v. Pro-Football. Inc.*,[235] petitioned the TTAB in 1992 to cancel the trademarks.[236] The TTAB agreed that the trademarked term "Redskins" "may disparage Native Americans" and ordered that the trademarks be cancelled.[237] pro-Football appealed, and the United States district Court for the district of Columbia (the court to which TTAB appeals typically go) reversed.

221 C*ardinal v. Cleveland Indians Baseball Co.*, 2016 ont. Superior Ct. of Just. 6929 (2018).
222. Id.
223. Id.
224. Peter Edwards, Challenge to Cleveland Indians Name Proceeds, ToRoNTo STAR (June 5, 2017), https://www.thestar.com/news/gta/2017/06/05/challenge-to-cleveland-indians-name-proceeds.html.
225. A.J. Perez, Rob Manfred, Indians Have Had Talks on 'Transitioning Away' from Chief Wahoo, USA TodAy (Apr. 12, 2017), https://www.usatoday.com/story/sports/mlb/2017/04/12/rob-manfred- indians-chief-wahoo/100369802/.
226. Bill Shaikin, Cleveland Indians to Retire Chief Wahoo Logo, loS ANGElES TIMES (Jan. 29, 2018), https://www.latimes.com/sports/mlb/la-sp-indians-wahoo-20180129-story.html.
227. Id.
229. Kevin Barry, Cleveland Indians Start Home Opener without Chief Wahoo, but Will Continue to Sell Wahoo Merchandise, NEWS 5 ClEvElANd (Apr. 1, 2019), https://www.news5cleveland.com/sports/ baseball/indians/cleveland-indians-start-home-opener-without-chief-wahoo-but-will-continue-to-sell- wahoo-merchandise discrimination that summer, dolan finally relented and committed to changing the name.230 In 2021, the club announced its new name: the Cleveland Guardians.
230. perez, supra note 225.
231. doori Song, Blackhorse's Last Stand?: The First Amendment Battle Against the Washington "Redskins" Trademark After Matal v. Tam, 19 WAkE FoREST J. BUS. & INTEll. pRop. l. 173, 174–78 (2019).
232. Id.
233. Casey leins, Washington Redskins Lose 6 Trademarks in Landmark Case, U.S. NEWS (June 18, 2014), https://www.usnews.com/news/articles/2014/06/18/washington-redskins-lose-6-trademarks- in-landmark-case.
234. Id.
235. 50 U.S.p.q.2d 1705 (T.T.A.B. 1999).
236. Id. at *1.
237. Id. at *48.

SRLA To Host Sports Law Conference in Las Vegas in Late February

The Sports and Recreation Law Association (SRLA) will hold its annual meeting at the Tuscany Suites and Casino in Las Vegas February 22-25, 2023. More details, such as the keynote speaker, will be announced in January.

SRLA serves academicians and practitioners in private and public sport and recreation settings. Members have diverse educational and experiential backgrounds and represent a variety of occupations and interests. They may teach or be students at institutions of higher education (sport and recreation management programs, law schools), practice law, operate risk management firms, or serve in other related fields.

The purpose of the conference is to provide quality peer-reviewed scholarship in the area of sport and recreation law. Scholarship is disseminated through 25 or 50-minute presentations, 75-minute symposium sessions, and poster sessions. Conference attendees also have opportunities to interact with scholars and practitioners from across the country, engage in social activities, and network with industry professionals. The annual conference is beneficial for professionals, academics, and students alike.

To register for the conference, visit https://srla2023.exordo.com/ Registration rates are as follows:

- **December 1st-January 20th**
  Professional Member: $450
  Professional Non-Member: $575 (includes SRLA Membership for 2023)
  Student Member: $150
  Student Non-Member: $200 (includes SRLA Membership for 2023)

- **January 21st-February 15th**
  Professional Member: $575
  Professional Non-Member: $700 (includes SRLA Membership for 2023)
  Student Member: $150
  Student Non-Member: $200 (includes SRLA Membership for 2023)

Questions about the conference should be directed to Nita Unruh at unruhnc@unk.edu. Once you have paid your membership dues, you will receive a discount code to register for the conference at the Member Rate.

Professional Registration includes access to all conference sessions, the SRLA Welcome Bash, the Keynote Luncheon, the SRLA Awards Luncheon, the SRLA Teaching and Learning Breakfast, a conference gift item, and a digital program.

Student Registration includes access to all conference sessions, the choice of one conference social event, a conference gift item, and a digital program.

Pro Sports Reporter's Litigation Against Employer Continues

By Jeff Birren, Senior Writer

Todd Romero is a Denver-based sports television announcer. For years, he hosted various local sports events, including the Denver Nuggets pregame and post-game shows. After he went through drug-dependency treatment he was demoted by his employer, Altitude Sports ("Altitude"). Romero then sued Altitude, and recently the U.S. District Court in Denver granted one of Romero's two motions to amend his complaint.

Background

Romero was born and raised in Denver and also attended college there. He began covering Denver's sports teams decades ago. He was jointly hired by Altitude and Kroenke Sports & Entertainment LLC ("Kroenke Sports") in 2012 to host the pregame and post-game shows for the Nuggets. He also does play-by-play for local high school football games and the men's and women's basketball games at the University of Denver.

Some years later, Romero sought treatment for prescription-drug dependency. According to Romero, he used vacation time to receive inpatient treatment for his prescription medication addiction related to a severe neck injury. That is when the problems allegedly began. Romero alleged, Altitude "intentionally discriminated against" him by "removing him from a successful sports host and reporter…to a literal afterthought who provides short features on gambling, taped from his home computer, during the same games that he used to host." Romero also claimed that Altitude "paid Romero less than his non-Hispanic, non-brown-skin-colored peers despite his consistently stellar performance" (*Todd Romero v. Altitude Sports & Entertainment LLC*, et al, U.S. Dist. Ct. CO, Case No. 21-CV-885 ("Complaint") at 1, (3-26-21)).

