
CHAMBERS GLOBAL PRACTICE GUIDES

Sports Law 2023

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USA: Law & Practice

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Herrick, Feinstein LLP





Law and Practice

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Herrick, Feinstein LLP provides a full range of legal services to its clients worldwide from its office in New York City, Newark, New Jersey, Pittsburgh, Pennsylvania and Istanbul, Turkey. Herrick's Sports Law Group works in conjunction with the firm's complementary practice groups on a myriad of corporate, real estate, tax, intellectual property, restructuring, employment, government relations and litigation aspects of sports law for global sports dynasties. Herrick has brought countless novel and transformative concepts to life – including regional sports broadcasting and premium stadium experiences. Its attorneys have guided stakeholders in professional sports as they have entered into transactions to access capital, invested in interests in professional sports teams, entered

into concession services agreements and invested in mixed-used developments. Herrick's work spans league and team formation and operation, arena and stadium financing and development, naming rights, sponsorships, media rights, team acquisitions and investments and a range of ancillary concerns. Herrick has represented major athletic teams and affiliated entities in transactions totalling over USD100 billion. In addition to the authors referenced below, the firm would like to thank partner and chair of the Insurance and Reinsurance Group, Alan R. Lyons, and attorneys Justin Blass, Daniel A. Field, Stephen DiMaria, Tara Guarneri-Ferrara, Jennifer Muller, Meaghan Roe, Silvia Stockman and Adam Unger for their valuable contributions.

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1. Regulatory

1.1 Anti-doping

Doping is a criminal offence in the USA. On 4 December 2020, the Rodchenkov Act was enacted, which enables US authorities to pursue criminal penalties against those involved in doping conspiracies at international events involving American athletes, sponsors or broadcasters. The Rodchenkov Act gives prosecutors the power to seek fines of up to USD1 million and prison time of up to ten years, as well as restitution to victims.

The World Anti-Doping Agency (WADA) expressed concern that the Rodchenkov Act would destabilise the global anti-doping effort by extending US jurisdiction beyond its own borders. Now, the Department of Justice must develop a robust programme, co-operating with the US Anti-Doping Agency (USADA) and international law enforcement.

Eric Lira, a “naturopathic” therapist, was the first and thus far only person charged under the Rodchenkov Act. Lira was charged by the DOJ with obtaining and distributing various performance enhancing drugs to athletes in advance

of the 2020 Olympic Games in Tokyo – which convened in the summer of 2021. The case was investigated by the FBI’s Integrity in Sports and Gaming Initiative. Lira’s trial is expected to begin in June 2023. The maximum term of imprisonment under the Rodchenkov Act is ten years, and any sentencing will be determined by the judge assigned to the case.

WADA

Since 2004, WADA has published an annual list of prohibited substances and methods (the Prohibited List), which is updated at least annually, with the new list taking effect on 1 January of each year. The list identifies the substances and methods prohibited in and out of competition, and for particular sports. The list is divided into two sets of substances and methods.

- Those that are prohibited at all times (including but not limited to):
 - (a) substances such as hormones, anabolics, EPO, beta-2 agonists, masking agents and diuretics, and any pharmacological substance not currently approved for human therapeutic use; and
 - (b) methods such as blood transfusion or manipulation, gene editing or intravenous

injections in some situations.

- Those that are prohibited only in competition, including but not limited to stimulants, marijuana, narcotics, glucocorticosteroids, and, in particular sports, beta-blockers.

A substance or method can be added to the Prohibited List if it is deemed to meet two of the following three criteria:

- it has the potential to enhance or enhances sporting performance;
- use of the substance or method represents an actual or potential health risk to the athlete; and
- use of the substance or method violates the spirit of sport.

Athletes are responsible for knowing what substances and methods are considered banned by the Prohibited List. Under World Athletics Rules, the presence of a prohibited substance in an athlete's sample, or the use of a prohibited substance or prohibited method, constitutes a doping offence. WADA's Code provides a global framework for the anti-doping policies, rules, and regulations within sports organisations and among public authorities. USADA, the national anti-doping organisation in the USA for Olympic, Paralympic, Pan American, and Parapan American sports, is a signatory to the Code. USADA is charged with managing the anti-doping programme including testing both in and out of competition.

US Professional Sports Leagues

With respect to individual sports leagues in the USA, doping matters are generally handled internally by the leagues. Each league, through collective bargaining with players' associations, implements procedures and guidelines for the administration of drug testing. These procedures

usually consist of collecting random blood or urine samples that are tested by an independent laboratory.

1.2 Integrity

In May 2018, the US Supreme Court struck down the federal Professional and Amateur Sports Protection Act (PASPA), which had effectively prohibited individual states from legalising sports betting, with a few exemptions. The ruling provided a pathway for individual states to legalise sports gambling. Nearly 20 states have legalised sports betting, with many others introducing proposed legislation.

With the legalisation of sports betting, there is an increased risk of match-fixing and in-play manipulation. The legislation that has emerged, however, does not include provisions criminalising match-fixing. In large part, both states and the federal government appear to be relying on existing penal code provisions to preserve the integrity of athletic competition.

The Sports Bribery Act is the federal criminal law that targets the manipulation of athletic competition. The act makes it a felony to "... influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest".

This act does not cover other non-bribery concerns such as extortion, blackmail, tipping of inside information, or betting on games by someone who can affect the outcome. Private sanctions for misconduct also exist.

1.3 Betting

Across the USA, sports betting is part of popular sports culture and many states have passed, and are continuing to pass, legislation to legalise sports betting in varying forms. Such forms

include mobile sports betting with multiple sportsbooks options, one mobile betting option, in-person online betting (ie, proximity to brick-and-mortar sportsbooks) and only physical sportsbooks. Some states restrict sports betting to only in-person betting, while others allow both in-person and mobile betting options. Since the start of 2022, over 30 states allow sports betting in some form, with over half of states allowing mobile betting. While sports gambling as legalisation is still growing in the USA, it has solidified as a new norm. In 2022, the amount wagered in the USA on sports increased by 70% year-over-year.

Sports Governing Bodies Sharing Information with Betting Operators

US sports leagues license their data to sports betting operators via exclusive or co-exclusive distributors to provide accurate, real-time data for an agreed upon fee. Sportsbooks operate outside of the sports, but often license from the sports organisations, as opposed to a third-party organisation. Sports organisations enjoy the win-win of earning fees for the data collection already underway and protecting the integrity of the sports wagers by ensuring accurate results. Certain states (eg, Illinois and Tennessee) require that operators use official data for certain sports wagers, namely props or in-play betting.

