

SPORTS LITIGATION ALERT

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Case Summaries

High School Concussion Case Filed Decades Too Late

By Jeff Birren, Senior Writer

Sports-related concussion cases have received a lot of publicity and this in turn continues to generate more cases. One such case was filed in the United

States Federal Court in Florida. Plaintiff Maurice Jackson claimed that while playing high school football, he suffered severe blows to his head that caused “disorientation, a ringing sensation, hearing loss, nausea, and vomiting.” Despite these asserted symptoms, Jackson was allegedly encouraged to continue to play, and, as a result, he has long term brain damage and other

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symptoms consistent with CTE. However, Jackson also alleged that this happened in 1990 and 1991, and that his contemporaneous symptoms were “clear” at the time of the injuries. Jackson finally sued in 2020. The District Court dismissed the case as untimely. Recently, the Eleventh Circuit affirmed in an unpublished opinion (*Jackson v. Scott*, Case No. 21-11572, Non-Argument Calendar (“*Jackson*”) (1-4-22)).

Facts

Jackson “played high school football at several Broward County, Florida high schools” (Id. at 4). His Complaint alleged that in games and practice he was required “to absorb consistent, sudden, and violent blows to his head.” This caused the symptoms described above, and ultimately “long term brain damage.” The intervening years were not always kind to Jackson, and “he is currently a prisoner of the state of Florida where he has been continuously incarcerated for the last 16 years.” Recently he “became aware of chronic traumatic encephalopathy and its association with football after reading several news articles and watching television programs on the topic.”

Jackson filed his Complaint on December 23, 2020 (*Jackson v. Scott et al*, S.D. Fla., Case No. 0:20-cv-62656-WPD, (“*Jackson v. Scott*”), (12-23-20)). The defendants were “Ken Scott, his high school head coach during his junior and senior years,” the Broward County School Board, “the Florida High School Athletic Association, and several other known and unknown individuals affiliated with the school board and FHSAA.” He claimed: “the defendants violated his due

process right to bodily integrity and showed deliberate indifference to his medical needs” (*Jackson*, at 4).

In the District Court, Briefly

Jackson filed *in forma pauperis* and made a motion to proceed that way (*Jackson v. Scott*, Doc. No. 3). The Court granted that motion (Id., Doc. #7). He also made a motion for the court to appoint counsel (Id., Doc. #4), but that was denied (Id., Doc. #8). The Court then “screened his complaint under 28 U.S.C. §1915(e)(2).” That section requires the District Court “to dismiss the case at any time if the court determines that” it “fails to state a claim on which relief may be granted.”

The District Court determined “that because Jackson sued under Section 1983, his claims were subject to a four-year statute of limitations borrowed from Florida tort law.” It held that the claims “accrued in 1991, the date of the latest incident forming the basis of his complaint.” The Court “concluded that the statute of limitations began to run at that time, that it had clearly expired, and that Jackson had therefore failed to state a claim upon which relief could be granted” (*Jackson*, at 4). The District Court dismissed the case on March 10, 2021 (*Jackson v. Scott*, Doc. #9), before the defendants made an appearance in the case. Jackson filed a motion to alter or amend the judgment (Id., Doc. #10, (4-5-21)), that was denied (Id., Doc. #11 (4-20-21)). Jackson promptly filed his Notice of Appeal (Id., Doc. #12, (5-5-21)).

In The Eleventh Circuit

Jackson proceeded “*pro se*” (*Jackson*, at 4). He appealed both the dismissal of his Complaint and the denial of his motion to alter or amend the judgment (*Jackson*, at 5). The Circuit first took up the dismissal of the Complaint. Jackson argued that his claims were timely because CTE “is a ‘degenerative disease’ that ‘may not manifest to any medically detectable degree for many years.’ We disagree.”

The appellate court reviews a “dismissal *de novo* and takes all allegations in the complaint as true.” However, the District Court may dismiss the complaint “if it is apparent from the face of the complaint that the applicable statute of limitations bars the claim.” Such a dismissal is reviewed *de novo*. The statute of limitations for “Section 1983 claims is borrowed from the forum state’s residual personal injury statute of limitations, which in Florida is four years.” The statute begins to run “when ‘the facts

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which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights This requires only that the plaintiff know or should know (1) that he has suffered an injury that forms the basis of his action and (2) who has inflicted the injury” (Id.).

The Court held that the District Court “did not err in dismissing Jackson’s Section 1983 claims as untimely.” “According to his own allegations, symptoms from the injuries forming the basis of his action were ‘clear’ when the injuries occurred.” Moreover, the injuries “were so obvious that a television reporter approached the sideline during the 1991 game concerned about Jackson’s ‘apparent and visibly injured condition.’” Jackson’s argument that “his coaches showed deliberate indifference is premised on the allegation” that the injuries were “obvious” and “significant.” He also “knew the identities of the individuals that allegedly inflicted his injuries by urging him to continue playing in the game.” Thus, the facts “that he now relies on to support his Section 1983 action were apparent to him in 1991” and that is “when his cause of action accrued and when the statute of limitations began to run.” Approximately “twenty-nine years passed between the time his cause of action accrued and when Jackson filed his complaint” (Id. at 6). The claims were therefore untimely, and the Circuit affirmed the dismissal.

Motion to Alter or Amend the Judgment

The denial of the *Federal Rules of Civil Procedure 59(e)* motion is reviewed for abuse of discretion, and it will be affirmed unless the District Court “has made a clear error of judgment or applied the wrong legal standard.” The motion “may only be granted on the grounds of newly discovered evidence or manifest errors of law or fact.” It “may not be used to relitigate old matters or to raise arguments that could have been raised prior to the judgment.”

The Circuit held that the District Court “did not abuse its discretion” in denying the motion. Jackson failed to show that the court below “made a clear error of judgment or applied the wrong standard in dismissing his Section 1983 claims as untimely.” He may have recently “learned of additional long-term consequences of his football injuries” but he had alleged “that his injuries were apparent to him and others in 1991.” Finally, because the District Court “dismissed all of the

Section 1983 claims over which it had jurisdiction, it did not err by declining to exercise supplemental jurisdiction over any remaining state constitutional claims.”

Conclusion

Jackson can file a motion for certiorari in the Supreme Court, where the odds will be daunting. He can also contemplate trying to file his “state constitutional claims” in the appropriate state court. Athletes have endured concussions since sports began but it is only in recent decades that the severity of the problems have come into focus. Nevertheless, many athletes knew at the time that they had concussion-related injuries, and *Jackson* holds that is when the statute of limitations begins. For those wishing to file such decades-old claims, *Jackson* should be considered when writing the complaint, and counsel will have to contend with its reasoning when opposing a motion to dismiss or summary judgment. Time and tide wait for no one, and so it can be with the statute of limitations.

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Title IX Sex Discrimination & Negligence Lawsuit Against Fargo Public School District & the Board of Education Partially Dismissed

By Emily J. Houghton, PhD

Brian and Jennifer Berg filed a lawsuit as individuals and on behalf of their daughter Regan against the Fargo Public School District (FPSD) and the Board of Education in the City of Fargo in 2021. They argued that Regan faced sex discrimination, deliberate indifference under Title IX, the FPSD Handbook and negligence from FPSD following an alleged sexual assault by a male student off-campus.

Background

The Bergs allege Regan, a high school gymnast, faced sex discrimination from FPSD. Regan was suspended for six weeks (because alcohol was present at the house) after reporting the incident to FPSD. In comparison, John Doe 1 (the alleged assailant) was not initially suspended. In addition, the Bergs argued that FPSD failed to investigate the case in a timely manner and failed to respond to their inquiries about the school district's investigation into the incident (Baumgarten, 2021). The Bergs filed the initial complaint on April 16, 2021.

On April 27, 2021, the Bergs filed an amended complaint in federal district court against Fargo Public School District and the Board of Education in the City of Fargo bringing claims on behalf of the parents and Regan, for: 1) sex discrimination and deliberate indifference in violation of Title IX 20 U.S.C. §1681 against all defendants; 2) sex discrimination in violation of the FPSD policies; and 3) a North Dakota State law negligence claim.

Facts

On October 19, 2019, Regan, and another female student athlete (Jane Doe) on the gymnastics team at Davies High School were at the Berg's house with two male students (John Doe 1 and John Doe 2). John Doe 1 was also a student at Davies High School, John Doe 2 went to a different high school. The next morning Regan told her parents that she was sexually assaulted by John Doe 1 and John Doe 2, and that Jane Doe was

sexually assaulted by John Doe 1 (*Berg v. Fargo Public School District and Board of Ed, 2021, *33*). The Bergs reported the incident to the Fargo Police Department on October 20, 2019, and on October 21, 2019, the Bergs met with the Davies High School principal, a resource officer, and a counselor to discuss what occurred. They discussed creating a safety plan and providing a "safe room" at the high school for Regan and Jane Doe to use whenever they needed (*34).

During that meeting, the school representatives informed the Bergs that they were suspending Regan and Jane Doe for six weeks because they violated school policy related to underage minors and alcohol. During the same time Regan and Jane Doe were suspended, John Doe 1 and John Doe 2 were allegedly allowed to participate in extra-curricular activities at their respective high schools (*44). When the Berg's found that out, Jennifer contacted Todd Olson the Director of Activities and Programs for the School District in November 2019. By December 2019, the Davies High School basketball team had removed John Doe 1 and he was no longer playing basketball.

Between December and February 2020, the Bergs notified Davies High School that they had filed a protective order for Regan. The order prohibited John Doe 1 and John Doe 2 from contacting her and coming within 300 yards of her, except if they had the same class. By February 2020, FPSD informed Jennifer Berg that John Doe 1 did not attend Davies High School anymore. As a result of the alleged assault and issues described above, Regan suffered depression, and attempted suicide in April 2020 (*72).

Count 1: Sex discrimination and deliberate indifference in violation of Title IX 20 U.S.C. §1681

The plaintiffs allege that Regan was discriminated against because the school engaged in deliberate indifference through the following inactions: FPSD failed to investigate the case, failed to respond to inquiries about the investigation from her parents, and failed to eliminate a hostile environment in the school (*76). In addition, the plaintiffs allege that the school failed to follow "good faith" stipulations in Title IX that protect the survivor of the assault when FPSD suspended Regan from the gymnastics team after she reported the incident (*80). The defendant's response to the claim

of sex discrimination and deliberate indifference filed by Jennifer and Brian Berg was that the parents lacked statutory standing. The court used a “*zone of interests*” analysis to determine if the plaintiff falls under the category of individuals the law was designed to protect. The plaintiffs relied on *Dipippa v. Union Sch. District*, a case where parents filed a Title IX lawsuit as individuals and on behalf of the child who was a minor, to argue that they have standing and therefore should be reimbursed for damages stemming from deliberate indifference of the defendants. The court argued that unlike *Dipippa*, Regan is not a minor, Regan is an adult (*Berg v. FPSD, 2021*). Instead, the court utilized *Burrow v. Postville Community School District* in which the parents of an adult student filed a Title IX lawsuit on her behalf. Similar to the plaintiffs in *Burrow*, Jennifer and Brian Berg were not “excluded from or denied benefits of Title IX” because they were not students at Davies High School. The court concluded that Jennifer and Brian Berg lacked statutory standing and “failed to state a claim” because Regan was an adult, and they were not students at Davies High School. This claim filed by Jennifer and Brian Berg was dismissed with prejudice. However, Regan’s claim on count I, remains active, in that the defendants acted with deliberate indifference and discriminated against her.