The Litigation Begins

Romero sued Altitude and Kroenke Sports, filing a 34-page Complaint. He had nine causes of action, including claims for discrimination and retaliation in violation of the Americans with Disabilities Act; discrimination because of race and national origin, and retaliation in violation of Title VII; discrimination based on race, color, national origin, and retaliation in violation of 42 U.S. Section 1981; discrimination and retaliation in violation of age; and breach of contract. Romero asserted that Altitude "intentionally and unlawfully discriminated against him by not renewing his contract, falsely claiming that all on-air talent was being moved to at-will employment and taking away his on-air host duties…in favor of other hosts" who are not people of color ("Inside Todd Romero's Lawsuit Against Altitude TV", Michael Roberts, Westworld (4-12-21)). Romero sought compensatory damages, backpay, punitive damages and attorneys' fees. The case was assigned to District Court Judge Christine M. Arguello.

Altitude and Kroenke Sports filed a motion for an extension of time to Answer or Respond (Doc. #9) and answered on April 29, 2021 (Doc. #11). The parties consented to assignment to a magistrate judge, and discovery began. Before 2021 ended the parties were in a dispute over who could see compensation information produced in discovery. They took this dispute to Magistrate Judge S. Kato Crews. Judge Crews ruled that such information could be designated as "Confidential" but not "Attorneys' Eyes Only" (Doc. #33). Consequently, Romero could see the confidential salary information. Altitude appealed that order to Judge Arguello (Doc. #36) and Romero filed an opposition (Doc. #37).

Judge Arguello affirmed the magistrate's ruling, finding that the defendants "had not met their burden of showing good cause" for "Attorneys' Eyes Only" protection. Furthermore, there was "no clear error or abuse of discretion in Judge Crews's conclusion that 'a confidential' designation is sufficient to protect Defendants' interests and the interests of these non-parties' with respect to the compensation information in this case" and overruled all objections (Romero, Order (4-5-22)).

The Fun Continues

The deadline to amend the pleadings was July 13, 2021. Undeterred, Romero filed a motion to supplement his Complaint on February 22, 2022 (Doc. #43). The defendants filed an opposition (Doc. #46), and Romero replied (Doc. #47). Before that motion was heard, Romero filed a Second Motion to Supplement on August 4, 2022 (Doc. #55). The defendants again opposed the motion. At this point the Court stepped in and exercised "its discretion" under the local rules of court "to rule on the Second Motion to Supplement without awaiting the benefit of a Reply" (Opinion, at 2 (8-30-22)).

The Court stated that because "the deadline to amend pleadings has long passed" there was a two-step analysis. The pleadings could only be amended "for good cause and with the judge's consent." The moving party had to show "the scheduling deadlines cannot be met" despite that party's "diligent efforts." FRCP 16 states "good cause requirement" may be satisfied "if a plaintiff learns new information through discovery or if the underlying law has changed." Rule 16 "focuses on the diligence of the party seeking to modify the scheduling order" (Id.).

The second step, under FRCP 15(d), gives the Court "broad discretion" and leave to amend "shall be freely given when justice so requires." The motion may be denied due to "undue delay, undue prejudice to the opposing party, bad

faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." The opposing party has the burden to prove "that the amendment should be refused on one of these bases" (Id.).

The First Motion to Supplement

Romero alleged that the "Defendants have continued their discriminatory and retaliatory actions against [him], which have escalated and caused [him] further severe emotional distress and lasting damage to his reputation among the public and those in the industry." Romero sought to add events that occurred after he initially sued "in support of his request for injunctive relief." This included allegations "that he has been entirely excluded from hosting duties for Nuggets and Avalanche games for the 2021-2022 seasons" and that the defendants "have assigned" him "to host a low-profile sports betting show with much lower television ratings as pretext for discriminatory/retaliatory reasons." Romero "seeks to add prayers for injunctive relief restoring him to his previous position, or awarding him front pay in lieu of reinstatement, and prohibiting Defendants from violating Title VII, the ADA, the ADEA, and any of Plaintiff's other constitutional rights" (Id., at 2/3).

Romero asserted that good cause existed to allow these changes because it did not involve different issues "but describes the continuation of events that have occurred since the filing of his Complaint" (Id., at 3). Finally, Romero stated that there was no prejudice to the defendants because when he filed the motion "discovery had barely begun, no documents had been exchanged, and no depositions had been taken" (Id.).

The defendants naturally opposed the motion. They asserted that the motion was "untimely and that Plaintiff unduly delayed in seeking to supplement." The Court acknowledged that the motion was filed "approximately six months after the deadline to file an amended pleading." However, Romero "demonstrated good cause for the delay in that the new alleged events happened—and continued to happen—during the time period between the amendment deadline" and his First Motion to Supplement. Moreover, Romero could not have known when he filed the case that "he would be permanently removed from hosting duties." He also identified several "instances … when on-air hosts were sick or on vacation and unable to host Nuggets or Avalanche games, but Defendants refused to allow Plaintiff to fill in as a host. Under these circumstances, the Court finds that Plaintiff has adequately explained his delay in filing the First Motion to Supplement and that such delay was not 'undue'" (Id.).