Recent Noteworthy Betting Cases/ Disciplinary Actions

There are few examples of disciplinary action for sports betting violations. The most notable actions are the disciplining of former baseball player Shoeless Joe Jackson and former baseball player and manager Pete Rose. However, in 2019, for the first time since the 1980s, the National Football League (NFL) disciplined a player for wagering on NFL games. Josh Shaw, an Arizona Cardinals cornerback, was indefinitely

suspended for betting on multiple NFL games. Jacksonville Jaguars wide receiver Calvin Ridley (at the time a member of the Atlanta Falcons) became the first NFL player to be suspended since Shaw. The NFL announced that Ridley was suspended for at least the 2022 season after placing a legal mobile bet in Florida in 2021 that included a bet on the Falcons to win. Notwithstanding the relatively small size of the bet, Ridley's suspension evidences the NFL's zero tolerance policy on sports wagering by players.

1.4 Disciplinary Proceedings

The steps taken by sports governing bodies with respect to doping, integrity, and betting offences vary by sport and violation. For example, pursuant to MLB's Joint Drug Prevention and Treatment Program (the JDPT Program), a player who tests positive for a performance enhancing substance is subject to an 80-game suspension for a first violation, a 162-game suspension with 183 days of pay suspension for a second violation, and potential permanent suspension from major and minor league baseball for a third violation. This contrasts with other sporting bodies, such as the NFL which, although having a shorter season, has slightly different punishments for similar violations.

With respect to gambling and integrity violations, Major League Baseball (MLB) has – in effect – clear guidance, through MLB Rule 21, which can provide, depending on the offence, for up to permanent ineligibility based on a single offence. MLB's clear guidance on the penalties' specific offences contrasts with other leagues' guidelines, such as the NFL's, in which the Commissioner may analyse violations on a case-by-case basis, with the resulting disciplinary actions including severe penalties, up to and including a fine, termination of employment and/or banishment from the NFL for life.

2. Commercial Rights

2.1 Available Sports-Related Rights

Aside from sponsorship and broadcasting rights (discussed elsewhere in **2.2 Sponsorship** and **2.3 Broadcasting**), key sports-related rights include merchandising, hospitality, events and ticketing. While these rights all involve sports teams' licensing, they primarily relate to the use of a team's stadium or third-party facilities.

Commercial rights to merchandising most commonly relate to retail sales of a wide variety of products, including team logos and player references. To make use of these rights, teams or leagues will typically enter into agreements with retail goods companies for design and production of gear. Those contracts often include intellectual property licences of team trade marks and copyrights, in exchange for a fee or percentage of sales. Teams and players may also engage in more specialised merchandising, including sales of memorabilia used in-game at pivotal or record-setting moments, often by way of auction or private sales to collectors.

Use of stadiums and sports facilities can be a significant commercial right that sports organisations monetise, which includes provision of hospitality services and concessions. To provide concessions at their facilities, sports organisations contract with suppliers. Alternatively, some teams form their own hospitality organisations to control both the quality of the concessions available at their events, and the profits to be made therefrom.

Teams also monetise unique offerings in their stadiums and facilities, including specialty seating for games or higher-end restaurants. Sports organisations may even use their facilities for special events such as concerts, either charg-

ing a fee for use of the space or including some split of ticketing profits in agreements with event organisers.

Teams profit from the sales of tickets and the accompanying sales of concessions and merchandise. Increasingly, sports organisations are facilitating secondary ticket sales and combating illegal sales through e-ticketing and apps dedicated to purchasing, storing and producing tickets for safer access to games.

2.2 Sponsorship

Sponsors use sport to enhance and promote their brand primarily through advertising and title rights. Sports organisations attract sponsors through the creation of advertising space and marketing title rights. The primary contract terms typically revolve around payments and intellectual property rights.

Sports organisations provide sponsors with a wide variety of opportunities for advertising, including on billboards, on the field or court, or even on the players' uniforms. Broadcast of events provides an advertising opportunity by promoting different brands through commercial segments between periods of play. Additionally, sports organisations can provide sponsors with title rights as the "official" service provider of the team in the sponsor's industry, complete with in-game announcements or broadcasting tie-ins. Title rights may even extend all the way up to the large-scale sponsorship right over naming a stadium. For food and drink sponsors, stadium advertisement can be tied to exclusive sales of sponsors' products in concessions at the team's stadium or facility.

Contracts between sports organisations and sponsors inevitably focus on payment and intellectual property rights. Sports organisations will

often have some input on the advertising material that may be displayed by the sponsor, as well as some level of veto or control over the material displayed. Sponsors will look for strict intellectual property rights reservations and controls, to ensure ownership over all trade marks, copyrights, or other intellectual properties of the sponsor displayed by the sports organisation.

2.3 Broadcasting

Holders of sports rights will package broadcasting rights for broadcasters, and broadcasters in turn monetise their broadcasts of games and other content. Wrapped up in these arrangements are agreements for broadcasting regionally versus nationally, licensing interactive media, and rights to access venues by broadcasters.

Broadcasters use the broadcasting rights they receive through advertising, subscription services, and licensing previously broadcast games for future programmes. The primary exploitation of broadcast rights comes through advertising. Broadcasters sell airtime to a variety of sponsors for advertising during live sporting events. Increasingly, broadcasters leverage their rights to provide content through streaming platforms, deriving subscription income from viewers. Additionally, subject to compliance with any applicable league copyright regulations, broadcasters can license out their previously recorded broadcasts for use in replays, future programming and content.

Sports rights-holders traditionally package their broadcast rights by the season. Within each season, different broadcasters will pay for the right to broadcast a certain number of games. In many sports, packages are split between regional and national broadcasters. In such a split, regional broadcasters will purchase rights to a larger number of games, with a smaller select

number of games going to national broadcasters. Increasingly, sports rights-holders package these television rights while still reserving the right to broadcast games over the internet and through interactive media, to increase both the audience for their games and their ability to profit from selling broadcast rights for different distribution mediums. While teams have made use of broadcasting rights for league-specific broadcast services for a more extended period of time (for example, NFL teams broadcasting via NFL Game Pass), teams are increasingly providing broadcasting rights to other television streaming services, such as Hulu, Apple TV+ and Amazon Prime, to increase the fees received for broadcasting rights and audience accessibility. More tangible examples of this trend have emerged in 2022, with Apple TV acquiring the exclusive rights to certain Friday Night Baseball games from MLB and Amazon Prime broadcasting Thursday Night Football games from the NFL.