Count II: Sex discrimination in violation of the School District’s policies

In count II, the plaintiffs restate the claims of deliberate indifference and sex discrimination from count I and argue that the FPSD did not follow the formal resolution policies described in the Davies High School Handbook. The school district argued that the sex discrimination claim is not independent of count I and that it should be part of the Title IX discrimination claim (count I) under Federal Rule of Civil Procedure 12(b)(6). The court stated that the Bergs did not cite any specific law or statute that the sex discrimination claim (count II) would violate. Instead, the court continued to state that count II only provided further detail and support to count I, Title IX sex discrimination and deliberate indifference violation. The court pointed to the statement from the plaintiffs that count II “does not stand alone” as evidence of sex discrimination. Since count II was not an independent claim, the court

dismissed it without prejudice for both Regan and her parents.

Count III: North Dakota State law negligence claim

The plaintiffs argue that the FPSD and the Board of Education owed them a duty of care under North Dakota state law. The plaintiffs state that the lack of investigation by FPSD, the school’s failure to report the case to the Title IX Coordinator, and failure to enforce the protection order against John Doe 1 & John Doe 2 was a breach to their duty of care (*89). This breach caused Regan further emotional harm and ultimately led to a suicide attempt (*90). The defendants moved to dismiss the claim pursuant to Federal Rule of Civil Procedure 12(b)(6). This statute allows the claim to be dismissed if the plaintiff “fails to state a claim on which relief could be granted.” Jennifer and Brian Berg pointed to policies within the Davies High School Handbook to establish a duty of care to the parents in this situation (*24). The court argued, however that the complaint did not show enough or any specific information from the handbook that the defendants owed a duty of care to Jennifer or Brian Berg. The court went on to state that while the Davies High School Handbook may establish a duty to notify parents when policies, procedures or actions may impact their child, it does not establish a duty of care beyond that to the parents. The court then dismissed with prejudice, the North Dakota state law negligence claim under Federal Rule of Civil Procedure 12(b)(6) filed by Jennifer and Brian Berg. While the court dismissed the parent’s claims for count III, Regan still has an active claim that the defendants acted negligently and breached their duty of care towards her.

In sum, the court dismissed counts I (deliberate indifference and sex discrimination in violation of Title IX) and III (negligence under North Dakota state law) of the parents. The court dismissed count II (sex discrimination in violation of the FPSD Handbook) for all three plaintiffs. Regan’s claims to counts I and III remain ongoing.

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Ruling Highlights Difficulty Student-Athletes Have when It Comes to Cashing in on a Promise of a College or University

By Loren Galloway, Assistant Coordinator at the University of Texas

Student-athletes and student managers at the University of Hartford sued their school over its decision to transition from NCAA Division I to Division III, alleging various claims of fraud, misrepresentation, and breach of contract as well as seeking an injunction to prevent Hartford from moving to Division III.

According to the plaintiffs, Hartford's president, Gregory Woodward, began looking at ways to change the university's athletics programs even before taking the helm in July 2017, allegedly sending an email to the school's men's basketball head coach in May 2017 in which Woodward criticized the performance of Hartford's athletics programs and stated his intention to "rethink" the operations of the athletics department. In 2019, Woodward launched a task force charged with examining the practicality of Hartford remaining in Division I and the American East Conference, both of which the university had been a member since the mid-1980s. The group was specifically asked to look at a way to reduce Hartford's costs. Although the task force's final report was never publicly released, Woodward told Hartford's faculty senate in April 2020 that transitioning to Division III would likely not lead to cost reductions.

Hartford also hired an outside consulting firm to review the athletics programs and make recommendations on how the university could continue to sponsor its 17 sport programs, while reducing funding for the athletics department. In a study submitted to Woodward in February 2021, the firm concluded that it was not "realistic" or "sustainable" for Hartford to remain in Division I and recommended that the university consider transitioning to Division III. The plaintiffs, however, allege that the study was flawed because it did not factor in the costs of transitioning to Division III and overestimated the costs of remaining in Division I. The plaintiffs also allege that Woodward knew the study had errors, but still recommended that Hartford's Board of Regents vote to move to Division III. In May

2021, the Board voted to move from Division I to Division III, after which the AEC voted to expel Hartford from the conference after the 2021-22 academic year.

The Board's vote means that Hartford will apply for Division III membership. The Division III Membership Committee is required to approve applicants who meet Division III's requirements for provisional applicants, which Hartford does. The Board's vote, therefore, effectively ensured that Hartford would become a reclassifying member of Division III in the academic year following its application. After three years as a reclassifying member, Hartford would become eligible for active Division III membership.

However, the effects of the transition to Division III start as soon as a school becomes a reclassifying member. In the first year of the three-year reclassification period, Hartford would no longer be allowed to award athletics scholarships to incoming student-athletes. In the second year, Hartford would not be allowed to compete in NCAA championships, and in the third year, Hartford would no longer be allowed to provide athletics scholarships to any student-athletes, except for student-athletes who had previously received athletics aid and were no longer participating in athletics.

The defendants moved to dismiss the case, arguing that the plaintiffs lacked Article III standing and had failed to state a claim. On the former, the judge disagreed. Article III standing, put simply, requires that the plaintiff have some sort of personal stake in the outcome of the case. A plaintiff can establish Article III standing by showing that he or she has suffered an injury in fact, that the defendant caused the injury, and that a ruling in the plaintiff's favor would redress the injury. The defendants argued that the plaintiffs had not been harmed by Hartford's decision to transition to Division III, specifically because, by the time Hartford became an active Division III member in 2025, all plaintiffs would have had the opportunity to play on or manage a Division I team for four years. However, the judge noted that the plaintiff's ability to compete in AEC and NCAA championships and to receive athletics scholarships would be impacted prior to 2025. Because those impacts would be caused by the university's decision to transition to Division III, and because an injunction preventing the transition would redress the injury, the court found that the plaintiffs had established Article III standing.

On the issue of failure to state a claim, however, the plaintiffs found less success. When reviewing a motion to dismiss for failure to state a claim, the court considers whether the plaintiff's allegations, if assumed to be true, would give rise to a legal claim. The plaintiffs' first claim was fraud, which requires the plaintiff to show that the defendant knowingly made an untrue statement of fact in order to induce the plaintiff to act and that the plaintiff suffered harm by relying upon the untrue statement. The Federal Rules of Civil Procedure additionally require that the plaintiff specifically identify the fraudulent statements, when and where those statements were made, and by whom the statements were made. The defendants argued that the plaintiffs failed to state a claim of fraud because they did not allege any false statement of facts and did not allege that the speakers knew that any statements were false.

The student-athlete plaintiffs alleged that the coaches who recruited them to Hartford had told them that it would be a four-year commitment and did not tell them that Hartford might transition to Division III. However, the court found that the plaintiffs' allegations were too general to state a claim of fraud because they did not identify the speakers or when or where the statements were made and because the statement that being a student-athlete at Hartford was a four-year commitment was not untrue—the plaintiffs did not allege that they were promised a four-year *Division I* experience, nor that Hartford would eliminate any of their sports. Additionally, the plaintiffs did not allege that the Hartford coaches knew or could have known at the time that any statement they were making was untrue, since they were not aware of Woodward's intent to persuade the Board of Regents to vote to transition to Division III.

This same reasoning led the court to dismiss all claims of negligent misrepresentation, as well, except for that brought by Malcolm Bell, a student-athlete on Hartford men's lacrosse team. Bell alleged that, during his recruitment, the coaches told him that during his four years at Hartford, he would be "held to the expectations of a Division I athlete." Viewing this allegation in the light most favorable to Bell, the court found that this statement could reasonably be construed as an assurance that Hartford would remain a Division I school. Although there was no allegation that the representation made to Bell was untrue, the court found that the allegation that the defendants should have

known the statement was untrue was sufficient to survive the motion to dismiss because Woodward had already expressed his desire to transition to Division III when Bell was being recruited. "In other words," the opinion stated, "it was arguably negligent for the University—aware of its new President's intentions—to continue to allow coaching staff to make recruiting pitches to prospective student-athletes that suggested that the University would remain in Division I." The court emphasized, however, that the ruling on Bell's negligent misrepresentation claim was "a close call."

The plaintiffs also claimed that the defendants had committed fraud by nondisclosure, which occurs when the defendant has a duty to disclose known facts and fails to do so. Such a duty can arise from a statute or regulation, a voluntary disclosure (which under common law requires the speaker to make a full and fair disclosure), or a special relationship between the parties. The court found that the plaintiffs had failed to allege any duty on the part of the defendants that would have given rise to a claim of fraud by nondisclosure. Similarly, the court found that the plaintiffs had failed to establish that there was any special relationship between the students and the university that would support a claim of constructive fraud.

The court also declined to rule that innocent misrepresentation—a tort which occurs in commercial transactions when an untrue representation is made to induce the plaintiff to purchase something but does not require knowledge on the part of the defendant that the representation is untrue—does not apply to the relationship between a student and a university because such a relationship is not considered a commercial exchange.

In addition to the fraud and misrepresentation claims, the defendants moved to dismiss the contract claims brought by the plaintiffs, the first of which alleged that the student-athletes and managers had a contract implied in fact with Hartford which required the university to remain in Division I while the plaintiffs were enrolled. A contract implied in fact arises when, through their conduct, the parties assent to a contractual agreement. However, to claim a breach of an implied in fact contract, a plaintiff must still show that the defendant failed to hold up their end of the agreement. The court found that this was not the case for all plaintiffs except Bell, using largely the same reasoning as

in the analysis of the claim of fraud and negligent misrepresentation: The other plaintiffs allege they were promised four-years in their sport but did not allege they were specifically promised those four years would be in Division I. In Bell's case, however, the statement that he would be held to the standards of a Division I athlete, which could reasonably be inferred to be a promise that Hartford would be a Division I school while Bell was there.