Prejudice

The Court then turned to the question of whether the defendants were prejudiced by the delay. Undue prejudice occurs "when an amendment unfairly affects the opposing party 'in terms of preparing their defense to the amendment.'" This

happens "when the amendment claims arise out of subject matter different from what was set forth in the complaint and raises significant new factual issues." The defendants argued that the proposed allegations "will require new evidence and likely new witnesses" though they conceded that Romero could nevertheless assert the proposed allegations "as further support for his claims as pled in his original Complaint." The Court agreed with Romero that "there is no prejudice" because as of the date of the motion, discovery "had barely begun." Furthermore, "the new allegations supporting injunctive relief are substantially similar to those already in the Complaint" and thus the defendants "would not be prejudiced by the Supplemental Complaint" (Id.). Consequently, Romero "adequately demonstrated good cause for modifying the scheduling order" and it "will not unduly prejudice Defendants. The Court therefore grants Plaintiff's First Motion to Supplement" (Id., at 4).

Romero's Second Motion to Supplement

This motion sought to add facts learned during a June 2022 deposition. Those allegations were: (1) defendants refused to offer Romero an employment contract because of the pending lawsuit, based on the advice of counsel; (2) counsel instructed defendants to offer employment contracts to all other similarly situated on-air talent; (3) Romero had been denied salary raises since 2019 due to his discrimination charges, though other on-air talent received raises; (4) and for the past six years, Romero was paid "between two and two-and-a-half times less per year than other on-air talent." Romero did not attempt to add any new claims or prayers for relief. These allegations were intended to "bolster the claims alleged and the relief requested" (Id.).

The Court was not impressed. These new allegations were filed more than thirteen months after the deadline to amend the pleadings had passed. This was sufficient reason to deny the motion. Furthermore, Romero did not seek to add additional claims, but the proposed amendments were only to "bolster" his allegations. The Court agreed "with Defendants that the purpose of Rule 15 and Rule 16 would be undermined were a plaintiff granted leave to update his complaint each time the plaintiff learned facts supporting his allegations." In addition, Romero "knew information to assert these allegations" prior to the deposition because he knew "that he had not been offered a new contract or received a pay increase since he filed his charges in 2020 and his lawsuit in March 2021" (Id.).

Furthermore, Romero's Complaint "alleged that the decision not to renew his contract was communicated to Plaintiff in 2018, well before" he filed his charges of discrimination (Id. at 5). The new material was "duplicative because Plaintiff already alleged in his original Complaint" that he had been paid less than his non-Hispanic peers. These additional allegations were thus "untimely" and "are either duplicative of or in tension with the allegations in the existing Complaint." The Court cited cases that state there "is no absolute right to repeatedly amend a complaint." The Court found that the "Second Motion to Supplement is untimely, and that Plaintiff has not established good cause for amending the scheduling order to permit further supplementation" (Id.).

Further Developments

Romero filed his Amended Complaint on September 7, 2022. The Court then granted a joint motion for a telephonic hearing to resolve pending discovery issues. It was assigned to the Magistrate and was heard on September 16, 2022. Judge Crews ruled that the defendants "shall provide all amended discovery responses within the next fourteen days." Discovery is set to be completed by December 9, 2022. Dispositive motions are to be filed by January 9, 2023, and the final pretrial conference is scheduled for March 15, 2023 (Doc. #69, (9-16-22)). Altitude and Kroenke Sports answered the Amended Complaint on September 20, 2022 (Doc. #71).

One of Romero's lawyers then filed a motion to withdraw from the case. That was granted on October 6, 2022 (Doc. #76). One day later new counsel filed a "Notice of Entry of Appearance." What makes this case somewhat peculiar is that this is not the first counsel to withdraw from the case. The first motion to withdraw was filed on July 22, 2021 (Doc. #22). Another motion to withdraw was filed on January 12, 2022 (Doc. 38). A third such motion was filed on April 27, 2022, (Doc. #49). In a case less than 20 months old, this recent motion was the fourth motion to withdraw as counsel. One wonders what is going on behind closed doors in the sanctum of attorney-client relations.

Conclusion

The case is now in the discovery home stretch. Such cases typically settle before trial, but given the internal upheaval within Romero's camp that may not be possible. The private goings on in this case to date are likely even more interesting than what is available in the public record. Romero had a long on-air career prior to his demotion, so at least for much if it he must have been doing a good job. Consequently, at this distance one can only wonder what impact the prescription pain medication rehabilitation had on Romero's job performance, or how he was perceived by his supervisors. An impending trial could get ugly.

Report of Toxic Culture Draws Statement from Phoenix Suns

An investigative story published by ESPN's Baxter Holmes, which quoted anonymous Suns and Mercury employees, which claimed several team executives have contributed to a toxic workplace culture, has drawn a response from the Phoenix Suns.

The statement reads:

> In September, at the conclusion of a full investigation, the NBA and an outside firm issued a comprehensive report on the workplace culture of Suns Legacy Partners, and we continue to do the work of using the report's findings to grow and improve. We will continue to be accountable to our staff, partners, fans, players and the NBA, as we follow the NBA's guidelines around workplace culture, including the creation of confidential, safe channels to anonymously report any issues. As we have said before, we are on a journey that began before last November, one that has included substantive changes to leadership, staff, policies and accountability measures.
>
> At the beginning of this process, we encouraged all of our employees to participate in interviews for the NBA's outside investigation and we have investigated issues raised within that report. We continue to encourage employees to utilize internal channels to report issues as they arise. To create a safe space for employee feedback and an environment of accountability, we fact-find related to each complaint on its merits. We will continue to keep any such investigations and their findings internal and confidential.
>
> As we told the reporter of today's story in reviewing his questions, there are factual inaccuracies not supported by the findings of already-completed internal or external investigations, including incorrect attribution of confidential claims made as part of the NBA investigation. That being said, as we move forward, we do so with the knowledge that we have not been a perfect organization. Our current leaders have taken accountability for the claims that have been substantiated through investigations. And all of us continue to be committed to learning, growing and upholding a culture of respect."

Zavian Talks Esports and What is Next in the Dynamic Industry

As a trailblazer in sports law, attorney Ellen M. Zavian has a keen eye for developing trends in the industry. So, it is not surprising that she spotted the rising esports trends long before most of us had an inkling of what was going to happen.