Broadcasting arrangements provide not only for fees, but also for certain access rights and intellectual property concerns. Broadcasters need to bargain for the rights to access venues where sports occur, to ensure that their cameras and media equipment are present, alongside their announcers and commentators in commentary booths and on the field or court. Intellectual property rights are a large concern in these arrangements, as broadcasters retain rights over their final broadcasts while using them to showcase trade marks and other intellectual property of the sports rights-holders.

3. Sports Events

3.1 Relationships

There are multiple proprietary rights in a sports event. These include:

- copyrights in the actual broadcasts (TV, cable, streaming, download, pay-per-view, etc);
- athletes' individual rights of publicity, including sponsorships and depiction of sponsor names/logos in association with individual players; and
- trade mark rights in teams and leagues' names, logos and other marks, and trade mark rights in the names of certain sports events themselves.

In addition, any music or other third-party content that will be played at an event must be properly licensed by the team, league and/or venue.

Under US copyright law, sporting events in themselves are deemed to be performances that are not protected by copyright in the absence of such events being "fixed" in some media, including by digital means. Accordingly, US broadcasts of college and professional sporting events are therefore simultaneously recorded.

Physical spectator access to event venues is controlled by ticketing, which creates a contract with the ticket purchaser. Tickets typically contain printed restrictions on filming and photography. An increasing number of US sporting events are broadcast over cable TV channels and through dedicated streaming apps and web channels, where user access is controlled through service subscription and terms of use agreements.

Sporting event organisers/leagues are significantly concerned about illegal streaming/pirating of sporting events. This is addressed through copyright and trade mark enforcement proceedings, including copyright "take down" notices issued to internet service providers under the Digital Millennium Copyright Act.

3.2 Liability

Sports events organisers generally owe a duty of care to both participants and spectators to ensure that the stadium and playing field are reasonably safe and to avoid creating dangerous conditions.

Holding certain sporting events during the COVID-19 pandemic involved additional potential liability exposure for event organisers. For example, claimants might allege that they became infected with COVID-19 while attending a particular event due to the organiser's non-compliance with certain safety or mitigation requirements. Such claims might be difficult to prove given the prevalence of the virus, but any person who entered a venue, including athletes, staff, spectators and vendors, were potential claimants. If a person is injured at a sporting event, whether that person has a valid cause of action against the organiser will depend on whether they can prove all of the following three elements:

- the person was owed a duty of care by the organiser;
- the organiser breached this duty of care; and
- the injury resulted from that breach.

To determine whether the event organiser breached its duty of care, a court will apply a test of "reasonableness". A court may consider whether the organiser implemented risk management policies and procedures to minimise risks and/or maintained its facility at reasonably expected standards.

How Can Liability Be Limited?

Courts have repeatedly emphasised that event organisers are not required to guarantee the total safety of guests.

The most common argument used in defending negligence claims involving injuries at sporting events is the “assumption of risk” doctrine. This doctrine can preclude recovery for injuries resulting from an activity in which the plaintiff realised the risks, and nevertheless voluntarily participated in and accepted those risks. Assumption of risk can be express (eg, a waiver signed by the plaintiff), or it can be implied from the voluntary participation in the activity.

To prevail on the assumption of risk defence in a spectator’s personal injury action, the defendant is required to demonstrate that the injury-causing events were known, apparent, or reasonably foreseeable consequences of attending the game.

It is not uncommon for event organisers to include disclaimer language in small print on the reverse of the ticket. Whether these disclaimers are valid is an issue of state law, and states differ as to the enforceability of these waivers.

MLB and its clubs have largely avoided financial responsibility for foul ball accidents, since every MLB ticket contains a disclaimer that fans enter at their own risk. US courts have generally upheld the “Baseball Rule”, which provides that a baseball facility has met its duty of care to spectators by providing seating that is protected from projectiles that leave the field of play.

Another reason why an owner’s liability may be limited is the requirement that the owner’s negligence must be the cause of the injury.

What Liability Cannot Be Excluded?

While disclaimers and waivers are valid in many states, they do not necessarily protect facility owners from their own negligence. Despite the disclaimers on the reverse of ticket stubs, sta-

dium owners still have an obligation to act reasonably to minimise the risk of injury to spectators. Waivers are also not effective if the sports organiser is found to be grossly negligent or to have intentionally harmed the claimant.

How Can Athletes Be Liable to Spectators?

Athletes who engage in typical activities associated with a sport will not usually face liability for any resulting injuries that occur during the game. However, in limited cases, an athlete may bear liability for a spectator’s injury where, for example, an athlete behaves aggressively or fails to act according to the rules of the game.

How Are Sporting Events Kept Safe from Violence and Disorder?

Sports organisers have a duty to keep the sporting stadium/facility reasonably safe, which may include a duty to take precautions if it is foreseeable that a third party will commit a criminal or violent act causing injury to a player or spectator. There are certain steps that can be taken to reduce that risk and potential liability:

- adopt and enforce internal disciplinary policies for players and coaches setting forth standards of conduct and impose penalties for violations which are applied consistently;
- review and strengthen, if necessary, policies and local laws on the serving and consumption of alcoholic beverages;
- work closely with police and security to identify and deter the potential for violence and other unruly behaviour, and to implement a plan to discourage and respond to spectator violence if it occurs, including a strong, visible police presence;
- install video equipment in the seating area to help deter misconduct and identify spectators in the event of fan violence;

- have a designated area in the stadium for visiting team's spectators; and
- make public announcements before and during the game emphasising standards of spectator behaviour.

Each sporting institution should review and examine its culture, prior experiences and resources to prepare for sporting events and to reasonably ensure their safety.

4. Corporate

4.1 Legal Sporting Structures

Entity selection is an important concern that must be addressed early in connection with formation of any professional and non-professional sports clubs (amateur athletics) and sports governing bodies. In all instances, limiting liability against legal claims will be of paramount importance and in the USA will be provided for by resorting, basically, to use of any of the following entities:

- limited liability company;
- limited partnership; and
- corporation (publicly or privately owned).

Each of these types of entities are presently represented in all areas of professional and non-professional sports.

In the absence of ownership by persons or entities that are non-resident in the USA, the limited liability company form is likely the prevailing form of ownership and operation. These are frequently referred to as "pass-through entities" for purposes of taxation, providing for a single level of income taxation while affording their owners the ability to construct creative and sometimes unusual distribution "waterfalls", directing how

various revenue-streams are distributed. The limited liability company is governed by a limited liability company operating agreement and the state laws where that entity has been formed. Essentially, the operating agreement is a contract that provides for nearly unlimited variations of rights and remedies among its owners, which may consist of traditional common equity investors, those with preferred equity investments, and those holding hybrid securities (which may be combinations of debt and equity securities). The applicable state law statutes are structured to defer to contractual rights of ownership and operation negotiated by the owners.