With Bell's negligent misrepresentation and breach of contract claims being the only ones to survive the motion to dismiss, the court then considered the plaintiff's motion for a preliminary injunction to prevent Hartford from reclassifying to Division III. A preliminary injunction may be granted when the party seeking the injunction shows irreparable harm and demonstrates either a likelihood of success on the merits or sufficiently serious questions on the merits with a balance of hardships favoring the party moving for the injunction. The court found that Bell's loss of opportunity to play lacrosse in Division I constituted irreparable harm but did not find that Bell had demonstrated a reasonable likelihood of success on the merits.

Additionally, the court found that the balance of hardships did not favor the plaintiffs. Were the injunction denied, Bell would still be free to transfer to another Division I school to play lacrosse. Were the injunction granted, however, there would be significant financial impacts on the university, and Hartford would be prevented from implementing a plan which it had determined would benefit the larger student body and institution as a whole. The court, therefore, denied the plaintiffs' motion for preliminary injunction.

This case illustrates the deference given to schools to decide how to manage their own enterprises, as well as the risks student-athletes face when relying on recruiting pitches to make decisions about where to go to college. As the ruling on the motion to dismiss shows, it can be tremendously difficult for a student-athlete to show that he or she was promised something by a college or university in a way that meets the legal thresholds for relief. This is not only because a student-athlete is usually still a teenager (and therefore probably *not* a sophisticated contract negotiator) when engaging in these recruiting conversations but also because the bureaucratic structures of college and universities make it unlikely that a coach will know for sure what decisions

the governing actors will make during the course of the student-athlete's college career that might impact the coach's ability to deliver on the promises made during recruitment. The takeaway for college and university administrators here might be that those bureaucratic structures are working inasmuch as they seem to limit this sort of liability.

And the takeaway for prospective student-athletes? Always get it in writing.

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Apple Wins Big with Dismissal of Loot Box Case

By Meredith Murray, GW Law 2L

(The following appeared in [Esports and the Law](#), a newsletter produced by Hackney Publications.)

In early January, Judge Richard Seeborg of the U.S. District Court for the Northern District of California granted Apple, Inc.'s Second Motion to Dismiss a class action suit in which the plaintiff argued that the tech company "relie[d] on creating addictive behaviors in kids to generate huge profits" through the in-app purchase of loot boxes.

Rebecca Taylor and her son, C.T., brought the suit against Apple, saying that the child had spent \$25 on "loot boxes" in an app called Brawl Stars. Taylor claimed that, as a minor, her son was especially susceptible to the addictive nature of loot boxes which give users a chance at winning valuable digital weapons, costumes, or other items. Likening loot boxes to "Big Tobacco's 'Joe Camel' campaign," Taylor's Complaint argued that loot boxes and the lure of winning rare items creates addicting behaviors in kids that reaps huge profits for Apple.

Loot boxes have been under increasing scrutiny in recent years. The in-app mechanic allows users to purchase chances to win rare digital items with real money. Critics of loot boxes liken the system to gambling, since purchases do not guarantee the user will receive certain things; rather users have simply purchased a chance to win items, much like a slot machine.

The Complaint presented evidence from psychologists who have found there is a connection between "problem gambling and loot box buying among...

adolescents and adults.” Buying loot boxes and waiting to discover the reward inside has been shown to activate the user’s chemical reward system thus creating an excitement that some consider addicting.

Judge Seeborg dismissed the proposed class action suit, writing that Taylor failed to show that she and her son suffered any economic injury from Apple’s conduct. In his Opinion, Judge Seeborg reasoned that users are not buying loot boxes directly, but are rather purchasing virtual money that can be used to buy a myriad of things within apps.

“All C.T. purchased from Apple was virtual currency. He obtained exactly what he paid for — virtual currency that he was free to use as he wished in the game,” he said. “C.T. had the opportunity to use it to purchase virtual items within the game other than loot boxes.”

The judge also rejected Taylor’s assertion that loot boxes operate essentially as slot machines and therefore violate California’s Unfair Competition Law that regulates gambling devices. The Complaint said that Apple violated the Unfair Competition Law by “conducting illegal and unlicensed gambling business... knowingly accepting payments from those who participated in Defendant’s unlawful Internet gambling, and promoting predatory gambling as entertainment for children and families.”

Judge Seeborg wrote that the UCL does not clearly prohibit loot boxes and that the plaintiff’s argument does not successfully stretch the law to encompass Apple’s alleged conduct. Additionally, he wrote that if loot boxes really are so harmful and addicting, the public’s interest would best be served by legislative remedies.

The dismissal of this case is a significant win for Apple, as the company could have found itself liable to potentially millions of app users. But this does not mean loot boxes are free from all other litigation. Currently Google is working to have a similar case dismissed in the Northern District of California. There, Judge Beth Labson Freeman has indicated that the suit against Google may similarly fizzle out. Judge Freeman does not see any connection between Google and the loot boxes themselves, since the company sells the virtual tokens to users that can be used in many ways. So far, no case involving loot boxes has been found in favor of the plaintiffs.

Research for the article was provided by Justin Ward.

Previous articles on loot boxes can be found in the ESL spring and summer 2021 issues.

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Federal District Judge Sweeps ‘Broomstick Hazing Case’ Under the Rug by Granting School District’s Motion to Dismiss

By Robert J. Romano, JD, LL.M., St. John’s University, Senior Writer

On August 23, 2021, the parents of two former Plainfield Central High School (Illinois) freshman football players filed a ten-count civil lawsuit against their school district and three of its football coaches in the U.S. District Court, Northern District of Illinois after they were involved in a hazing episode that included a sexual assault.

As per the complaint, the plaintiffs allege that the defendants, Plainfield Community Consolidated School District 202, and coaches Michael Moderhack, Jon Pereiro and Vincent Vasquez, acted willfully and wantonly in depriving them their constitutionally protected substantive due process rights as guaranteed under 42 U.S.C. § 1983, by knowingly and deliberately allowing these so-called ‘hazing traditions’ to be perpetuated on them as freshman football team members.

The two minor-age plaintiffs, through their individual parents, allege that Plainfield Central High School has had longstanding issues concerning hazing and bullying of a sexual nature regarding its football team. Specifically, a rite of passage known throughout the school’s community as ‘Code Blue’ has allegedly been part of the football team’s culture since around 2014 and requires that all freshman submit to various forms of harassment and assaults “varying in nature from forcing a freshmen to the ground and pushing a broom stick between and through their buttocks resulting in penetration and forcing freshmen to strip and allow themselves to be covered in soap and beaten up in the locker room shower with the water running”.

In addition, it is the plaintiffs’ contention that the coaching staff, defendants Moderhack, Pereiro, and

Vasquez, knew that the seniors would subject the incoming freshmen to these hazing rituals but intentionally looked the other way because the acts were considered a ‘team bonding’ exercise wherein the new members would feel as if they were part of the team.

On October 14, 2021, the defendants, in accordance with Federal Rule of Civil Procedure 12(b)(6), moved to dismiss the plaintiffs’ complaint in its entirety. The School District’s and coaches’ various arguments for dismissal were that a) the plaintiffs failed to sufficiently allege that the coaches’ indifference to the hazing rose to the level of willful and wanton misconduct, b) the Illinois Tort Immunity Act allows the School District the benefit of immunity and the coaches the benefit of qualified immunity for any alleged constitutional claims, c) the one-year statute of limitations bars the lawsuit, and d) the plaintiffs failed to allege facts that plausibly state a claim for a violation of their substantive or procedural due process rights.

Three months after its filing, on January 19, 2022, Federal District Court Judge Charles P. Kocoras, granted the motion to dismiss, finding the plaintiffs failed to demonstrate how the alleged harm and was caused by the school district. Judge Kocoras indicated that the Court is bound to case precedent and identified several matters wherein a school’s failure to keep students safe from bullying, harassing, and assaulting each other is not a “state-created danger.” Noting, that its only in instances where a school employee actually participates in or actively encourages the assaults that a school district would be held accountable.

The District Court based its decision on the fact that although the Due Process Clause of the Fourteenth Amendment “is a restraint upon governmental action . . . it does not impose a duty on the state to protect against injuries inflicted by private actors.” Continuing, the Court when on to state that the purpose of the

Due Process Clause is “to protect the people from the State, not to ensure that the State protect[s] them from each other.” In other words, the state does not have a duty to protect against acts which are considered of ‘private violence’.

The District Court did mention the ‘DeShaney Exception’ that applies when the state creates the danger, but noted that under this exception, “a plaintiff must show that the state affirmatively placed him in a position of danger and that the state’s failure to protect him from that danger was the proximate cause of his injury.” The Court went on to note that “Only the most egregious official conduct will satisfy this stringent inquiry,” and that “Making a bad decision, or even acting negligently, does not suffice to establish egregious behavior shocking enough to result in a constitutional violation.

Interestingly, Judge Kocoras did recognize “that the line between action and inaction (by a school district and coaches) is not always easily drawn.” He continued, stating that in this matter, “the plaintiffs’ complaint focuses on the defendant coaches’ inaction (i.e., failed to observe and monitor the Doe children and the locker room; failed to follow District policies), and that failing to prevent the harm is simply not the same as creating or increasing the risk of harm, which is a fundamental requirement for this type of substantive due process claim.”

In reality, what Judge Kocoras is saying is that when it comes to minor children knowingly being assaulted in a sexual nature with a broomstick, it is easier to find that any indifference or inaction should be “swept under the rug,” than it is to hold those who consciously stood by and did nothing accountable.

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Articles

Baylor University ‘Heading’ to Federal Court After Former Female Soccer Player Suffers Multiple Traumatic Brain Injuries

By Gina McKlveen

Former Baylor University women’s soccer star Eva Mitchell filed a complaint last month in the U.S. District Court for the Western District of Texas claiming that Baylor knew Mitchell sustained multiple concussions and failed to protect her from “repetitive, aggressive, and unnecessary heading drills.”

The “drills” were conducted during practice by then head coach Paul Jobson using overinflated soccer balls that were fired from a high velocity machine, which caused her severe and continuous neurological damage, according to the complaint.

Jobson has since resigned from his coaching position at the University. Meanwhile, Mitchell’s complaint states that she requires full-time assistance from her family to accomplish even the most basic living activities.

The complaint, filed by Mitchell’s attorneys Robert Stem and Jason Luckasevic, demands a jury trial to determine compensatory, consequential, and punitive damages including recovery for Mitchell’s past and future physical pain and suffering, mental anguish, medical expenses, loss of earning capacity, and physical impairment. The complaint describes her injuries as “persistent and debilitating dizziness with diagnoses of post-concussion syndrome, persistent postural-perceptual dizziness, central vestibular disorder, dysautonomia, depression and anxiety” and further alleges the uncertainty of whether Mitchell will ever fully recover from these injuries, thus diminishing her once promising soccer-playing prospects. However, whether Mitchell will receive a favorable verdict in her case against the Big 12 university is also uncertain given recent outcomes against NCAA athletes, like football player Matthew Onyshko, for similar concussion and other brain-related injuries in federal court jury trials.