We wanted to learn more about her perspective beyond her stellar work as editor-in-chief of Esports and the Law. An interview with Zavian, who is also General Counsel of USA Lacrosse as well as a GW Law professor, follows below.

Question: How did you get drawn into the esports/law niche?

Answer: As an athlete, I horned my competitive juices in middle school and high school on the track team. This was simultaneous with my involvement in the debate team and theatre. Following my high school graduation, I worked at the Maryland racetracks within the marketing department while attending the University of Maryland. It happened to be a robust year for Terp players going pro and some of my friends were meeting with agents to fulfil their NFL dreams. This led me to focus on sports, international law, and contracts when I entered law school.

Q: How does esports differ from video gaming?

A: The difference between the two is important, especially when one overlays the law. In general, video gaming is entertainment, bringing enjoyment and relaxation to the user. Conversely, esports, aka electronic sports, is truly competitive gaming for prize money or a trophy. As lawsuits become more prevalent in this space, deciding if the matter fits into entertainment verses sports will likely yield the difference between winning or losing a suit.

Ellen M. Zavian

Q: Given your background in the labor side of sports, is there a chance we might see more union activity among gamers?

A: My initial introduction to this space occurred when some gamers from New York City contacted me because they believed they were not receiving monies due. My first reaction was, "What do you do?" This was a decade ago…and look how far we have come. However, the gamers, unfortunately, are still dealing with the same issues like lack of timely payments, safe working conditions, and ownership of their intellectual property. While I believe we will see a union in the U.S., the global aspect of the sport brings some difficulty to the union voting and certification process.

Q: What kind of trends do you expect with sports betting and esports?

A: I expect betting and esports to become synonymous. Lootboxes is only the first step…not the final step. Unfortunately, I do believe games will bring our youth into habits of betting (small bets at first), which will only mean their adulthood would be more likely to show gambling addiction habits.

Q: As a parent of a video gamer, how have you taken your knowledge in this space and applied to his learnings?

A: I am concerned, as a professor and parent, of how technology companies are gamifying learning in K-12 grades. Who said learning must be fun? Perhaps understanding that the technology companies are marketing themselves as 'edtech' entities as well as marketing their 'gamifying education portals' to school districts at an alarming rate. Our districts are paying for edtech learning software while the edtech companies are collecting/selling data on our youth. If anything, the edtech (really technology companies) should be paying us, the parents. All of this is done with no proof of success (better reading and math scores). Unless our reading or math skills are going to increase double digits because of these edtech platforms, I am inclined to go back to the pencil and paper method, that has served us well…and keeps our brain in the loop.

Q: Can you tell us a bit about your new podcast, Esportslawshow.com?

A: Allowing esportsandthelaw.com to focus on specific case law is important to the community. In addition, each podcast has the opportunity to bring these cases to life, to discuss trends of the future, to hear from outside experts, and to consider the future of the industry, all of which is best done in conversation. We look forward to having our readers join in on these conversations, while focusing on the same goals we had with ESL – being the thought leader in the space.

The New York Jets Embroiled in Sponsorship Dispute over Fubo Gaming

The New York Jets franchise is asking the Delaware Chancery Court to appoint a receiver for Fubo Gaming, Inc. after the mobile sports betting venture, which had a sponsorship agreement in place with the Jets, was shuttered.

Specifically, the Jets are hoping to recover a $1.18 million sponsorship payment from Fubo Gaming, which is overdue. That payment was part of a $12 million, five-year sponsorship agreement that Fubo Gaming had with the Jets.

A 2021 press release described the parameters of the agreement as follows: "The partnership centers around the creation of the Fubo Sportsbook Lounge at MetLife Stadium for Jets home games, set to debut during the 2021-22 NFL season, and will be the first authorized, mobile sports betting lounge in the stadium. In addition, Fubo Sportsbook will become the presenting partner of the Jets Mobile App and is the team's first legal sports betting (LSB) partner to leverage the Jets' new advertising data partnership with Sportradar."

The best laid plans went awry on Oct. 17 when FuboTV, the parent of Fubo Gaming, announced it was shuttering the subsidiary and cancelling the agreements. FuboTV CEO, David Gandler, said the decision was precipitated by the "challenging macroeconomic environment," which impacts "our ability to reach our longer-term profitability goals."

The Jets' attorneys, who called the FuboTV's decision "a blatant act of bad faith."

In a letter to Fubo Gaming, the attorneys wrote that "the Jets were shocked to learn late last week, from public reporting, of an additional default by the filing for dissolution of Fubo Gaming in Delaware and its ceasing of all operations, both at the direction of the board of directors of its parent company, FuboTV."

Further, the attorneys claimed the Jets have "fully performed under the agreement, including giving substantial marketing and advertising benefits, a suite and tickets to Jets home games, and incurring significant expense to build, staff, and operate the Fubo Sportsbook Lounge at MetLife Stadium, among other things."

Sports Law Expert Podcast Features Matthew E. Eisler of Hogan Lovells and Carla Varriale-Barker of Segal McCambridge

Hackney Publications, the Nation's Leading Publisher of Sports Law Periodicals, Shares the Podcast Across All of Its Platforms, Bringing Recognition to Leaders in the Sports Law Industry

Hackney Publications has published its latest episodes of Sports Law Expert – a Podcast, two of which feature Matthew E. Eisler of Hogan Lovells, who is partner and global head of the firm's Sports group, and Carla Varriale-Barker of Segal McCambridge, who initiated and leads the sports law practice for that firm.

The segments can be heard here: https://anchor.fm/dashboard/episode/e1pofe1

Going forward, those interested in being notified when a segment goes live can subscribe by visiting here.