4.2 Corporate Governance

Governance in sports spans many participants, including players, clubs, local, national and international organisations, spectators, the media, commercial (sponsors), non-commercial interests, and educational and training bodies. Enhancing governance in sports has undoubtedly been a priority in response the public scandals at the highest levels and bears similarities to the evolved corporate governance standards and expectations applicable to business corporations in the public capital markets. However, in the USA there is no "one size fits all" approach recommending or prescribing governing principles and, as a result, codes of conduct abound at all levels (eg, professional, collegiate and youth). This stands in contrast to, for example, the UK's Code for Sports Governance, with broad application to all that seek government and lottery funding.

These governance codes must be updated to address ever changing matters, such as laws governing online gambling, the ongoing debate over pay for college athletes, and the increasing number of substances banned for use by athletes.

In the USA, sports leagues are most often governed according to rules and internal regulatory procedures set forth in league organising documents. Most typically, these consist of league constitutions and by-laws. In many cases, these documents establish a board of governors comprising team owners or their representatives. These documents provide for establishing and managing league governance and regulatory policies and typically provide for appointing a league commissioner. The league commissioner serves as a chief executive officer and is typically responsible for overseeing the day-to-day league operations. League organisational documents and CBAs set forth player and coach codes of conduct.

4.3 Funding of Sport

Federal agencies and state and local governments often turn to public-private partnerships to structure and execute the development of stadiums and other sports-related facilities. Often this is done in conjunction with redevelopment of real estate located in areas qualifying for tax status as a Qualified Opportunity Business Zone with special tax advantaged attributes.

In connection with professional stadium finance projects, separate private revenue streams are identified and evaluated. They consist of and include the following: ticket sales, personal seat licences, club seats, luxury seats, stadium tours, concessions, merchandise sales, advertising (including signage, virtual advertising, sponsorships, naming rights and pouring rights), parking, and other exclusive arrangements.

Stable revenue streams are of paramount importance to funding transactions. Declines in event attendance during COVID-19 were due to capacity and social distance restraints imposed by governments rather than a decline

in measured demand for tickets. While there is some uncertainty about the pace at which the live events industry will recover, the shift in consumer spending from product to experience is increasing and is expected to be robust in the medium to long term.

4.4 Recent Deals/Trends

US leagues have begun to modify ownership regulations to allow new investment opportunities for funds to acquire minority interests in multiple clubs. In 2019, MLB modified its rules to allow such funds to acquire a passive minority stake in multiple clubs. Similarly, the National Basketball Association (NBA) recently approved a plan to allow investment firms to own interests in teams. As many sports properties confront long-term cash flow and capital shortfalls, new variations on investment funds are likely to continue to develop.

In addition, sports and entertainment venues have, in recent years, paired with and become integral components of mixed-use development projects. These projects often take the form of public-private partnerships revitalising downtown areas and have resulted in the rehabilitation or creation of entertainment spaces, hospitality ventures (including hotels, bars and restaurants), residential projects (including affordable housing), and office and innovation workplace lab spaces, tailored for changing modern workplace norms. While diminishing as a tax benefit incentive, many urban projects were subject to special federal income tax benefits if the projects were located within qualified opportunity zones, often associated with urban renewal projects. This was particularly useful as direct taxpayer support for new stadiums and arenas has been waning.

College athletes are now able to exploit their own name, image and likeness (NIL). This is the result of some new state laws, as well as a change to the National Collegiate Athletic Association (NCAA) rules providing collegiate athletes for the first time with the right to profit by licensing their NIL rights. This monumental change for college athletes has raised burgeoning issues and opportunities. (see **5.3 Image Rights and Other IP** and **9.1 Overview of Women's Sport**).

5. Intellectual Property, Data and Data Protection

5.1 Trade Marks

Trade mark rights in the US are based on use of a mark (be it text, designs/logo, slogans, or a combination thereof) in US commerce for specific goods/services. US trade mark rights are generally based on use in US commerce, not registration. Thus, unregistered but otherwise protectable marks (ie, common law use) may be enforced against junior users of the same or confusingly similar marks for the same or closely related goods/services.

Registration is available at the federal level for marks that are used in US interstate commerce. All 50 states also have state trade mark registrations for marks used only within their respective states.

Word marks that are generic can never be registered. Marks that are merely descriptive also cannot be registered on the Principal Register or enforced until, and if, they obtain secondary meaning (also known as acquired distinctiveness). Marks cannot be registered if they are confusingly similar to any prior filed application or issued registration for related goods/services.

While registration is not necessary to enforce valid trade mark rights, under the US Trademark Act (also known as the Lanham Act), the advantages of federal registration include:

- legal presumption of validity of the mark and its ownership;
- constructive nationwide notice of registration; and
- potential for enhanced damages in infringement cases, especially for counterfeit merchandise.

Changing Controversial Team Names

Of interest is the recent trend for sports teams to change their names where the names reflect historical bias or content that is offensive to one or more societal groups. For example, in 2020, the professional NFL Washington Football Team (an interim name used until early 2022) dropped its longstanding “Redskins” name and all related marketing and merchandising in deference to Native Americans, who, along with many other groups, for many years had viewed the “Redskins” name as highly offensive. After soliciting fan suggestions for new names and conducting thorough trade mark clearance searches, in early 2022 the team was formally re-named the “Washington Commanders.” In December 2020, the Cleveland Indians professional baseball team announced they would do the same, following decades of opposition to the “Indians” name; in July 2021, the team rebranded as the “Cleveland Guardians.”

5.2 Copyright/Database Rights

US copyright law is exclusively governed by the 1976 Copyright Act, which is a very lengthy and complex statute with additional enabling regulations. The USA is a member of the Berne Convention. Registration is not required to protect copyright, which exists from the moment of

creation of an original work of authorship that is otherwise protectable by copyright.

However, except for non-US Berne Convention works, registration is still required as a prerequisite to sue for copyright infringement in the USA. In addition, if a registration is issued within three months of a work's first publication, in a subsequent infringement action the copyright owner may seek both statutory damages (in lieu of a need to prove actual damages or an infringer's profits) and legal fees if successful. Although non-US Berne Convention country copyright owners are exempt from the registration requirement as a pre-condition of suing for infringement, they cannot seek statutory damages or legal fees unless a US registration is effective before an act of infringement begins.

Common defences include lack of personal jurisdiction, statute of limitations, absence of infringement based on non-substantial similarity of copyright-protectible elements, public domain, lack of copyrightable subject matter, *scènes à faire*, idea-expression merger, and statutory fair use.