In response to Mitchell’s allegations of vicarious liability and negligence, Baylor will be positioned defensively, disclaiming any of Mitchell’s assertions that its “reckless, intentional, wanton, and depraved acts and omissions” led to her injuries. Therefore, expect Baylor to double-down on its strict adherence to concussion injury protocol and emphasize its commitment to the health and safety of all its student-athletes.

Although Mitchell’s collegiate soccer career did not begin at Baylor, her injuries there have brought her playing days to a swift end. Mitchell spent her freshman season at the University of Kentucky where she was one of just three players to earn a starting position in every game while leading her team as a top scorer. Her standout skills caught the attention of Baylor University. She was recruited based on her exceptional soccer talent and awarded an athletic scholarship, which she accepted. From the Spring semester of 2019 through the Fall Season of 2020, Mitchell played as a Midfielder/Forward for the Baylor University Women’s Soccer Team.

Within Mitchell’s time at Baylor, two specific instances alleged in the complaint were the actual and proximate cause of her on-going head injuries.

The first instance occurred at a practice in February 2019 where Mitchell and her teammates were forced to participate in heading drills conducted by Jobson and his coaching staff. The complaint also alleges that Baylor was the “only women’s soccer program in the country” using this drill. Baylor coaches repeatedly punted “overinflated balls the width of the field required the girls to advance the ball as far as possible using their heads.” Upon impact, Mitchell’s complaint states that she “felt like her brain was smashed after she took the first header during this drill,” but she was nevertheless required to continue the drill for another seven to eight turns.

Following this practice, Mitchell and most of her teammates visited the team’s athletic trainer, Kristin Bartiss, expressing symptoms and signs of a concussion. Mitchell was then diagnosed with her first concussion related to the header drills. Further investigation by Mitchell’s father revealed that her concussion was likely caused by the soccer player’s “weak neck”

and by Jobson “using overinflated balls shot too hard out of a ball launching machine which were hardened even further by the cold weather” of that February practice.

At this point, Mitchell’s complaint claims Baylor was “on notice Coach Jobson’s aggressive coaching and was aware of his heading drills increasing the risk of harm and injury to players, and in fact causing concussions to Ms. Mitchell and symptoms to some of the other women players on the team.”

Yet, a second instance took place in August 2020 during a three-day practice period several months after Mitchell had recovered from her first concussion. Once again, Jobson and his staff forced Mitchell and her teammates to participate in repetitive and aggressive header drills using the same tactics as before with overinflated balls, shot from a long distance using a machine exerting extreme velocity and force. Mitchell’s complaint states that she “felt threatened to participate [since] she had been removed from a game [...] after she failed to “head” a line drive shot during a game.” Mitchell was also concerned about losing her scholarship and her starting position if she refused to participate. As a result, Mitchell sustained a second—more severe—concussion that has taken her permanently off the field and is taking Baylor to court. Ultimately, a Texas jury may decide whether Baylor’s coaching staff took the phrase “Get your head in the game” a step too far.

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Proposed California Bill Would Give Minor League Baseball Players More Control Over Their Name, Image & Likeness

By Gregg E. Clifton & Henry L. Sanchez, of Jackson & Lewis

In the wake of a recent trial court decision finding that minor league baseball players are year-round employees, California State Senator Josh Becker has introduced legislation proposing that California enact the Minor League Baseball Players’ Bill of Rights.

Commenting on his proposed legislation Senator Becker stated, “I introduced Senate Bill (SB) 1248

to create the Minor League Baseball Players’ Bill of Rights and to clear the way for better wages, better treatment and fair contracts for these athletes. It’s only fitting that the legislative movement for Minor Leaguers’ rights begins in California.”

SB 1248 would define a minor league baseball player as a person who is employed to play baseball for a minor league team that is affiliated with a major league baseball team and who plays, resides, or is employed in California. It would drastically reduce the current seven (7) year time period that a minor league player can remain under a Major League Baseball team’s contractual control. It would expressly prohibit an employment contract entered into on and after January 1, 2023, from having a term in excess of 4 years.

Using similar legislation to the California bill signed into law by Governor Newsom in 2021 which granted college athletes the right to market and profit from their name, image, and likeness as a model, this bill would require that minor league player employment contracts permit a player to use his name, image, or likeness as he sees fit, the legal right to receive compensation for that use, and any such provision prohibiting such use would be void and unenforceable. SB 1248 would also protect a player’s exercise of the right to use his name, image, or likeness by prohibiting retaliation in any form against a player as a consequence of the exercise of this right.

Becker further commented, “Baseball is called America’s pastime and Minor Leaguers are just asking for what every American worker wants. These players are asking for fair treatment and the opportunity to make a decent living under decent conditions.”

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Navigating the Sports Biometrics Boom

By Skyler Hicks

Now more than ever, access to quality data translates to monetization opportunities and this is especially true in the world of collegiate and professional sports. In the past two decades, data analytic tools measuring athlete health and performance have come a long way, and now, it is not just players or teams that stand to potentially profit. In particular, the advent of

wearable technology has produced a sports biometrics boom that could soon become a gold rush for players, teams, universities, and companies looking to use or sell biometric data.

However new opportunities also usher in new risks, and anyone interested in taking part will need to keep abreast of a regulatory environment that has yet to fully take shape.

How This Came to Be

Merriam-Webster defines biometrics as “the measurement and analysis of unique physical or behavioral characteristics (such as fingerprint or voice patterns) especially as a means of verifying personal identity.” Much of the press coverage surrounding biometrics concerns issues related to facial recognition technology, but wearables also collect massive amounts of other physical data every day.

Wearables come in the form of watches, rings, and now even chest straps. More than that, wearables no longer simply count our steps. Today, they can measure our heart rate, temperature, respiration, blood pressure and even our REM sleep cycles. Many athletes—particularly those at the highest level of their sports—have adopted wearables in the quest to learn more about their bodies and to measure and track their health. For instance, many baseball players now have the option of wearing a sleeve that measures elbow stress. When millions of dollars depend on a pitcher avoiding Tommy John surgery, it is no surprise players and teams want to use this technology.

While many athletes first started using wearables on their own volition, many teams and now even college programs have begun to encourage and sometimes even directly provide such wearables to their athletes. Players today usually retain some level of freedom of choice when it comes to using wearables, but that choice may disappear as new collective bargaining agreements come forth.

In fact, some collective bargaining agreements now permit leagues to collect player data from wearables measuring a whole host of metrics such as a player’s acceleration, heart rate, blood oxygen, and even glucose levels among others. Furthermore, not only can some leagues require its players to wear sensors that measure such data, some can also use this data commercially.

It’s Now Bigger Than Just Players & Teams

As a starting point, a number of professional leagues have now signed deals with wearable companies. But even more importantly, legalized betting across the country has produced deals between major professional sports leagues and third-party betting organizations, and many of these deals will allow sportsbooks to create new betting categories using advanced real-time data. With the increasing state by state legalization of gambling, some estimate that the market size of sports betting in the United States will grow to annual revenues of more than \$15 Billion by 2025.

This means anyone reading this—provided you live in one of the nearly 30 states that have now legalized gambling—will likely soon be able to rely on players’ biometric data when making betting decisions. In a few years, it’s not inconceivable to imagine that oddsmakers or bettors might look to biometric data concerning a player’s blood pressure or oxygen saturation to predict whether a key player has contracted an illness that will sideline him from a game. Or perhaps basketball players might be wearing “smart” sleeves that track shooting mechanics and could thus help predict a bad shooting night. Furthermore, in-game prop bets might even allow bettors to bet directly on the biometric data itself. For instance, anyone might be able to directly bet on a player’s heart rate while shooting free throws.

Legal Considerations

The commercialization of sports biometrics invokes a number of legal questions.

Who owns this data?

Presumably, individual players own the biometric data recorded on their personal wearables. But these rights can be signed away as part of a league’s collective bargaining agreement or in a player’s contract with his or her team. Alternatively, if a team lends wearables to its players, the teams could possibly claim ownership over the data. Or, another way players may lose ownership over their data is if they sell it to a third party. However, if a player sells its data knowing it could lead to asymmetric information impacting betting markets, sharing such information could possibly be construed as impermissibly facilitating gambling, and thus could be in violation of its league rules.

What Responsibilities Come With Accessing or Acquiring Another's Biometric Data?

If teams or universities gain ownership over player biometric data, it remains unclear what responsibilities they will assume. For instance, some posit that biometric data is not governed by the Health Insurance Portability Act (or HIPAA), while others suggest it does and that teams' medical staffs might have to comply with HIPAA's privacy and security rules. In addition, access to a player biometric data might impose legal obligations to inform the player of any data suggesting a health concern.

Teams might also have to closely monitor and sometimes return or destroy biometric data. For instance, in Washington State, "a person who knowingly possesses a biometric identifier of an individual that has been enrolled for a commercial purpose... (a) must take reasonable care to guard against unauthorized access to and acquisition of biometric identifiers that are in the possession or under the control of the person; and (b) may retain the biometric identifier no longer than is reasonably necessary." RCW 19.375.020(4).

Additional questions arise if a league sells player biometric data to a gambling operator but then the wearable produces faulty data that changes the outcome of a bet. Even if aggrieved bettors do not have a strong case, they might nevertheless initiate a class action challenge against the wearable company, the league, and/or the gambling operator.

Does the Right of Publicity Apply?

Many states have right of publicity statutes that bar the use of a figure's likeness in a commercial context without consent. For instance, California's Civil Code Section 3344 imposes liability on "any person who knowingly uses another's name, voice, signature, photograph, or likeness" for commercial gain without consent. § 3344(a). If biometric data can reveal a player's distinctive traits or mannerisms, the right of publicity might protect the player from the unconsented commercial use of such player's likeness.

On the other hand, use of a player's likeness might be deemed "newsworthy" and protected on First Amendment grounds. In [*Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 398 \(Ind. 2018\)](#), the Indiana Supreme Court—interpreting Indiana's right of publicity statute—held that

gambling websites' use of athlete statistics in their fantasy sports offerings was protected on First Amendment's "newsworthy" grounds. However, unlike traditional statistics that any third-party could observe (e.g. batting average), biometric data can reveal information and patterns hidden to any third-party observer of a player's performance (e.g. a low heart rate when shooting free throws in the fourth quarter). While a player whose shockingly low heart rate in pivotal moments could be deemed newsworthy, this data will only be available if the player publicly discloses it or otherwise sells the data to someone who does.