About Matt Eisler

Clients turn to Matt Eisler for record-breaking deals and complex corporate transactions in the sports, technology, media, and health care sectors. He represents prominent, strategic companies and private investment funds in connection with acquisitions, valuations, joint ventures, strategic funding and financing issues. Matt advised Oracle on its $28 billion acquisition of Cerner Corporation and later advised the company on the landmark acquisition of the naming rights to the San Francisco Giants park, now known as Oracle Park. Matt led the team that advised Roku, Inc. on its acquisition of exclusive content rights to Quibi's award-winning programming, expanding the platform to be one of the biggest streaming services in the United States and again advised the company on the acquisition of TOH Intermediate Holdings LLC, owner of "This Old House". As global head of the Sports sector, Matt's winning record includes handling the two highest value transactions the U.S. sports world has ever seen, the Walton-Penner Family US$4.65 billion acquisition of the Denver Broncos from the Pat Bowlen Trust and the sale of the NBA's Brooklyn Nets and the Barclays Center.Matt is also a regular speaker, writer, and commentator on current legal issues related to the business of sports and entertainment. He also likes to think that the Colorado Rockies will win the World Series in his lifetime.

About Carla Varriale-Barker

Varriale-Barker is an accomplished litigator who is at home in a courtroom, board room or classroom. She represents a portfolio of clients in the sports, recreation, amusement, and hospitality industries with a client-centered practice focusing on tort, discrimination, contract, insurance, and premises liability matters, including the defense of claims arising from alcohol service, security lapses, discrimination in places of public accommodation, sexual abuse, and molestation. She is chair of the firm's Sports, Recreation & Entertainment practice group. Varriale-Barker counsels clients involved with the U.S. Center for SafeSport, an organization established by Congress to address sexual abuse, bullying and other misconduct, and the U.S. Olympic and Paralympic Movements. She is an adjunct instructor at Columbia University's School of Professional Studies where she has taught in the Sports Management Program since 2008. Prior to joining Segal McCambridge, Varriale-Barker was a founding partner of a women-owned law firm. She has also written for the American Bar Association about diversity and inclusion and the importance of mentorship and sponsorship. Varriale-Barker earned her J.D. from New York Law School where she was part of the Order of the Barristers and the Moot Court Executive Board. She holds a B.A. from Boston University.

Teams Embrace Personal Injury Law Firms as Sponsors

Bailey & Galyen Announces Partnership with the Texas Rangers

Bailey & Galyen has announced a two-year business relationship with Major League Baseball's Texas Rangers, designating the legal practice as the Official Law Firm Partner of the Rangers. The deal includes entitlement of the Suite Level at Globe Life Field, presence on the Rangers' digital platforms and in-stadium signage, as well as the Texas Rangers 9th-inning "Get Home Safe" program. This program includes in-stadium signage reminding fans to drive responsibly and a public service announcement on every Texas Rangers Radio Network home game broadcast, progressing the legal practice's mission of advocating for responsible drinking.

"The Texas Rangers are an integral part of one of the greatest sports and entertainment complexes in the world," said President and CEO of Bailey & Galyen, Phillip Galyen. "This partnership allows us to continue to provide high-quality legal services to consumers throughout the Dallas-Fort Worth Metroplex and the state of Texas while playing our part in putting the best interest of the community at the forefront."

In addition, Bailey & Galyen will be the Official and Exclusive Law Firm Partner of the Texas Live! Entertainment Complex, adjacent to Globe Life Field. As part of the Texas Live! partnership, Bailey & Galyen will receive in-venue signage, digital market-

ing, and an extension of the "Get Home Safe" program following major events at the venue. The legal practice will also receive an endorsement from legendary Ranger, Ivan "Pudge" Rodriguez as its ambassador during the 2023-2024 season to promote inclusivity among the Hispanic community.

"The Texas Rangers are proud to partner with the leading law firm in the state of Texas," said Jim Cochrane, the Rangers Senior Vice president of Partnerships. "As we set out to find a partner in the category it was important to align with a firm that matched our organization's community-focused approach. It became clear through our many discussions that Bailey & Galyen was a perfect match. We look forward to joining them in advocating responsible drinking via the Get Home Safe program at Globe Life Field, Texas Live!, and throughout all of Rangers country."

Vegas Golden Knights Announce Team Partnership With Naqvi Injury Law

The Vegas Golden Knights have announced today a multi-year partnership agreement with Naqvi Injury Law, a local personal injury law firm founded by Farhan Naqvi and his wife Ellie, making the firm an Official Partner of the Vegas Golden Knights.

Naqvi Injury Law will celebrate the new partnership with the team by donating $250 to the Vegas Golden Knights Foundation for every goal scored by the Golden Knights during the 2022-23 regular season at T-Mobile Arena. At the end of the regular season, a check presentation will be held between the two entities that includes the full amount of Naqvi Injury Law's donation to the VGK Foundation, which supports various charitable organizations throughout the Las Vegas community. Additional details regarding the check presentation will be determined at a later date.

"We take pride in teaming up with organizations that are also based here in Las Vegas, especially ones with a reputation as bright as Naqvi Injury Law," said Golden Knights President Kerry Bubolz. "Naqvi Injury Law will be great partners for us in supporting the community we're fortunate to call home."

Naqvi Injury Law will be the official branding inside the away team penalty box at T-Mobile Arena for the 2022-23 season. The local law firm will also be featured in-arena during home games and on Digitally Enhanced Dasherboards (DED) as part of the NHL's all-new broadcast advertising campaign this season.

"Both the Vegas Golden Knights and our firm were founded in Las Vegas and take pride in representing our city," said Naqvi. "We are honored to partner with our hometown team and support their ongoing efforts to be the very best organization in the NHL."