Databases can be protected by copyright and/or trade secret laws under both state and federal laws. Trade secrets are typically protected by confidentiality and non-disclosure agreements. Copyright does not protect facts, such that factual data within a database cannot be protected; however, the original structure, sequence and organisation of a database (ie, the schema) can be protected if it is original.

5.3 Image Rights and Other IP

There is legal recognition for image rights for individual athletes, but generally only at the state level under statutory and common law rights of publicity. As this is governed by the laws of 50

individual states, it is a complex area of US law. Some states do not recognise a right of publicity, while many others recognise such right by statute and/or common law. Some states also recognise a post-mortem right of publicity that extends beyond a person's death and which can be enforced by the deceased person's heirs.

The rights of college athletes to be able to financially exploit their own name, image and likeness (NIL) experienced a ground-breaking moment in 2021, when some new state laws and National Collegiate Athletic Association (NCAA) rules changes provided such athletes, for the first time, with the right to profit by licensing their NIL rights. In the past, NCAA rules prohibited college athletes from accepting any such compensation as a condition of being able to compete as an "amateur".

In addition to publicity rights, well-known and famous athletes may develop trade mark rights in their names and persona, providing additional intellectual property protection under federal and state law. The concept of "passing off" is a form of trade mark infringement and unfair competition under the federal Trademark (Lanham) Act and state laws, regardless of whether an athlete's rights are registered. However, athletes would only have enforceable trade mark rights in their names or other aspects of their persona if such persona were in fact used as a brand to market and sell goods/services in the USA.

5.4 Licensing

Licensing is a primary revenue generator of team and league revenues. In the USA, the professional major sports leagues generally control and administer all member team trade mark rights and the licensing thereof (see **2.1 Available Sports-Related Rights**). Licensing revenues

are shared with teams based on contractual formulas.

Athletes are generally free to enter into direct sponsorship and licensing agreements, typically through their agents, provided such acts do not otherwise violate their team and league policies and any player contract provisions.

There are no legal restrictions on assigning IP rights to third parties, with the only statutory exception that an “intent to use” federal trade mark application can only be assigned to a successor of the underlying business. Restrictions on assignment of IP rights to third parties is generally a matter of contract. In the absence of any such restriction, contractual rights may generally be assigned except for personal service contracts; however, this is a matter of state law and is therefore subject to specific applicable laws of the 50 states.

5.5 Sports Data

Sports in the USA are heavily reliant on massive amounts of data and statistics respecting players’ performance and health, training, competitive team positions and information, scouting reports, team competition, and fans. Major sports leagues and their teams employ sophisticated technology to capture real-time game data, such as MLB’s StatCast system, which uses radar and high-speed cameras to record all movements made by players and tracks the flight and velocity of baseballs. Similar systems are installed in NFL and NBA arenas, and are being implemented by the National Hockey League (NHL).

There are many commercial opportunities presented by sports data, particularly for third-party developers who create and license sports-related applications and application programming

interfaces (APIs) using data that focus on a myriad of sports-related uses, such as athletes’ health and nutrition, athletes’ performance, training regiments, scouting reports, player-trading decisions, statistics for game broadcasts, fantasy sports, sports betting, video gaming, e-sports competitions, and predictive modelling.

5.6 Data Protection

In the USA, there are no specific data protection laws at the federal level regarding sports. However, various states have enacted data protection and security laws that protect personally identifiable information. The California Consumer Privacy Act is currently the most extensive such law in the USA and is modelled in part on concepts included in the GDPR. California recently enacted an even more robust Privacy Rights Act that becomes effective in 2023. In addition, all 50 states have data breach-reporting laws.

If personal health-related information of individual athletes is collected, maintained or provided by medical practitioners, healthcare institutions or their business associates, such data is protected under the federal Health Information Portability and Accountability Act (HIPAA).

In one notable example, in 2015–16, the FBI investigated MLB allegations that the St. Louis Cardinals hacked into the internal networks of the Houston Astros, including the baseball club’s proprietary competitive databases of scouting reports, trades and proprietary statistics. A Cardinals’ scouting director ultimately pleaded guilty to unauthorised access to an Astros computer.

6. Dispute Resolution

6.1 National Court System

Internal Regulation and Arbitration

US sports leagues are typically governed according to rules and internal regulatory procedures set forth in league constitutions and by-laws. In many cases, a league commissioner serves as a chief executive officer and is responsible for overseeing the day-to-day operation of the league. Although the organisational structure of each league differs, the commissioner generally has plenary authority to enforce league rules.

Jurisdiction over sports-related disputes depends on the nature of the dispute. In professional sports, an arbitration clause is often found in a collective bargaining agreement (CBA) between a players' association and the league or team. Under most CBAs, it is common for grievance, salary, and contract disputes to be resolved through binding arbitration. League constitutions and by-laws often require that disputes between the league, players, member teams, officials, or shareholders be resolved through arbitration, with the league commissioner serving as arbitrator.

Dispute Resolution Before the Courts

It is a common requirement under most governing documents that the internal arbitration process be exhausted before a dispute can be heard in court. While it is unusual for a player to appeal their suspension, the most well-known and highly publicised example of this process is the "Deflategate" scandal. Following the 2015 AFC Championship game, the NFL investigated claims that the New England Patriots and quarterback Tom Brady deflated footballs. Following the investigation, NFL Commissioner, Rodger Goodell suspended Brady for four games. Under the terms of the NFL CBA, before Tom

Brady could bring an appeal of his suspension to federal court, he was required to exhaust his internal NFL appeals. After the NFL Commissioner, Rodger Goodell heard Brady's appeal and upheld his suspension, Brady then appealed to federal court. After a lengthy appeal process at the league level and in federal court, the suspension was upheld, and Brady served the suspension.

There are cases in which disputes involving leagues or teams may be heard initially in state or federal court. This usually occurs when a litigant is not party to the league's operating agreements and is not bound by an arbitration provision contained in those governing documents.

6.2 ADR, Including Arbitration

League constitutions and by-laws typically require that disputes between the league, players, member teams, officials or other internal league stakeholders be resolved through arbitration, in many cases before the league commissioner as arbitrator.

MLB

One type of arbitration is the "baseball arbitration", which originates from a methodology that was used to resolve baseball players' salary disputes. In this type of arbitration, each party submits to an arbitrator an amount that represents the party's last, best offer. The arbitrator then must pick one of the submitted figures. MLB CBA still requires "last, best offer" arbitration. This system usually causes good faith bargaining and results in a high percentage of settlements.