What About Biometric Privacy Laws?

Just as federal health privacy laws—according to some legal experts—might not control the collection of most athlete biometric data, state biometric laws might also not apply in the sports context. Today, states such as Texas, Illinois, and others have biometric statutes in place that limit the definition of biometrics to "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," and these definitions might not encompass the type of biometric data currently collected by athletes and teams.

However, some state laws are beginning to broaden the scope when defining "biometrics." For instance, Washington State's biometrics statute defines biometrics as "data generated by automatic measurements of an individual's biological characteristics, such as a fingerprint, voiceprint, eye retinas, irises, *or other unique biological patterns or characteristics* that is used to identify a specific individual." RCW 19.375.010 (emphasis added). Going further, under the California Consumer Privacy Act, "biometric information" encompasses—among other things—an individual's "gait patterns or rhythms, and sleep, health, or exercise data that contain identifying information." [*CA Civ Code § 1798.140\(b\)*](#).

Given the widespread use of biometrics in sports is only now beginning to gain more understanding, it is possible future statutes might continue to broaden their scope or perhaps even expressly include the types of biometric data common in sports.

Reminders Going Forward

The law is still catching up to the commercialization of biometrics in sports, but athletes, teams, and companies

looking to cash in on the monetization of this data should remember that these opportunities are not without risk. While the legal issues mentioned above are numerous, they are certainly not exhaustive and it remains to be seen how courts apply new or currently existing laws in this particular context. In the interim, anyone whose data may be used or anyone who wishes to use such data should seek out legal guidance as each unique situation might require a custom approach.

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Professor Sights Shocking Behavior at the Gymnastics World Cup Series

By John T. Wendt, J.D., M.A., Professor Emeritus, Ethics and Business Law, University of St. Thomas

As many know, after a 2015 World Anti-Doping Agency-commissioned independent investigation (McLaren Report) confirmed Russian State manipulation of the doping control process, Russia was banned for four years from using its name, flag, and anthem at world sports championships, including the Olympic Games.¹ This includes a ban on wearing their flag on their uniforms during competition and in awards ceremonies.

And as a result of Russia's invasion of Ukraine, Russian athletes and coaches were banned from competition in most international sporting events from March 7, 2022 until further notice.² Just before that date the 14th Taishan International Gymnastics Federation (FIG) Artistic Gymnastics World Cup was held in Doha, Qatar. On March 5, 2022, in the Men's Parallel

Bars event Illia Kovtun of Ukraine won the gold, Milad Karimi of Kazakhstan the silver, and Ivan Kuliak of Russia the bronze. But controversy erupted at the awards ceremony.

But, at the awards ceremony for the parallel bars in Doha, Kuliak stepped up onto the podium with a white, makeshift "Z" on the chest of his blue uniform. The controversy was created because the "Z" has become inflammatory as it has been seen on Russian tanks and armored vehicles and the "Z" has come to represent support for Russian President Vladimir Putin, nationalism, and for the invasion.³ Reportedly Russia's Ministry of Defense has claimed the "Z" symbol means "For Victory." Just after the invasion started, RT, the Russian government funded network started selling "Z" t-shirts and other merchandise to show their support for Russian troops. The "Z" has been painted on buildings, cars have been lined up in "Z" formations, and there have even been pictures of school children standing forming the letter all in support of the invasion.⁴

The legendary, two-time Olympic gymnastics champion Svetlana Khorkina, who is now a colonel in the Russian Army, has used the "Z" saying, "A campaign for those who are not ashamed of being Russian, let's spread it!"⁵ About Kuliak's gesture Russian Gymnastics Federation head coach Valentina Rodionenko said, "Our guys are patriots of Russia."⁶

Kuliak himself, who started training in the Russian military last November⁷ said that he would do it again, "We were told to cover our flag. That's what I did... I just wanted to show where I'm from, that's all and nothing more. I have never been afraid of the consequences and I don't want to hurt anyone. This 'Z' sign

3 Sean Ingle, *Russian gymnast with 'Z' symbol on podium next to Ukrainian faces long ban*, THE GUARDIAN, March 7, 2022, <https://www.theguardian.com/sport/2022/mar/07/shocking-behaviour-russian-gymnast-shows-z-symbol-on-podium-next-to-ukrainian-winner> (last visited Mar 7, 2022).

4 Pjotr Sauer, *Why has the letter Z become the symbol of war for Russia?*, THE GUARDIAN, March 7, 2022, <https://www.theguardian.com/world/2022/mar/07/why-has-the-letter-z-become-the-symbol-of-war-for-russia> (last visited Mar 7, 2022).

5 Michael Pavitt, *Kuliak faces disciplinary action after displaying symbol linked to Ukraine war*, (2022), <https://www.insidethegames.biz/articles/1120185/kuliak-disciplinary-action-war-symbol> (last visited Mar 10, 2022).

6 *Id.*

7 *Id.*

1 Sammy Westfall, *Here's why you won't find the Russian flag or national anthem at this year's Olympics*, WASHINGTON POST, January 6, 2021, <https://www.washingtonpost.com/sports/olympics/2021/07/06/russia-olympics-neutral-flag-doping/> (last visited Mar 13, 2022).

2 Fédération Internationale De Gymnastique, *FIG adopts further measures against Russia and Belarus*, (2022), <https://gymnastics.sport/site/news/displaynews.php?idNews=3444> (last visited Mar 7, 2022).

means ‘for victory’ and ‘for peace’. Ukrainian athletes treated us badly, you had to see it to believe it.”⁸

Kuliak went on to say, “They started this whole political movement. It was in response to this behavior that I showed up with the patch on my shirt. The Ukrainians wrapped themselves in their flag and shouted ‘Glory to Ukraine’ on the podium. According to the contest rules, this was not allowed, but no one said anything to them. They also demanded that we Russians be excluded, although we had not said or done anything against anyone...I try not to pay too much attention to what is happening around me. I don’t feel any particular discomfort.”⁹

The International Gymnastics Federation confirmed that it will ask the Gymnastics Ethics Foundation “to open disciplinary proceedings against male artistic gymnast Ivan Kuliak (RUS) following his shocking behaviour (sic) at the Apparatus World Cup in Doha, Qatar.”¹⁰ The Disciplinary Code states in part, “Any infringement of the Statutes, Rules and Regulations, Policies and/or Procedures, as well as of the principles of integrity and sports fairness by the FIG member Federations, gymnasts, officials (judges, coaches, medical staff or others) or by members of the FIG Authorities is liable to sanctions provided for by the Statutes and this Code.”¹¹ The Code goes on to state that, “These principles are infringed should someone: Damage the image of gymnastics, the FIG or its members through his/her behaviour, his/her words or his/her deeds... Demonstrate anti-sport behaviour;... Behave in an offensive way towards the FIG members, gymnasts or FIG official.. Harass and/or abuse any person or a group of persons, in any way, in particular due to their race, color, sex, sexual orientation, language, religion, political or other opinion, national or social origin...”¹²

8 Jim Reindel, *Russian gymnast Kuliak speaks out after standing on podium with “Z” painted on uniform*, INFOBAE (2022), <https://www.infobae.com/aroundtherings/articles/2022/03/08/russian-gymnast-kuliak-speaks-out-after-standing-on-podium-with-z-painted-on-uniform/> (last visited Mar 8, 2022).

9 *Id.*

10 Fédération Internationale De Gymnastique, *Incident at the Doha World Cup – FIG statement*, (2022), <https://gymnastics.sport/site/news/displaynews.php?idNews=3445> (last visited Mar 7, 2022).

11 Fédération Internationale De Gymnastique, *Code Of Discipline 2021 Edition*, (2021), https://www.gymnastics.sport/publicdir/rules/files/en_Code%20of%20Discipline%202021.pdf.

12 *Id.*

The Code provides for a hearing with a right to appeal to an FIG Appeal Panel and ultimately an appeal to the Court of Arbitration for Sport (CAS). As mentioned earlier, the IOC banned the Russian Olympic Committee (ROC) athletes and officials from participation in all international sport including the Paralympic Games that just concluded. More than 15 International Federations have also issued bans against Russian athletes. Currently the ROC has appealed to the CAS the decision to exclude Russian and Belarus athletes and officials to from the 2022 Winter European Youth Olympic Festival (EYOF) which is schedule to be held in Finland, March 20 – 25, 2022.¹³ The Football Union of Russia (FUR) has also filed an appeal to the CAS against the decision to suspend all Russian teams and clubs from participation until further notice.¹⁴

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Preparing For a Potential Future with College Athletes as Employees

LEAD1 Association, the premier association representing FBS athletic departments, recently held a webinar, which looked at the “college athletes as employees” issue.

The panelists for the talk included:

- Brian D. Barger, Partner, McGuireWoods LLP (Moderator)
- Michael R. Phillips, Partner, McGuireWoods LLP
- Sarah K. Wake, Partner, McGuireWoods LLP

What follows is the webinar recaps, provided by LEAD1:

Every LEAD1 athletics department should be aware of legislative, judicial, and administrative

13 Court of Arbitration for Sport, *CAS registers the appeal filed by the ROC against the decision taken by the EOC not to allow Russian athletes and officials to participate in the 2022 Winter European Youth Olympic Festival*, (2022), <https://www.tas-cas.org/en/general-information/news-detail/article/cas-registers-the-appeal-filed-by-the-roc-against-the-decision-taken-by-the-eoc-not-to-allow-russian/> (last visited Mar 13, 2022).