Impacted by COVID-19 Vaccine Policy, An Couple Sports Industry Participants Fire Back in Court

Doug Kerkering et al. v. Nike, Inc.

Various Nike employees are suing the company, claiming they suffered religious discrimination, medical discrimination, and battery because of Nike's COVID-19 vaccine mandate.

"Nike holds itself up as a diverse, equitable, and inclusive employer and has even developed reams of policies and procedures to guarantee religious freedom and privacy, but Nike ignored years of policy when it came to COVID-19," according to the Health Freedom Defense Fund (HFDF), which is helping to bring the lawsuit.

Doug Kerkering, Wanda Rozwadowska, and Hannah Thibodo are the named plaintiffs in the case.

HFDF Attorney Scott Street claimed that "Nike displayed blatant disregard for its own privacy policies and violated state and federal law by denying religious and medical accommodations to those who sought them."

The full complaint can be viewed here: https://healthfreedomdefense.org/wp-content/uploads/2022/11/Final-NIKE-complaint-Final.pdf

Mauer et al. v. NBA

Three former referees have filed a lawsuit against the NBA, alleging they were fired because they refused to take the COVID-19 vaccine.

Plaintiffs Kenny Mauer, Mark Ayotte and Jason Phillips filed the claim in the U.S. District Court, Southern District of New York. The men claimed that the league improperly forced them to comply with the policy and then wrongly concluded their objections on religious grounds were meritless.

"Had the NBA not taken upon itself to force faith-based conscientious objectors to adhere to secular norms, none of plaintiffs' complained-of injuries would have manifested," according to the complaint. "In sum: Plaintiffs were persecuted."

Waiving a Cautionary Yellow Flag on the Expansion of Sport

By Gil Fried, Professor/Chair, University of West Florida, Editor-In Chief of Sports Facilities and the Law

I hate to be the harbinger of doom, but I have seen this script before. An industry sees lots of potential and tries to monetize the opportunity while it is hot, and in the process hurts the entire industry. I lived this back in the 1980s with the Women's Professional Basketball League, which was launched before the WNBA and crashed and burned shortly thereafter. Things have not improved much since them. There appears to be a lot of stupid money out there trying to hunt for the next big hit without regard to the possible carnage that might be left behind.

Sport is a very sensitive ecosystem. While we often focus on our silos, we are all part of the same system. And if we look bad, the impact and implications can hurt us for years to come.

Currently, there is a mad rush to invest in sports. Everyone is hyping so much money and so many opportunities. Does that sound like the Dot Com bubble? Recent stories have highlighted how big-name sport stars are buying into professional pickleball teams. A recent headline spoke to how League One Volleyball is launching a professional indoor women's league after the 2024 Paris Olympics and recently raised $16.75 million in Series A funding. It seems like a gold rush. But similar to past gold rushes, some people made it and others lost their shirts.

Sport executives are stewards to a legacy and tradition as well as a hopeful supporter of the future. However, when we put revenue and growth ahead of basic business principles, we risk destroying what might make something exciting. Recent sports such as pickleball and disc golf had taken off during the pandemic. Will they become fads and come back down to earth from their phenomenal growth? Are we searching for the next major revenue source at the expense associated with existing sports, which might see declines? Is that part of a natural cycle or can this lead to major shifts in our sport consumption habits? For example, with declining youth football participation numbers what will that impact future football consumption patterns?

Technology has often impacted how we move forward as an industry. Ticketless entry, scanning technology, RFID sensors in jerseys, performance tracking, etc. … all could be great techniques to harness data or make life easier for those in our space. The other side is that we can push away participants and future fans. Wearable technology was the next big thing and how many people bought motion tracking technology that sits gathering dust in a drawer. A major tennis racket company invested significantly on tracking associated with rackets to find out that they could not sell the racket well because players did not want numbers. Instead, they wanted coaching to tell them what to do better. It is the personal touch a coach could provide.

Technology has its benefits, but it cannot solve all problems, nor will it always generate a great return.

I constantly hear about monetizing sport, but this does not take into account that we are talking about people. I do not want to be monetized. I am not alone. I don't want my data dissected into millions of ways. I want to make a buy decision based on what I hear from my fellow sports people. I will not buy sport equipment based on a Facebook advertisement. No social media post or search history tracking algorithm will change my behavior. I do not follow any influencers. I follow friends who play sports similar to me and they listen to me as I listen to them. If they say a pickleball paddle is great I might try it. I am not influenced by the pickleball magazine that seems to be 80% advertising and 20% content. I have actually stopped reading the pickleball magazine as I want to improve my game, not buy any new equipment. If a customer feels like they are being treated as a commodity they can walk with they feet and that is my concern.

If we can partner with people and treat them as equals, then they will stick around when the times are tough. If customers start feeling they are being taken to the cleaners - well they will fight back. There is such an emphasis to squeeze every last dollar out of people whether it is through licensed goods, tickets, concession sales, subscriptions, NFTs, SPAC deals, streaming deals, sport wagering, etc. When times get tough, such as now, we can face a major backlash.

Most of the world has socialized sport-based systems where the government has primarily funded youth and community sport. Remember the good 'ole days where we had physical education for one hour a day, five days a week. Now we are lucky if we get 50 minutes a week. While Title IX has helped grow interest in women's sports, social media and societal pressures have decreased the number of young women who participate in organized sports, especially during the high school years. We have allowed the capitalist system to thrive and in the past it did very well. However, with all the NIL deals, push for professionalism, increase in team valuations, Crypto hyping by athletes, SPAC deals backed by athletes, as a start- maybe we have gone too far. Our industry is not recession proof. We have had a gravy train for over 14 years (since the 2008 decline) with a little blip from Covid. If this turns into a long inflationary and recessionary period many in the sport space might head towards the direction of dinosaurs.