NBA

The NBA utilises arbitration to resolve issues pertaining to the CBA. The CBA provides for arbitration of disputes relating to player grievance and

selected articles within the CBA. Issues involving income, salary cap, and minimum team salary are subject to arbitration under the CBA. Some disciplinary determinations issued by the NBA commissioner are binding upon the player. If the disciplinary determination meets certain criteria, it may be appealed to a grievance arbitrator for a final determination.

NFL

The NFL CBA provides for arbitration of what are essentially labour disputes between the team and a player including salaries and whether an injury that precluded a player from performing was sustained as a result of play.

6.3 Challenging Sports Governing Bodies

Following a league-issued decision, there is typically an internal appeals process that is set forth in league-governing documents. This internal appeals process is typically the final adjudicatory step available at the league level. After an arbitration award is issued, a party seeking to enforce the award must file a petition in federal court to confirm such award within one year of the date the award was issued. As noted in **6.1 National Court System**, after exhausting their appeal options at the league level, players or teams may appeal the league's determination in federal court under a narrow set of circumstances set forth in the Federal Arbitration Act (FAA) or under the Labor Management Relations Act (LMRA). An appeal sought from an arbitration award in the labour and employment context will result in an appeal under the LMRA. Otherwise, the FAA's appeal procedures are likely to apply.

The standard for vacating an arbitration decision is high and courts are generally deferential to arbitration decisions since the parties agreed to arbitration in lieu of using a court to settle

the dispute. Courts will generally uphold the decision unless the arbitrator acted with bias, corruption or fraud, or exceeded their authority under the terms of the CBA. Similarly, under the FAA, a party may seek to vacate an arbitration award where:

- the award was procured through corruption or undue means;
- there was evident partiality or corruption among the arbitrators;
- the arbitrators were guilty of misconduct and the rights of a party was prejudiced; or
- the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

7. Employment

7.1 Sports-Related Contracts of Employment

Relationships between athletes and sports organisations in football, basketball, baseball, hockey, and soccer are typically handled by employment contracts, commonly referred to as Standard Player Contracts or Uniform Player Contracts (SPK). An SPK is typically a form document which has been negotiated between the league and the players' union pursuant to a CBA. Most CBAs require that the league does not approve an individual player's SPK unless it has been negotiated with an agent registered with the player's union or the player has negotiated the contract themselves. Generally, the Commissioner of the league has the power to reject an SPK if the agreement violates any provision of the CBA, including its salary cap and registered agent provisions.

Typical Terms of the SPK

The standard SPK typically requires the player to:

- participate in meetings, training camps, workouts, practice sessions, regular season games, exhibition games, and postseason games;
- license the player's name(s), image, likeness, and other identifying information and characteristics to the team for promotional purposes and seek the team's consent before engaging in any media or public appearances;
- participate in reasonable activities promoting the team and league as directed;
- maintain good moral character, good citizenship, good sportsmanship, and integrity, including by not betting on games, accepting anything of value to attempt to fix a game, or using or providing others with prohibited substances;
- maintain good physical condition and notify the team of injuries and illness, including notifying the team of injuries incurred as a result of the player's employment with the team;
- abstain from playing other sports or engaging in activities that may involve a substantial risk of personal injury without the consent of the team; and
- accept an assignment of the SPK in the event the team trades the player to another team, and faithfully perform the duties as required by the SPK for the new team.

While CBAs may restrict the subjects on which teams and individual players may negotiate in an SPK, the parties are generally permitted to negotiate the player's signing bonuses, contract restrictions on trading the player, and compensation in the event of injury, among other provisions. The SPK may also specify the team's option to retain a player for another year after the

conclusion of the SPK, or the player's option to become an unrestricted or restricted free agent. As an unrestricted free agent, the player may opt to remain with their current team for another year or accept offers from other teams. As a restricted free agent, the player may receive offers from other teams, but must allow their original team an opportunity to meet or exceed any offers.

CBAs between players' unions and sports organisations also typically require the league and teams to spend a guaranteed amount on player compensation.

Antitrust and Anti-competitive Concerns

Employment contracts between sports teams and players requiring loyalty to the player's team and league do not unreasonably restrain competition. Additionally, the non-statutory labour exemption to antitrust laws insulates agreements in the CBA from antitrust challenges. In particular, anti-competitive provisions in a CBA may be entitled to the non-statutory labour exemption where:

- "the restraint on trade primarily affects only the parties to the collective bargaining relationship";
- "the agreement sought to be exempted concerns a mandatory subject of collective bargaining"; and
- "the agreement sought to be exempted is the product of bona fide arm's-length bargaining".

Such protections may not extend to league-wide rules having an anti-competitive effect that have not been negotiated between the players' union and the sports organisation. One case ruled that the non-statutory labour exemption does not apply to the National Women's Soccer League age rule – requiring players to be at least 18 –

because it was not the result of collective bargaining negotiations.

With respect to student athletes, NCAA rules limiting education-related benefits, such as scholarships for graduate school, payments for academic tutoring, or paid post-eligibility internships, violate the Federal Antitrust Act.

7.2 Employer/Employee Rights

Anti-discrimination Protections

Under Title VII of the Civil Rights Act of 1964 (Title VII), Title I of the Americans with Disabilities Act of 1990 (ADA), the Age Discrimination in Employment Act (ADEA), Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), and analogous state and local laws, sports organisations are prohibited from discriminating against or harassing their athlete-employees on the basis of race, colour, religion, national origin, sex, sexual orientation, disability, age, and genetic information. Generally, player-employees are also protected against retaliation for engaging in protected activities, such as complaining of unlawful discrimination; filing a charge of discrimination; and/or participating in an investigation, lawsuit, or other proceeding concerning discrimination. State and local laws may provide protections based on additional protected characteristics.

Americans with Disabilities Act

Pursuant to Title I of the ADA, and state and local disability laws, employer sports organisations have a duty to not discriminate against player-employees on the basis of disability, to keep player-employees' medical information confidential, and to provide a reasonable accommodation to player-employees with disabilities absent an undue hardship. The extent to which player-employees may be entitled to reasonable accommodations in a profession based on

physical ability and competition has not yet been outlined by the courts.

Sports organisations may also have a duty to not discriminate against players on the basis of disability if they are public accommodations. See *PGA Tour, Inc. v Martin*, 532 U.S. 661, 681 (2001).

Age Discrimination

The ADEA and state and local counterparts prohibit discrimination on the basis of age, with the ADEA and many states protecting individuals aged 40 and above. However, sports organisations should ensure that their practices are compliant with the requirements of an applicable state and/or local laws with a lower protected age or which does not specify an age threshold.