14 Court of Arbitration for Sport, *The Court of Arbitration for Sport (CAS) registers the appeals filed by the Football Union of Russia against the decisions taken by FIFA and UEFA to suspend Russian Teams and Clubs from their competitions*, (2022), <https://www.tas-cas.org/en/general-information/news-detail/article/cas-registers-the-appeal-filed-by-the-roc-against-the-decision-taken-by-the-eoc-not-to-allow-russian/>.

developments that may affect the status of college athletes. Because of these possible changes, LEAD1 Association (“LEAD1”) hosted a webinar with expert employment law attorneys at McGuireWoods LLP to discuss preparing for a possible future with college athletes defined as employees. Although likely a couple years away from a final outcome (due to the possibility for appeals), perhaps the most imminent way that college athletes could be defined as employees is the *Johnson v. NCAA* case in the U.S. Court of Appeals for the Third Circuit, where the essential question is whether college athletes can be employees under the Fair Labor Standards Act (FLSA). Here are some of the important takeaways from the webinar:

1. *A Third Circuit ruling on interlocutory appeal, while likely not definitive, could open the door for athletes to be considered employees under the FLSA.* *Johnson v. NCAA* is being heard by the Third Circuit on interlocutory appeal, which means in the middle of the case or before the District Court resolves the case on the merits. This means that even after a Third Circuit ruling, the case will go back to the District Court for further resolution. But the Third Circuit ruling that college athletes could be employees under the FLSA would create a circuit split on the employment issue given previous court rulings in the Seventh and Ninth Circuits, where both circuits have held that college athletes are not employees. A circuit split generally increases the possibility of the U.S. Supreme Court hearing a case.
2. *There are many practical questions that would arise from college athletes being defined as employees under the FLSA, such as, would college athletes be entitled to a minimum wage?* Yes. The FLSA applies to both public and private schools, and so college athletes would be entitled to federal minimum wage standards, and subject to their state minimum wage laws, which vary by state.
3. *Would college athletes be paid for overtime hours?* Most likely. College athletes would most likely be considered non-exempt employees under the FLSA, which means they must be paid overtime wages. Under the FLSA, unless exempt, employees must receive overtime pay for hours worked over 40 in a workweek at a rate not less than one-half their regular rates of pay. Accordingly, it would be essential to determine what would be considered “compensable time” under the FLSA. One way to define compensable time could be any hourly activity directly related to athletics, such as working on strength and conditioning. But with a potentially blurry definition, it could open the floodgates for other activities like time spent on academics or even travel to be considered compensable. A possible exempt status (not subject to overtime) under the FLSA would likely need to be created by the Congress, which would be highly impractical.
4. *Could there be a set pay structure for college athletics?* It is highly unlikely that the NCAA and/or the conferences could cap certain pay structures given the potential for liability under antitrust law, however, a ruling under the National Labor Relations Act (NLRA) with collective bargaining involved could create a more controlled wage structure.
5. *Could there be an open economy allowing schools to compete for athletes for higher wages?* Yes. It is possible that if college athletes were entitled to hourly wages and not considered exempt that competition in the marketplace, like in other industries, could dictate wages, particularly given antitrust concerns with institutions potentially conspiring to control wages.
6. *Could college athletes be considered “at-will” subject to termination and might college athletes be able to negotiate their compensation?* Yes. Institutions could either set up their employment structure as (1) “at-will” where college athletes could be potentially fired for bad performance (or for any other legal reason) or (2) for a definite term, such as a four-year contract where athletes could be involved in negotiating their contract and penalties could be imposed for leaving their institution. In other words, an employment structure could be at-will or arranged as more of a definite contract.
7. *Would Title IX be affected?* Most likely. If there

were an open economy, those institutions with larger budgets may be in a better position to offer higher wages to college athletes. In such a scenario, such as, for example, the football team being offered higher wages, there would be gender equity implications.

8. *Could scholarship aid be impacted?* Yes. Scholarships would not be considered wages. Thus, athletes who receive need-based aid may be less eligible due to being paid wages. In addition, such wage income would be taxed. On the other hand, because institutions may not be able to afford paying their athletes both hourly wages and scholarship aid, they may be more inclined to revoke scholarship aid, which unlike hourly wages, wouldn't be required under federal law.

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Discovery Heats Up in Wrongful Death Litigation Involving AEDs and High School Athlete

The discovery in a wrongful death lawsuit in Kentucky, where the parents of a high school athlete claimed the school, diocese, and the hospital were negligent, is leading to some interesting details.

First the background: Matthew Mangine was participating in a practice on June 16, 2020 when the incident occurred. His parents alleged in the lawsuit that there were many automatic external defibrillator (AED) devices on-site, none of which were used on Mangine after he collapsed.

Furthermore, the parents noted that the head coach, athletic trainer, and athletic director were not trained properly on how to use an AED. The fault for this, according to the complaint, rested with the defendants – St. Henry High School, the Diocese of Covington, and St. Elizabeth Medical Center, which employed the athletic trainer.

Specifically, the parents alleged that the coaches and trainers there when Mangine collapsed “were not equipped to deal with the situation present by Matthew’s cardiac arrest, due in large part to the failures of the defendants to adequately and properly prepare them for such emergencies.”

The complaint further states that “for many years, St. Henry and the Diocese have been operating their sports program, in conjunction with St. Elizabeth, in blatant and serious violation of the state law, KHSAA policies and the applicable standard of care.”

The “violations” mentioned by the parents centered on the creation of an Emergency Action Plans (EAP) and training on AEDs.

“For well over a decade, the standard of care mandates that schools should have an Emergency Action Plan,” according to the complaint. The complaint also noted that the EAP was not specific to the venue of the practice field, as required.

Discovery Revelations

Since the lawsuit was first reported in these pages, the coaches and athletic trainer at the school revealed that they were in fact trained on how to use an AED and knew what the signs were for sudden cardiac arrest in athletes.

However, they said the AEDs were not secured after Mangine collapsed because the EAP did not list their locations on the school’s campus.

Furthermore, media reports suggested that the athletic trainer, Mike Bowling, did not have the necessary keys to access an AED, which was 50 yards from where the athlete collapsed.

KHSAA commissioner Julian Tackett has also made a few headlines, confirming that if the school didn’t notify his association that it did not have an EAP, that would be a violation of the organization’s self-reporting policy.

In a media interview, Tackett noted that it would be “a technical requirement” for the school “to certify that they’ve got them. I mean, at some point — there’s no way with 286 high schools and that many more middle schools, you’re not going to have an army of people going out and checking.

He went on to give an example.

“It’s no different (then) an academic rule (we have had) for years. We don’t check transcripts. At some point, it is self-policing. It is. They’ve done it. They know the risk of not doing it. They know the liability of not doing it, and their peers are watching, so there is that accountability.”

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USF Baseball Players Sue NCAA and School for Failure to Protect Them from Sexual Misconduct by Coaches

Three University of San Francisco (USF) Baseball student-athletes filed a class-action lawsuit against the National Collegiate Athletics Association (NCAA), USF, and two USF coaches, Nino Giarratano and Troy Nakamura, alleging a long-standing history of abuse of student-athletes by the coaches, ranging from inappropriate yelling and humiliation to wildly sexualized behavior as a routine intimidation tactic, including sexualized exercises and nudity on the field.

The complaint includes allegations that the NCAA failed to protect the student-athletes from sexual abuse and harassment, and also failed to create and enforce prohibitions of sexual contact between coaches and student-athletes.

In addition to the litany of abuses by the coaches, the complaint also details multiple attempts made by parents and others to demand the Jesuit university to step in to protect the student-athletes from ongoing abuse, only to have the school administration repeatedly ignore calls for assistance.

The 113-page complaint also cites records that show that of the 17 recruits in the 2020 USF baseball class, eight have transferred and two more are attempting to transfer, a 60 percent attrition rate. The national average for baseball student-athletes entering the transfer portal is 2 percent.

The lawsuit details how the sexualized abuse and bullying was so profound that many of the student-athletes became severely depressed, affecting their ability to study, and, in at least one student, was so extreme that the stress of the abuse created health issues leading to five emergency room visits. Others sought support from a range of mental health professionals.

The complaint details two instances, the most recent in November 2021, in which a coach dropped his pants in view of players on the field and gyrated his hips to spin his penis. This is in addition to a third instance where a coach put on a “skit” and pretended to be at a buffet, and told a player to do a handstand, then grabbed the player’s legs and mimed eating spaghetti out of the player’s genital area. Further instances include coaches screaming profanities at public games so foul that parents of the opposing team reported the event.

The lawsuit, filed by the law firms FeganScott and Lief Cabraser Heimann & Bernstein in the U.S. District Court for the Northern District of California, alleges that the NCAA facilitated the coaches’ behavior by not implementing rules or imposing sanctions that would require member schools to take steps to prevent abuse by coaches, to force the school administrative faculty to pay attention to the complaints that do get made and to deter the perpetrators.

The lawsuit includes further allegations that the NCAA’s failure to prohibit sexual abuse contributed to threatening environments at its member institutions. Allegations against the coaches include verbal abuse, sexual harassment and intimidation, and public shaming.

Shortly after the lawsuit (Case No. 22-1559), was filed, Giarratano was fired.

FeganScott issued the following statement:

“The University of San Francisco’s removal of Coach Giarratano is a positive first step to safeguarding the student-athletes that remain in the program, but it does little to address the harm he and his assistant coach inflicted on those placed in the school’s care. It also does nothing to address the systemic institutional failures at USF that allowed this abuse to continue unabated despite complaints up to and including to the Athletic Director and Title IX office. If USF’s administration takes an honest look, they will realize the extent of the damages caused not just by the coaches but by their own shocking lack of oversight.

“This is yet another example of what happens because the NCAA disavows responsibility to its student-athletes and leaves it to the schools to police their own. Case in point: calls by parents to USF’s Athletic Director and Title IX office went unaddressed until after we filed suit. We will continue to see cases like this swept under the rug until the NCAA owns up to its responsibility to student-athletes everywhere.

“USF has shown that it cannot adequately address these issues. We have already heard from former players who experienced extreme levels of emotional abuse and sexualized misconduct by the coaches. By bringing the voices of players together, we can make change. If you experienced abuse or were exposed to sexual misconduct by the coaches, we encourage you to contact FeganScott and Lief Cabraser to share your experience.”

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Upcoming Esports Conferences Right Around the Corner

By Ellen M. Zavian, Esq., Editor-in-Chief ESL

We have seen the numbers of growth for gamers during the past 3 years, along with the prediction of growth for the audience and viewers. Thus, it is not a surprise that this trend is followed by the growth of the individuals working behind the scenes, to support and develop the expanding esports infrastructure. Consequently, it is a natural progression to see the growth of esports specific conferences to engage these business and legal minds on a sport that has taken hold, globally.

We caught up with three conferences that will be held in-person and virtual for 2022, to learn a bit more about their offerings and goals.

SportsTravel Summit, June 21-23, 2022, Daytona Beach, Florida.



Event Link: <https://www.esportstravelsummit.com/about>

The SportsTravel Magazine has created a summit for “esports organization leaders (including CEOs, esports directors, event organizers, event managers), the travel and hospitality industry (leaders at convention and visitor bureaus, sports commissions, venue management companies etc.) and industry suppliers (representatives from hotel companies, transportation companies, insurance companies, security companies, technology companies, white label production, consultants, etc.).”

The main goal for the 2022 conference is to “continue to provide cutting edge research and information to the industry on trends of the moment and to showcase our host city of Daytona Beach and its progress in hosting live esports events.” Jason Gewirtz, Vice President, Sports Division, Northstar Meetings Group, believes specific esports conferences are necessary because the “make up of the organizations and requirements are different” This conference “allows us to highlight the trends” along with the need to serve as

“an educational resource for destinations and venues that are first getting involved in the hosting of esports events.”