Another self-inflicted wound can be traced to the increase in cheating and unethical conduct for the sake of a victory. College athletics is replete with examples. A World Series will forever be challenged based on stealing signals. High school and youth sports

are now the scenes of all too frequent fights and even shootings. Then there are cheating scandals that have been raised just in the last couple months in poker, fishing, chess, and cornhole, just as examples.

I have students who believe that baseball cards can only go up in value. They do not see the downside or think that prices can ever go down. Some of these same students think they can win at sport gambling or they can always make money investing in stocks - until they cannot. These students are often the demographic targeted by sport organizations.

All this is raised to wave the cautionary yellow flag. There are thousands of tech employees who have or will be laid off in the next couple weeks. Many people thought that tech companies would be recession proof and constantly continue to grow. There is a limited amount of revenue out there and we can only divide it so much. Now is the time for innovative ideas based on solid business practices with a dose of caution.

I hope I am wrong. But I have predicted the last several major economic downturns and feel we might be facing a major correction in the sport space. Like I said, I hope I am wrong.

FTX

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accounts" (Id. at 8).

FTX advertised in sports-related activities. It "bought the naming rights" for the NBA's Miami Heat's facility, "signing a 19-year deal with the team and Miami-Dade County, Florida for $135 million" (Id. at 4). It also had a contract with the "Mercedes-AMG Petronas Formula 1 team." FTX became the title sponsor of Major League Baseball's Home Run Derby X and signed a deal with the Champions Chess Tour 2022. It "ran Super Bowl ads" and bought the naming rights for the University of California Berkeley's stadium.

FTX entered into an agreement with the Warriors in early 2022. FTX's logo was put on "the main court at "Chase Center, the GSW's new 1.4 billion arena. FTX served as GSW's Official Cryptocurrency Platform and NBA Marketplace, and to further promote FTX to its fanbase, the GSW dropped NFT's (nonfungible tokens) on FTX US beginning in early 2022" (Id. at 13). It was the Warriors' "first international rights partner" and included the Warriors' "G League affiliate team (Santa Cruz Warriors), the Golden Guardians and Warriors Gaming Squad (affiliated e-sports teams), including arena signage at Chase Center, and virtual floor signage at GSW games." For a short period of time, all seemed well, but it was not to last.

In early November 2022, the "FTX Entities imploded" and "filed for bankruptcy in the aftermath of a seemingly massive and nearly unprecedented liquidity crisis" (Id. at 2). The CEO resigned and was replaced by John Ray III. Ray later produced a report that said that FTX had issued a "$1 billion" loan to the former CEO (Id. at 3).

The class is represented by three law firms. One is in San Francisco, another is in Rutherford, California, and the third is in Hong Kong. The single named plaintiff, Elliott Lam, is a

citizen of Canada, but a resident of Hong Kong. Defendant Sam Bankman-Fried is the former FTX CEO and lives in the Bahamas. Ironically, both of his parents are Stanford University law professors, but neither one will now be teaching there in 2023. Bankman-Fried recently claimed that he is now "down to his last $100,000" ("Sam Bankman-Fried says he 'miscounted' $8 billion", Yahoo News (12-2-22)). He also said the company had "no accounting department" and "double-counted $8 billion."

Defendant Caroline Ellison was the CEO of Alameda Research LLC, a trading company "launched" by Bankman-Fried (Complaint at 5). Ellison became the sole CEO of Alameda in August 2022 until November 2022 when Alameda filed for bankruptcy, and she was terminated. Ellison, like Lam, lives in Hong Kong. The final defendant is the Warriors, the only party connected to California.

Jurisdiction and Venue

The Complaint asserts that California federal court has jurisdiction "because this is a class action for a sum exceeding $5,000,000.00," and "at least one class member is a citizen of a state different than the Defendants." The Court "has personal jurisdiction…because at least one Defendant conducts business in California." Venue is proper "because Defendants engaged in business in this District; a substantial part of the events or omissions giving rise to the claims at issue occurred in this District; and because Defendants entered into transactions and/or received substantial profits from those who reside in this District" (Id. at 6). Alternatively, venue is proper "as there is no single district in which all Defendants reside; because a substantial part of the events or omissions giving rise to the claims at issue occurred outside of the United States in the Bahamas" and the Warriors are "headquartered and conduct business in this District."

Factual Allegations

The Complaint states that Bankman-Fried co-founded FTX in May 2019, "the owner and operator of FTX.COM

cryptocurrency exchange." In July 2021, "the darling startup" "reached an astronomical valuation of $18 billion due to raising $900 million during a funding round." By October "the value of FTX had soared again to $25 billion" based in part on "an infusion of $420 millions from reputable investor institutions" (Id. at 7).

FTX's "primary product was a platform service provider that served as a mobile application for cryptocurrency investment and allowed users to place cryptocurrency trade orders on behalf of users like Plaintiff and Class and to use interest bearing or yield-bearing accounts." In 2022, "around $15 billion in assets were traded daily on the platform, which represented 10% of global volume for crypto trading. This made FTX one of the largest crypto-trading companies in the world." FTX had its "primary international headquarters in the Bahamas" but "maintained a US base of operations in Miami." By November 2022 "customers had entrusted a purported $10 to $50 billion dollars to the platform" (Id. at 8). Bankman-Fried profited from the growth that provided "him with an income of more than $1 billion in 2022." He allegedly "reached a net worth of $26 billion." Then came the fall of the House of FTX.

In August 2022, "a U.S. bank regulator ordered FTX to halt 'false and misleading' information about whether funds at the company were insured by the government (they were not)." In early November "a popular crypto news publication CoinDesk released a devastating report, with leaked financial documents." FTX then "saw a staggering $6 billion in withdrawals over 3 days." On November 11, 2022, FTX "filed for Chapter 11 bankruptcy and Bankman-Fried resigned as CEO" (Id. at 9).

