Sports Litigation Alert

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Sports Litigation Alert is proud to offer an Expert Witness Directory at our website. SLA subscribers are entitled to be listed in that directory, please email your details to us and we will include you in the listing. Here is this issue's featured expert:

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Case Summaries

Third Circuit Denies Plaintiff, Who After Suffering Multiple Concussions Claims School Failed to Make Academic Accommodations

The Third U.S. Circuit Court of Appeals has denied the appeal of a former high school athlete, who claimed that after he suffered multiple concussions that the school district failed to provide appropriate academic accommodations.

In so ruling, the panel found that the plaintiff had signed a settlement agreement, which precluded his claim, even though his allegations were seemingly unrelated to those made in the settlement. The panel, however, concluded that “the gravamen” of the complaint aligned with the claims that he voluntarily dismissed in reaching a settlement.

Robert Wellman, Jr., attended high school in the Butler Area School District. He suffered a head injury while playing flag football in his freshman physical education class. After school that day, Wellman attended football practice, where he suffered additional head injuries. The following day, Wellman saw his doctor and later underwent a CT scan, which revealed that he had sustained a concussion. Wellman allegedly suffered "pain" and experienced "staring spells, trouble sleeping, and difficulty concentrating."

Wellman returned to school, but his mother asked the school to assist him until his concussion healed. Wellman's mother requested that Wellman be taken out of his German and physical education classes, that he be given extra study halls, and that the football coach not allow him to engage in any unsuitable physical activity. Rather than allow him to rest during his extra study halls, however, the teachers allegedly required him to take make-up exams. Wellman alleged that the school's indifference to his need for accommodations increased his stress and aggravated his cognitive problems.

After performing an EEG test, Wellman's doctor wrote a letter asking the school to provide Wellman with academic accommodations, specifically tutors and more time to complete his assignments. The school allegedly ignored these requests.

A few weeks later, Wellman attended a high school football game. Before the game, Wellman's mother allegedly told the football coach that Wellman had a concussion, was not cleared to participate in the game, and should not be exposed to any possibility of physical contact. Despite this alleged conversation, the football coach asked Wellman to hold one of the markers on the sidelines. Wellman was not wearing any protective gear. During the game, a player in full uniform ran into Wellman and knocked him over, causing another head injury.

After this incident, Wellman's concussion symptoms worsened, and he experienced severe headaches, problems focusing, and exhaustion. A CT scan revealed that he had post-concussive syndrome. Wellman began to miss school because of his symptoms and medical appointments, and when he was able to attend school, his teachers allegedly refused to provide accommodations for him. As a result, Wellman suffered significant stress, embarrassment, and anxiety, according to the complaint.

The panel went on recount several more allegations that seemed to suggest a failure to accommodate, leading Wellman to eventually withdraw from the school and enroll in private school, from which he eventually graduated.

Wellman and his parents filed a due process complaint with the Pennsylvania Department of Education against the School District, requesting a hearing, an Independent Education Plan, compensatory education for two years, and payment of Wellman's private school tuition. Wellman and the School District eventually entered into a settlement and release agreement with respect to the claims in the due process case. Under the Settlement Agreement, the Wellmans released the School District and its employees from all rights, claims, causes of action, and damages of any nature including, but not limited to, any claim for legal fees and/or costs, which were pursued in the above-referenced case or which could have been pursued in the above-referenced case, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq; the Americans with Disabilities Act (ADA); or any other Federal or State statute, including the regulations promulgated thereunder.

Wellman thereafter filed a federal lawsuit in the Western District of Pennsylvania against the school district, alleging that it (1) violated the Rehabilitation Act, 29 U.S.C. § 794, and the ADA, 42 U.S.C. § 12132, by refusing to accommodate him and treating him as if his injuries were fabricated or exaggerated; (2) violated the Rehabilitation Act and ADA by insisting that Wellman hold the marker on the football field, even though the school district was aware that he had a concussion and should not have been exposed to unnecessary physical risk; and (3) sought relief under 42 U.S.C. § 1983 for a violation of Wellman's equal protection rights by failing to accommodate him, retaliating against him because he requested accommodations, and treating him differently from other disabled students.

The defendant filed a motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In the aftermath of the court’s decision in Batchelor v. Rose Tree Media School District, 759 F.3d 266 (3d Cir. 2014), which held that exhaustion under the IDEA was a jurisdictional requirement, the district court concluded that it lacked subject matter jurisdiction and dismissed the complaint without prejudice, because (1) each of Wellman's claims were related to the provision of a FAPE (or free appropriate public education), and he failed to exhaust his

claims before a special education hearing officer; (2) the Settlement Agreement did not render the claims exhausted because it did not serve the key purpose of developing an underlying factual record; and (3) no exception to exhaustion was applicable to the case, given that no underlying factual record was developed, there were no allegations of an emergency situation requiring immediate resolution, and Wellman's claims all principally related to his education.

Wellman appealed.