With a focus on travel and hospitality in the industry, the conference will also have one-on-one appointments for the purpose of business development. This will enable deals to get done while at the conference learning trends and expanding one’s network.

Esports Integrity Commission inaugural Global Esports Summit, EGES, April 13-14, 2022, ExCel Center in London, UK



Event link: <https://www.eges.gg/>

ESL readers will get a 20 percent discount at this link: <https://registration.gesevent.com/survey/12c2ac8prjsw0?actioncode=ESIC20>

According to Ian Smith, Commissioner of the Esports Integrity Commission (ESIC), the EGES Summit has been created for the esports ecosystem. Specifically, “those people who provide services and products to the esports industry, such as lawyers, financial services professionals, investors, hard and software producers and merchandise providers.” The main theme for 2022 runs deep in the goals of the ESIC, “to create the destination of choice for everyone in and connected to the ecosystem.” Since this will be one of two summits for ESIC in 2022, Smith believes this will allow them to capture this “fast-moving industry” without waiting a whole another year.

The need for a conference is clear to ESIC. “Esports is far less well understood than traditional sports and we are still at a relatively basic education level for service providers and investors who are looking at our industry for opportunities.” In addition, as a “trusted neutral” in the industry, “we are able to attract stakeholders from the widest spectrum of the ecosystem.”

EGES will be held alongside another popular conference, ICE, where the gathering of gaming (gambling) experts will convene. ICE is the largest global gathering of gaming operators in Europe. While it will be a busy few days, no matter if one is attending the

EGES and/or ICE conferences, the term ‘gaming’ will be the hot topic of the day.

Esports Venue Summit Set for May 4-5, 2022,
Swansea Arena, Wales, UK

eSPORTS **VENUE SUMMIT**

Event link: Esports Venue Summit—<https://www.esportsvenuesummit.com/>

According to Sam Wibrew, Head of Stadia & Events Portfolio, Hemming Group is hosting the Esports Venue Summit (EVS) in early May 2022 at Swansea Arena in Wales, UK (in person with a virtual option). The EVS’ goal is to bring together the esports and entertainment venue industries to discuss the latest developments in esports venues and in-person tournaments.

While their audience casts a wide net (i.e. property owners, operators, game developers, rights holders, bidding cities, team owners, tournament/league organizers), Wibrew is seeking to grow upon his successful 2020 online event that “attracted 1200 virtual attendees”. With the goal of rotating this summit around the globe, Wibrew believes that no matter where the conference lands, “it will be a platform for exchange of ideas and best practices.”

The need to expand revenue options for venues, especially after the Pandemic closed most locations down, is “what our attendees are focusing on; ways increase their existing revenue streams.” As Wibrew’s team finishes the final touches to their panelist, he is confident, “there is no other conference focusing solely on the venue!”

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University of Miami Set to Host Global Entertainment & Sports Law + Industry Conference April 7-8

What follows are summaries for the CLE sessions being hosted at the conference, which is being presented by the Entertainment and Sports Law Society and the LL.M. in Entertainment, Arts and Sports Law at the University of Miami School of Law.

To register for the event, visit: https://events.miami.edu/event/global_entertainment_sports_law_industry_conference_2982

Day 1: Thursday, April 7th

“Building Stadiums Block-by-Blockchain: The New Wave of Stadium Sponsorships and Fan Engagement”

The emergence of cryptocurrency and blockchain technology has only begun to transform the sports experience. Eager to expand its global reach, crypto companies have stepped into the world of sponsorships, stadium engagement, ticketing, and partnerships. Fans gain opportunities to use crypto to purchase tickets and merchandise, while blockchain ensures authenticity and dependability. This panel will discuss how teams, leagues, and stadiums around the world are taking advantage of such innovations.

Advising the Student-Athlete: A “NIL” Simulation

Nearly one year after the NCAA implemented its interim NIL policy, it is now more imperative than ever that key stakeholders in the sports industry who are involved in Name, Image, and Likeness (NIL) deals have a firm understanding of how to properly navigate each critical juncture of the contractual process. In this simulation, attendees will learn about three key touchpoints: (1) Picking the right sports agent; (2) deciding which companies to collaborate with; and (3) navigating key components of the NIL contract. By understanding these critical pillars of the NIL realm, agents, talent, and other key stakeholders will be better equipped to navigate the rapidly changing NIL era and remain compliant with all laws relevant to each respective deal.

Breaking the Subtitle Barrier: Foreign Content in the Domestic Market

After the domestic successes of international movies like *Parasite* and television shows such as *La Casa De Papel* and *Squid Game*, the subtitle barrier has officially been broken. US audiences are eager to watch films from international creators, which will greatly affect the domestic content markets. Discussing these effects, the process it takes to bring foreign content to the US, and the challenges that accompany these processes are lawyers and executives from the international departments

of studios, distributors, and creators, both domestic and international. Questions to be answered include: How is foreign content selected by US distributors? Are there any challenges specific to foreign content? Who owns what rights when a foreign film is picked up by US distributors? Are there domestic studios expanding to international spaces? What is the future of international influence on domestic content markets?

E-Sports in South Florida: A Keynote Discussion with Misfits Gaming

Today competitive professional gaming (eSports) is soon to be a one billion dollar industry. With eSports rapidly growing in popularity and lucrateness, the current number of eSports organizations and teams is likely to rise. This Keynote by E-Sports experts, Co-Founders of Misfits Gaming Laurie Silvers and Ben Spont, will explain how league organizations, teams, and athletes are building up their franchises and brands while navigating the evolving young territory of eSports team and player management. This conversation will also analyze and explain a multitude of regulatory and legal issues and other practical considerations that the speakers believe are vital to ensuring league, team, and eSports success.

Hot Topics for NBA Counsel

The issues hitting the desks of NBA General Counsels have been far from ordinary in these times of immense societal and technological change. Franchise legal teams have had to navigate a magnitude of contemporary issues, including how to fill a stadium post-pandemic and how to ratify the league to allow for institutional investment in franchises. This panel will discuss NBA General Counsels' overall responsibilities in overseeing particular franchises, and dive into expected issues in the near future.

Diversity, Equity, and Inclusion: A Discussion with Women Leaders in Entertainment & Sports

Entertainment and sports have the power to shape and inform society's values on diversity, equity, and inclusion, and show us what is possible for the future. Discussions surrounding diversity in these industries distinctly lack the perspectives of women that contribute to the success of professional athletes, teams, and creative talent. This panel of women leaders will share their perspectives and experiences on making diversity,

equity, and inclusion an important part of the entertainment and sports industries.

The Broadcaster and the Agent

As competition for views continues in sports, networks and programs have repeatedly turned to former athletes to man the broadcasting booth so that they can provide a unique perspective compared to other networks. This panel will discuss sports broadcasting and more specifically the transition from being an athlete to becoming a broadcaster. This panel features three former athletes that made the transition into the broadcasting booth and a leading sports broadcasting agent that has represented several former athletes that have moved into sports broadcasting. The panelists will discuss their transition into sports broadcasting and how agents have played a role in the transition from the field or court to the booth.

Miami 2030: A Keynote with Entertainment and Hospitality Mogul David Grutman

When discussing Miami as a global entertainment hub, there is no one better to talk to than entrepreneur David Grutman. From his restaurants to nightclubs to his hotel, all of Grutman's business ventures embody the vibrant and unique spirit of Miami. This keynote discussion will focus on the future of Miami hospitality and the next big things in entertainment.

Day 2: Friday, April 8th

Game Time: A Keynote Discussion with Showtime Sports President Stephen Espinoza

This keynote will discuss Stephen Espinoza's career path, how he came to be the President of Showtime Sports, and lead Showtime to becoming the world's leading outlet for live boxing. Espinoza will discuss his role at Showtime Sports in overseeing the production of the network's original sports series and documentaries, managing the network's relationships with distributors and talent, and leading the acquisition of licensing of all Showtime pay-per-view sports and event programming. Showtime's biggest acquisition under Espinoza was signing the boxer Floyd Mayweather. Espinoza plays a critical role at the crossroads of entertainment and sports law and will discuss Showtime Sports' innovative approaches to integrate media and sports broadcasting.

Art Coffee Talk—The Underline & Efforts to Radically Reshape Miami’s Public Art Space

This Art Coffee Talk will spotlight healthy and connective city design through green space reuse and artistic vision. Through the example of The Underline, the conversation will detail ways in which lawyers, architects, artists, and communities can reimagine public spaces and incorporate thoughtful, responsive design. *Art Coffee Talk—The Underline & Efforts to Radically Reshape Miami’s Public Art Space* will be moderated by Allison Friedin, Co-Founder and General Counsel of the Museum of Graffiti and feature Daniel Balmori, Senior Associate at Hogan Lovells and pro bono counsel to Friends of the Underline, Inc. and The Underline Conservancy and Steven Wernick, Managing Partner at Wernick & Co. and Adjunct Professor of UM’s School of Architecture.

Entertainment Coffee Talk—Music Catalog Sales and Acquisitions

Music assets are selling for extraordinarily high valuations. Over the past few years, songwriting catalogs have sold for about eight to twelve times the net publisher’s share. Music investment start-ups are heavily disrupting the way the industry operates, snatching up rights related to major artists like Fleetwood Mac, Neil Young, and Shakira. To protect their traditional industry power, music industry giants have spent hundreds of millions of dollars acquiring ownership of major artists’ catalogs. Artists seeking to leave legacies for their estates have greatly benefited from these unusually high sales. Smith Entertainment Law Group music attorneys Mike Olson and Henry Root discuss the tensions between start-ups and industry powerhouses and how lawyers can use these tensions to accomplish their clients’ goals.

Formula 1: Racing Towards the Miami Grand Prix

This panel will cover the life cycle of bringing the Grand Prix and Formula 1 to Miami, from its inception to a mere month out from the Grand Prix. The conversation will discuss negotiations between Formula 1 and Hard Rock Stadium, construction and clearances for building the race track, and a discussion of gathering vendors, sponsors, and city approvals. *F1: Racing Towards the Grand Prix* will feature a conversation with Myles Pistorius, Senior VP and General Counsel for the Miami Dolphins, Brandon Peck, the Manager of Legal Affairs for South Florida Motorsports, and Marcus Bach-Armas,

the Senior Director of Legal and Government Affairs for the Miami Dolphins & Hard Rock Stadium.