Allegedly, earlier in the year, "Bankman-Fried secretly transferred at least $4 billion in customer funds to Alameda to apparently cover for Alameda after it faced a series of losses." Bankman-Fried owned 90% of Alameda, but told an interviewer that he could not explain what happened to the missing billions of dollars (A. Osipovich, Wall Street Journal, (12-5-22)). The "FTX entities lent" Alameda "as much as $8 billion, of which more than half belongs to customers" (Complaint at 10). Alameda "suffered significant losses" and that "led to FTX loaning" it "more than half of its customer funds." Bankman-Fried admitted "that he made a poor judgment call." According to estimates, the FTX Entities "apparently lent billions to a company that Defendant Bankman-Fried also owned in the past year. This misconduct and mismanagement raises significant ethical, legal and conflicts of interest problems for Defendants" (Id. at 11).

This is a sports-related publication, so it has abbreviated many of the factual and legal allegations.

Class Allegations

The class includes all "persons or entities outside the United States who, within the applicable time period limitations, purchased or enrolled in ('YBAs') offered by" the defendants (Id. at 13). It is "comprised of thousands, if not millions, of consumers internationally, to whom FTX offered and/or sold YBAs" (Id. at 14). Common "questions of fact and fact predominate over any questions affecting individual class members" including "whether the YBAs were unregistered securities under federal or applicable law" (Id. at 15).

The Complaint has over two pages of class action law prior to stating the five causes of action. All five are California state law claims. The first is a purported violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 et seq. The second is an alleged violation of California's False Advertising Law, Cal. Bus. & Prof. Code §17500 et seq. The third is a claim for "Fraudulent Concealment." The fourth is for "Civil Conspiracy" and the fifth is for "Declaratory Judgment, Cal. Code Civ. Proc. §1060."

A Sports Case

The factual allegations concerning the Warriors appear briefly in the Complaint on page 4, page 12 and on page 13, from lines 1 though 16. After that, the Warriors are not specifically mentioned. However, by including the Warriors as a defendant, Plaintiff's counsel was able to file the case in San Francisco federal court, where the first-named Plaintiff's law firm is located, and it asserts only California state law causes of action. It also means that there is U.S.-based defendant with significant assets and insurance.

Conclusion

The Warriors and Miami Heat ended or paused their relationships with FTX in early November 2022. Apparently, the Warriors' alleged misconduct was in accepting a sponsorship agreement from a company that was to go bust within the year. Miami-Dade County has recently requested FMX's bankruptcy judge permission to terminate the FTX naming rights agreement. The Heat or MLB may be wondering if they will also be sued because of their FTX sponsorship deals. If taken at face value, sports-related entities are now allegedly liable for the financial misdeeds of their sponsors. Wall Street was not aware of FTX's financial shenanigans in January 2022, so it seems unlikely that the Warriors could have been aware of these issues. That is an impossible standard to place on leagues, teams, and colleges, but for now at least the Warriors will have to defend itself against these allegations.

NHL

Continued From Page 1

that his head trauma was not serious. In making this determination, the court said that two of the estate's claims were not pre-empted because they were based on common law obligations that existed independently of the CBA.

Montador reasserted the two surviving claims in a new lawsuit filed in the Circuit Court of Cook County. The NHL removed the case to the US District Court for the Northern District of Illinois, Eastern Division on the grounds that these claims are also completely pre-empted under § 301 of the LMRA.

Complete pre-emption under § 301 applies only when the determination of the state law claims is "inextricably intertwined" with the operative CBA (*Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L Ed. 2d 206 (1985)). "Factual overlap between a state-law claim and a claim one could assert under a CBA is not necessarily sufficient." (*Crosby v. Cooper B-Line*, Inc., 725 F.3d 795, 800 (7th Cir. 2013).

The circuit court concluded that the exact claims at issue – the NHL's purported "culture of violence" and misrepresentations concerning the long-term effects of players' head traumas – were not completely pre-empted because they were not duties created by the CBA, but were instead grounded in common-law duties. On the other hand, the NHL contended in district court that Montador's claims were merely disguised versions of the claims the circuit court previously preempted and ought to be similarly preempted.

However, the district court disagreed saying that the claims are certainly not inextricably intertwined, but are at most tangential to the terms of the CBA. It found that the NHL's duty not to unreasonably expose players to gratuitous violence arises out of the common law, not the CBA.

In its decision, the district court cited *Boogaard v. Nat'l Hockey League*, 211 F. Supp. 3d 1107, 1112 (N.D. Ill. 2016) in which the NHL made very similar arguments saying that even if the claims that the league promoted violence contained some similar allegations to the preempted claims, they were not predicated on the NHL's voluntarily assumed duties in the CBA, but rather alleged that the NHL took "active and unreasonable steps" to promote fighting.

It found that the NHL's duty not to unreasonably expose players to gratuitous violence arises out of the common law, not the CBA.

The district court found that the culture of violence claim is not inextricably intertwined with the CBA, and hence not preempted, because the NHL violated its common law duties by affirmatively encouraged fighting and unreasonably promoting a culture of violence.

The court also found that the misrepresentation was not preempted saying that the lion's share of the facts Montador offered suggested that the NHL affirmatively misled players by communicating through its conduct that head injuries were not serious.

The misrepresentation claim centered on the league's affirmative conduct, not its failure to warn. This affirmative conduct included the league's glorification and promotion of violence through its highlight reels and licensed video games which implicitly represented that head trauma could not cause severe long-term health complications as well as the false security created by the league's misleading research which downplayed the health consequences of head trauma.

Since these issues also were not inextricably intertwined with the CBA, the court held that the misrepresentation claims could also survive preemption.

The court remanded the case back to the Circuit Court of Cook County.