Gender Discrimination

Recently, disparities in pay and working conditions between men and women athletes has become the subject of significant public attention and litigation. See, *Morgan v United States Soccer Fed'n, Inc.* granting soccer federation summary judgment on women soccer players' discrimination claims as to pay under the Equal Pay Act and Title VII and as to field surfaces under Title VII, and denying summary judgment on their claim of discrimination in the provision of charter flights. Following this litigation, the US Soccer Federation reached a settlement to pay the US Men's National Team and the US Women's National Team equally, along with other considerations. However, claims of gender discrimination in employment by athletes are rare because a prima facie case of discrimination requires a showing of different treatment between the sexes by a singular employer, and most sports organisations employ players of the same sex.

Race, Colour, and National Origin Discrimination

Under Title VII and analogous state and local laws, employer sports teams are prohibited from discriminating against players on the basis of their race, colour, and national origin, among other protected characteristics. However, where a sports organisation acts on the basis of a protected characteristic with the goal of remedying its past discrimination, there is generally no violation of Title VII.

Protection of Genetic Information

Oftentimes, and as directed by the terms of a CBA, employer sports organisations have a role in managing player-employees' health and collecting their medical information. Pursuant to Title II of GINA, employer sports organisations are prohibited from discriminating against player-employees on the basis of their genetic information; requesting, requiring, or purchasing genetic information about player-employees; disclosing genetic information about player-employees, subject to limited exceptions; or retaliating against player-employees for protected conduct under GINA. GINA also requires that employer sports organisations keep player-employees' genetic information confidential. Employer sports organisations seeking to take advantage of increased accessibility of genetic testing and advancement of wearable technologies may be limited by GINA's requirements.

COVID-19

Per guidance issued by the Equal Employment Opportunity Commission, federal discrimination laws permit employer sports organisations to require employees to submit to testing for COVID-19 and/or be vaccinated against COVID-19 unless the employee has a reasonable accommodation because of a disability or sincerely held religious belief or observance (applicable

state or local laws may provide for further protected reasons). In response to local mandates which temporarily required COVID-19 vaccination of employees and/or as a condition of entry to sporting events and/or venues, some sports organisations had required player-employees and/or staff based in those localities to be vaccinated against COVID-19 in order to compete. Although employer sports organisations must consider requests for temporary or permanent exemptions from COVID-19 vaccination requirements for protected reasons, employer sports organisations may deny exemptions that would cause them to incur an undue burden. Additionally, many sports organisations had required COVID-19 testing, varying depending on, for example:

- the player-employee's vaccination status;
- whether the player-employee had symptoms attributable to COVID-19;
- whether they had been exposed to someone with COVID-19; and/or
- surges in positivity rates.

Wage and Hour Law

The Fair Labor Standards Act of 1938 (FLSA) and state and local wage and hour laws require that employer sports organisations pay all players the minimum wage and most players overtime premiums for hours worked over 40. Although there is no explicit exemption from the FLSA's overtime provisions for athletes generally, the FLSA carves out an exemption for baseball players during the regular championship season as long as they are paid at least the minimum wage for 40 hours weekly.

Collective Bargaining

Under the National Labor Relations Act of 1935 (NLRA), player-employees are entitled to unionise, collectively bargain with their employer

sports organisations, and participate in protected concerted activity. Under the NLRA, a sports organisation may not take unilateral action on terms affecting “wages, hours, and other terms and conditions of employment”, such as free agency, first refusal provisions, salary arbitration, the college draft, salary caps, minimum individual salaries, and fringe benefits, because these are mandatory subjects of bargaining. See 29 USC § 158(d).

Unemployment Benefits

The Federal Unemployment Tax Act requires the Secretary of Labor to reject any state’s unemployment programme if it provides unemployment benefits to professional athletes who are not playing between seasons if they are expected to play the next season. See 26 USC § 3304(a)(13).

Workers Compensation

Whether and the extent to which a professional athlete is entitled to workers’ compensation for injuries sustained while working varies from state to state.

Worker Adjustment Retraining Notification Act of 1988 (WARN Act).

The WARN Act and its state analogues require employer sports organisations to provide employees, their representatives, and certain governmental officials with advance notice of closings and layoffs affecting a threshold number of employees. Under federal law, and in many states, employers including sports organisations are not required to provide WARN notices for lockouts during labour disputes.

7.3 Free Movement of Athletes

The IRCA

The Immigration Reform and Control Act (IRCA) prohibits employers from discriminating on the

basis of an individual’s real or perceived citizenship or national origin. These IRCA protections do not apply to employers with three or fewer employees, to claims already under consideration with the Equal Employment Opportunity Commission under Title VII, or to situations where citizenship status is required by law or by government contract. The IRCA protects citizens and aliens actively pursuing citizenship and prohibits employers from enacting blanket hiring policies restricting employment to US citizens. The IRCA preserves employers’ rights to prefer citizens over equally qualified aliens.

Immigration and Visas

The Immigration and Nationality Act (INA) governs immigration laws as they pertain to professional athletes. There are both immigrant and non-immigrant options for foreign athletes seeking entry to the United States. Some of these are discussed below.

EB-1 – employment-based first preference immigration

A professional athlete who can demonstrate, by extensive documentation, extraordinary ability in athletics through sustained national or international acclaim may apply for an EB-1 Visa. While an employment offer is not required, the athlete must provide evidence showing they seek entry to the USA to continue to work in their field of expertise.

B-1 – temporary business visitor

An athlete visiting for a professional or commercial purpose may apply for a B-1 Visa. This visa generally limits the visitor to a six-month period and prohibits the visitor from engaging in productive labour and employment while in the USA. Types of foreign national athletes that can enter the United States using a B-1 Visa include individual professional athletes who will receive

no salary, other than prize money, and athletes of foreign-based teams that belong to international leagues or competitions whose salaries are principally earned in the foreign country.

O-1A – individuals with extraordinary ability or achievement

An athlete who possesses extraordinary ability and has been recognised nationally or internationally for those achievements may be eligible for an O-1A non-immigrant visa. The initial period of stay granted under an O-1A visa is three years.

P-1A – athlete

A foreign athlete seeking temporary entry to the USA for the sole purpose of competing at a specific athletic event may seek entry under the P-1A Visa. To qualify, the individual must be an individual or part of a team at an internationally recognised level of performance or a professional athlete. The INA defines a professional athlete as one employed by a team that belongs to an association of six or more teams whose total combined revenues exceed USD10 million per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage, or any minor league affiliated with such an association.