Influential Insights: How Influencers are Keeping up with Social Media

A novel yet ever-growing profession, social media influencers have drastically transformed the modern business and digital landscapes. Following pandemic shutdowns and the increased importance of community connectivity, social platforms like Tik Tok have become invaluable business tools through which influencers could sustain professional engagement with followers and counterparts. However, as a result, these applications have faced rising governance, most notably FCC regulation and enforcement of #ad and sponsor disclosures. Given this growing scrutiny, influencers must navigate their status as businesswomen and continually adapt to this evolving business environment

We Won’t “Shut Up & Dribble”: Athletes Fostering Social Change

In light of the recent worldwide demand for social justice and reform, this keynote will delve into athlete leadership in fostering that change. These champions have made a name for themselves on and off the court and have used their platform to address key social issues and promote justice, all while inspiring millions of others to do the same. Specifically, this keynote will address female athlete’s fight to bring awareness to equality, social reform, and mental health.

Streaming Wars

We are in the midst of the unstoppable streaming era with more content available at our fingertips than ever before. With seemingly countless platforms to choose from, the future of streaming is exciting and unfolding right before our eyes. As the competition for subscribers heats up amongst streaming companies, these service providers are tasked with the challenge of pushing the boundaries, extending past the realms of film and television, into the land of video games, music, audio-visual synchronization and beyond! So, how will streaming service providers and content creators ultimately fulfill the goal of gaining a subscriber base that sticks? In this discussion, our panel of attorneys and industry executives will discuss how the streaming business is working through these problems and seeking out solutions. By the end of this discussion, lawyers

and students alike will have a better understanding of the inner workings of the streaming business, the critical legal issues that arise, and forecasts for the future.

The Leadership Gameplan- Live Podcast with Coach and Lawyer Marc Trestman

A podcast from the University of Miami School of Law, The Leadership Gameplan goes beyond the X's and O's to examine leadership through the lens of our accomplished guests from the worlds of sports, business, journalism, and the law. We will be joined by a special guest to discuss how leadership in this accelerating and interconnected world determines our present and our future, and why how we lead today matters more than ever.

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Cadwalader Adds Sports Lawyer Helen Maher

Cadwalader, Wickersham & Taft LLP has expanded its Global Litigation Group with the addition of partner Helen M. Maher in New York. Maher joins Cadwalader from Boies Schiller.

Maher's practice focuses on complex commercial and antitrust matters for both plaintiffs and defendants. For over two decades, she has litigated cases in federal and state courts and arbitral tribunals throughout the country, including taking the lead in trying a number of these actions. The former head of Boies Schiller's Sports and Gaming practice, with clients including NASCAR, the Dallas Cowboys and the Ladies Professional Golf Association (LPGA), Maher will be one of the leaders of Cadwalader's Sports Law Group.

"Helen is a first-rate litigator and another great addition to our Global Litigation Group," said Cadwalader managing partner Pat Quinn. "She brings considerable commercial litigation experience and will also expand our Sports Law capabilities. We're delighted to welcome her to the firm."

Added Global Litigation Group co-chair Nicholas Gravante: "I have known Helen for quite some time and have worked closely with her on a number of complex, high-profile matters. She is nothing short of exceptional."

Added Global Litigation Group co-chair Jason Halper: "We are all in on continuing to grow our litigation capabilities, and Helen is another well-known and highly respected addition to our team."

Maher has represented the co-founder of AriZona Iced Tea in complex commercial litigation that led to a recovery of nearly \$1 billion for the client. Other clients, in addition to her sports law clients, include HSBC, Breakthru Beverage Group, Barclays and the State of Kentucky, among others.

Her abilities have been recognized by Benchmark Litigation, which has recognized her among the top 250 female litigators in the U.S. and as a litigation star.

"I am very excited about joining Cadwalader and its growing Global Litigation Group and to reunite with a number of former colleagues – in particular, Nick Gravante, Phil Iovieno, Karen Dyer, Larry Brandman and Sean O'Shea," Maher said. "Cadwalader has made such a strong commitment to growing its litigation offering, and the expanded team is truly world class."

Maher's arrival follows a number of significant partner additions, including: Gravante, Iovieno, Dyer and Brandman in global litigation; Philip Khinda, Mark Grider and Rachel Rodman in white collar defense; Doug Gansler to lead the State Attorneys General practice; and white collar partners Mark Beardsworth and Kevin Roberts in London.

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National Women's Soccer League Names Sports Lawyer Jessica Berman Its Next Commissioner

The National Women's Soccer League has announced that Jessica Berman has been named the league's next commissioner. Berman will oversee all operations of the league with a focus on supporting players on and off the pitch, working with NWSL clubs to continue to build on the positive momentum of the league's growing audience, and collaborating with NWSL partners to create the most engaging and entertaining fan experience.

The search committee of the NWSL board of governors included Angela Hucles (ACFC), Mike Golub (POR) Chris Long (KCC), Sophie Sauvage (RGN) and Mark Wilf (ORL). The Players' Commissioner Search

Committee was comprised of Crystal Dunn, Kaylie Collins, Jane Campbell, Bri Visalli, Nicole Barnhart, Emily Menges, Tori Huster, and Executive Director Meghann Burke.

“Jessica’s extensive professional background, her commitment to elevating diverse voices in the sports industry, and her vision for the future of our league, made her the right fit for this incredibly important position,” said Sauvage.

“Working on behalf of, and in partnership with, our players is my number one priority,” said Berman. “Having been involved in professional sports for many years, I know how critically important a genuine partnership with players is for us all to be successful and continue to grow. The successful conclusion of the league’s first-ever CBA with our players is the perfect foundation from which to build that partnership, and I am grateful for Marla Messing’s leadership in getting that done.”

Berman is set to begin her four-year term as commissioner on April 20, 2022. To ensure a smooth transition, Messing will continue her role as interim CEO until May 31, 2022.

Messing joined the league in October 2021. During her five-month tenure, she is credited with negotiating and launching a joint investigation with the NWSLPA, resolving the Washington Spirit ownership situation, and overseeing the sale of the club for a record \$35 million, completing the league’s first-ever collective bargaining agreement, and restoring confidence in the long-term prospects of the league among its myriad constituencies.

A seasoned sports executive, Berman joins the NWSL after two and a half years serving as deputy commissioner and executive vice president of business affairs at the National Lacrosse League. During her time with the NLL, Berman’s responsibilities included overseeing team services, operations, marketing and communications, broadcast and content, community engagement, human resources, and league governance.

Prior to her time with the NLL, Berman spent 13 years with the National Hockey League, first serving as vice president and deputy general counsel for the organization before becoming vice president of community development, culture and growth and executive director of the NHL Foundation. In her role as Deputy General Counsel, she was involved in collective

bargaining negotiations, and was a key contributor in creating and executing the NHL’s labor strategy during the 2012 talks.

Berman’s later roles with the league focused on bolstering the sports experience for NHL and hockey enthusiasts around the globe. This included implementing a positive, inclusive, community-friendly approach across the league and working to increase access to hockey at all levels of the game. In addition, Berman oversaw the design and execution of the NHL’s corporate social responsibility goals and initiatives, an area she is particularly passionate about.

A graduate of the Fordham University School of Law, Berman also worked as an associate at Proskauer Rose LLP in the labor and employment sector where she represented several employers in collective bargaining negotiations, arbitrations, mediations and litigations, and worked on pro bono cases involving domestic violence, sexual assault and military matters.

Berman completed her undergraduate studies at the University of Michigan in Ann Arbor, Michigan, graduating with a degree in Sports Management and Communications. During her time at Michigan, Berman was involved with the men’s hockey and football programs as an assistant in the sports information office. While completing law school, she served as editor-in-chief of the Fordham Sports Law Forum and was an associate editor of the Urban Law Journal.

Berman has earned several distinctions throughout her sports career. She currently sits on the Sports Lawyers Association Board of Directors, the University of Michigan Sport Management Advisory Board, the Fordham Sports Law Forum Board of Advisors, Sports Innovation Lab Women Executive Network, the Vice Chair of SIGA America Advisory Board and is a founding member of the Pro Sports Assembly, an organization dedicated to promoting diversity & inclusion in the professional sports industry.

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News Briefs

SRLA Presents Annual Awards to Sports Law Faculty at Annual Conference

The Sports and Recreation Law Association presented its annual awards to professors in the sports law field at its annual conference in Atlanta last month.

SRLA presented its most prestigious award, the Professor Betty van der Smissen Leadership Award, to Dr. Sarah Young, of Indiana University. Dr. Andy Pitman, a long-time sports law professor at Texas A&M and Baylor, introduced Dr. Young.

Dr. Young's research is bifurcated into legal issues in recreation and sport settings related to risk management, program delivery, and participant conduct; and using recreational sport to help solve community health issues for youth. She has also been presented by SRLA with the Herb Appenzeller SRLA Honor Award, another of the more significant awards presented by the association.

This year's Honor Award went to Dr. Thomas Baker, of the University of Georgia. Dr. Baker is also the long-time editor of SRLA's peer-reviewed *Journal of Legal Aspects of Sports*.

Among the many other awards presented were for SRLA Research Fellow to Dr. Natasha Brison, of Texas A&M University, College Station; SRLA Best Paper Award to Prof. Mark Conrad, of Fordham University; and the Lori K. Miller Young Professional Award to Prof. Alicia Jessop, of Pepperdine University. Professor Jessop served as president the association last year.

The new president of SRLA is Prof. Mark Dodds, of SUNY Cortland. Dodds holds a J.D. from Marquette University Law School, a M.B.A. from Robert Morris University, and a B.S. in Marketing Management from Syracuse University. While at MULS, he earned a Sport Law Certificate from the National Sport Law Institute. His research area is focused on legal issues in sport business, international sport, sponsorship activation, and legal issues with internships.

Bearby Promoted to Top Legal Post at NCAA

Scott Bearby has been promoted to senior vice president of legal affairs and general counsel at the NCAA, where he will oversee the office of legal affairs, hearing operations and government affairs. The office of legal affairs handles numerous legal responsibilities for the Association, including managing litigation involving the national office and supporting its governance and sport committees, 90 championships, and national office staff in assisting the membership and student-athletes. Bearby was named vice president of legal affairs and general counsel in August 2016 after serving in various legal positions at the national office since January 1999. Before joining the NCAA, Bearby spent six years in private practice. A native of Hammond, Indiana, he earned his bachelor's degree in government from Notre Dame and his law degree from Indiana University, Bloomington.



Blank Rome's Gervais Recognized in Women We Admire's Top 100 Women Leaders of Tampa

Blank Rome LLP has announced that Michelle Gervais, who serves as a litigation partner and co-chair of the firm's Sports Law practice, has been recognized in *The Top 100 Women Leaders of Tampa for 2022* by Women We Admire. The award program recognizes women who are "leading companies and driving change across nearly all industries including educational technology, healthcare, insurance and financial services, retail, media and more. They continue to break barriers into new territories that will allow those who follow after them to lead successful and meaningful careers."

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