Impact of COVID-19

Non-citizens who are non-immigrants travelling to the USA by air are currently required to establish proof of full vaccination with a Centres for Disease Control and Prevention-approved vaccine, with some limited exceptions. This requirement was contained in a Presidential Proclamation on 25 October 2021, and took effect on 8 November 2021.

8. Esports

8.1 Overview

Esports again earned over USD1 billion in revenue 2022 and generally continues to grow by all metrics. However, the industry generally grew at a slower pace after a pandemic-induced spike amid growing concerns from investors and team owners with regards to the industry's bottom-line profitability.

Due to the esports industry's growth in the last decade, mainstream sports luminaries such as Stan Kroenke of the Los Angeles Rams and Robert Kraft of the New England Patriots bought or invested in e-sports teams. However, the sport's lack of bottom-line profitability and return on capital has frustrated many traditional sports owners who invested in esports. For example, North American leagues such as Riot and Activision Blizzard are operating at a loss or just beginning to turn a profit and broadcasting deals with Twitch and YouTube have turned out to be less lucrative than many expected. Additionally, many of the mechanisms that traditional sports rely on to make money, such as fan bases built around a team located in a particular city or deals with television networks, are not consistently applicable in esports. Furthermore, the interests of investors and video game publishers are not always aligned. Video game publishers are not necessarily averse to operating an esports league that loses money as long as it drives interest in the video game. Despite some of these impediments to bottom line profitability, investors in the space still have confidence that esports will eventually become a very profitable industry.

One way in which esports teams are trying to drive bottom line profitability is through microtransactions. Microtransactions are small, usu-

ally digital purchases made within the game. Riot Games brought in an estimated USD40 million in microtransactions when it hosted one e-sport event in 2022. Microtransactions have also become increasingly popular in e-sports betting. E-sports betting continued to expand with West Virginia passing a bill in March 2022 that now permits betting operators to accept wagers on esports events. Additionally, e-sports betting platform Rivalry recorded its first ever profitable month.

2022 was a busy year for M&A. Microsoft acquired Activision Blizzard for USD68.7 billion; if it closes, this would be the biggest gaming acquisition of all time. The transaction is still subject to customary closing conditions and is in the process of seeking regulatory approval. Furthermore, Sony acquired Bungie for USD3.6 billion and Take-Two Interactive officially completed its USD12.7 billion acquisition of social game developer Zynga.

9. Women's Sport

9.1 Overview

The continuing evolution of the sports business and media landscape has created new opportunities for women athletes as well as for women's sports generally.

Investment in women's sports properties continues to grow. In 2022, the Women's National Basketball Association (WNBA), a high-profile professional women's athletic league, completed one of the largest ever capital raises for a women's sports property. The league has focused on modernising its distribution and merchandising strategies and securing new partnerships to continue to grow the sport. In addition, Nike, a current marketing partner of the WNBA,

acquired an equity stake as part of the fundraising, reflecting the new emphasis placed on women's sports.

The ongoing competition for sports programming has also created new opportunities for women's sports content. The Women's Sports Network, which debuted in 2022 as an ad supported streaming service, provides continuous coverage of female athletes on and off the field along with original programming, competitions and studio shows modelled after ESPN's SportsCenter. Several women's sports organisations, including the WNBA and LPGA, have partnered with the network and agreed to provide content.

Despite these new opportunities and developments, several challenges still remain for women in sports. The participation of transgender women in women's sports has driven conversation regarding maintaining competitive balance while respecting and recognising transgender rights. Funding discrepancies and disparate treatment at colleges and universities continue to be a source of controversy. Professionally, the salary gap between male and female athletes continues to grow. These differences were exemplified in the recent CBA negotiations for the men's and women's US national soccer teams, where players for the men's team have historically earned substantially more bonus income than their counterparts on the women's team. The recent settlement agreement to establish equal pay for the men's and women's national teams in the new CBAs is an important step towards equality.

10. Non-fungible Tokens (NFTs)

10.1 Overview

Non-fungible tokens (NFTs) are unique digital assets that use blockchain technology to record

ownership. Each NFT has a unique identifier that is recorded on a blockchain database, which acts as a public ledger to verify ownership and transfers. NFTs can reflect a variety of tangible and intangible objects, such as images, videos, songs and art. NFTs are distinguished from other digital assets that use blockchain technology, such as cryptocurrencies, by the “non-fungible” nature of NFTs. Each NFT represents a specific and unique item and is not valued on a one-for-one basis.

In sports, NFTs have been created for the ownership of video clips, highlights, images of iconic moments and player trading cards. One of the earliest and most significant NFT ventures in sports is the NBA’s Top Shot product. Top Shot is an NFT marketplace for digitised NBA-related content. The NBA licenses highlights and images to a third party which digitises the footage and creates NFTs, each with its own blockchain authenticity. Fans can then buy and sell the NFTs, and sales and transfers are recorded on a blockchain ledger for verification. The NFL’s NFL All-Day product and the Ultimate Fighting Championship’s UFC Strike product are additional examples of sports leagues creating officially licensed NFTs to be sold on similar marketplaces. Additional sports leagues will likely follow with similar products.

NFTs also provide teams and leagues with additional revenue sources and opportunities to enhance relationships with fans, and allow for real-world applications beyond investment. For example, holders of NFTs may be granted special in-person experiences or discounts on merchandise. In another example, a European soccer league has established an NFT market for fantasy sports, enabling fans to create fantasy line-ups using NFTs they own. Holders of NFTs have also been able to weigh in on governance

and other team decisions such as winners of player awards.

NFTs also provide individual athletes with ways to reach a broad consumer base with their own licensed NFTs, such as athlete designed artwork or images. Players have also paired the sale of their own NFTs with the opportunity to meet them in person and attend games. The ability of athletes to continue marketing their own individual NFTs may become a point of further discussion with leagues and teams going forward.

The NFT market poses risks for both investors and creators. Little regulation currently exists, and it remains to be seen how regulatory authorities will look to assert control over the market. Furthermore, investing in NFTs is speculative in nature with limited historical information to make informed decisions. Trading volume and valuations, based heavily on demand and scarcity, can and have fluctuated widely, even on established NFT marketplaces such as Top Shot. The ability of others to create new NFTs also poses a risk for value retention. Finally, most NFT purchases are made with cryptocurrency, which imposes risks of its own including price volatility, security risk and high transaction fees. The developing security and valuation issues in the broader cryptocurrency market may also cause teams, leagues and other players to reassess their use of NFT, given crypto’s status as a common currency for NFT purchases and the overlapping use of blockchain technology in both crypto and NFTs.

11. Regional Issues

11.1 Overview

There are no relevant issues in US sports law not already covered in this chapter.

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