The Third Circuit wrote that "the outcome of this appeal is largely dictated by the Supreme Court's recent opinion in Fry v. Napoleon Community Schools, 137 S. Ct. 743, 197 L. Ed. 2d 46 (2017), which requires that we consider the 'crux' — the 'gravamen' — of the complaint to determine whether a plaintiff seeks relief for 'denial of the IDEA's core guarantee [of] . . . a free and appropriate education [FAPE,]' id. at 748; if so, then the plaintiff must exhaust his administrative remedies under the IDEA. Because the gravamen of each count in Wellman's complaint seeks relief for the denial of a FAPE, Wellman would typically be required to exhaust his claims. Wellman concedes, however, that he released all claims seeking relief based on the denial of a FAPE, and thus, he has no claims to exhaust. As a result, we will vacate the district court's order dismissing the complaint without prejudice and remand with instructions to dismiss the complaint with prejudice."

Robert Wellman, Jr., v. Butler Area School District, Dr. John Wyllie, Individually, and in his capacity as principal of the Butler Area High School; 3d Cir.; No. 15-3394, 2017 U.S. App. LEXIS 25009; 12/12/17

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Standing Still: Fan Gets Second Chance to Bring Precarious NY/NJ Super Bowl Ticket Case

By Jonathan L. Israel, of Foley & Lardner LLP

Recently, the Third Circuit U.S. Court of Appeals turned the switch on a fan's seemingly dormant class action suit against the National Football League concerning its 2014 Super Bowl Ticket Distribution Policy, which limited tickets available to the general public. In Finkelman v. NFL, the plaintiff-fan accuses the NFL and its related entities of violating the New Jersey Ticket Law ("NJTL") that bars individuals with access to tickets from withholding more than five percent of all available tickets.

The putative class representative, Josh Finkelman, bought tickets to the 2014 Super Bowl at MetLife Stadium through the secondary market, purchasing two tickets with an $800 face value for $2,000 apiece. In his complaint, Finkelman alleged (and the NFL and its entities did not dispute) that the NFL withholds almost 99 percent of Super Bowl tickets from the general public and allocates those tickets as follows:

- About 75 percent to NFL Teams (5% to the hosting team(s), 17.5% to each Super Bowl participant, and 35 percent to the remaining NFL teams)
- About 25 percent to NFL stakeholders (e.g., broadcast networks, media sponsors, host committee, etc.)
- Roughly 1 percent to the general public through a lottery (an estimated 825 tickets for the 2014 Super Bowl)

To this point, the dispute has largely concerned Finkelman's ability to demonstrate sufficient constitutional (Article III) standing to bring his claim. Initially, Finkelman advanced the theory that the NFL's policy prevented him from buying a ticket at face value. He was bounced on standing grounds by the district court and then by the Third Circuit because Finkelman never entered the lottery for the general public, and thus, he was never denied the ability to buy tickets at face value (i.e., he lacked the requisite injury for standing).

Not to be discouraged, Finkelman amended his complaint to include a new standing theory alleging that the NFL's policy increased the price of the tickets he purchased in the secondary market. An expert economist with significant experience in the sports industry augmented this theory by offering that the NFL's policy elicited a layer of ticket brokers making fewer tickets available on the secondary market, resulting in higher prices (and thus harming Finkelman). Significantly, the Third Circuit accepted this second theory of standing.

So, after nearly four years of litigation, Finkelman can sue, but does he have a case on the merits? More delay ensues as the Third Circuit certified to the New Jersey Supreme Court two specific questions on the NJTL to determine whether Finkelman has alleged a viable claim under the statute, (i) with respect to the scope of the NJTL, and (ii) with respect to other required elements of Finkelman's claim, including the plaintiff's loss and the required causal connection to the defendant's conduct.

On the latter question, Finkelman claims that the NFL's ticket distribution or withholding caused him to pay an increased price for the tickets on the secondary market. What remains unclear, in the Third Circuit's view, is whether this allegation alone is enough to state the requisite causation under the NJTL or if it merely represents a fraud-on-the-market theory of causation, which is an actionable basis under the statute only for the New Jersey attorney general and not a private plaintiff like Finkelman.

On the scope question, the Third Circuit seeks clarity on whether the statute means that 95 percent of the tickets to all events in New Jersey must be made available for sale to the general public, as Finkelman asserts, or whether under the NFL's proposed narrower interpretations of the statute, (i) it did not withhold (i.e., retain custody of) any tickets, given that it allocated 100 percent of the tickets to others, and (ii) there was no sale of tickets to the general public because even the 1 percent sold through the

lottery came with various pre-conditions for entry and opportunity to purchase, which would not qualify as a sale to the public.

And so the parties (and interested court watchers) wait for the New Jersey Supreme Court to rule on these dispositive questions. As a practical matter, regulating the amount of tickets owners can withhold from the general public appears unique to New Jersey, which suggests that, whatever the outcome, this case is not likely to have an impact on events held in other states. Additionally, it seems that the statute lends itself to "marquee" events with a limited engagement in New Jersey, where reserving tickets for event stakeholders is more likely to occur. Nevertheless, as the New Jersey Supreme Court considers whether a private plaintiff can ever make a claim under the NJTL, Finkelman's survival skills may still hold some importance to Garden Staters looking to attend local events for a reasonable price.

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Court Dismisses Claim of Injured Football Player, Who Signed Release

By Lindsay Kaplow, of Havkins, Rosenfeld, Ritzert & Varriale

Defendants' Middle Country Center School District, Long Island Flag Football League, Inc., and Long Island Flag Football, Inc.'s pre-answer motion to dismiss was recently granted by Justice Peter H. Mayer of the Supreme Court, Suffolk County based upon the Release executed by the plaintiff.

The plaintiff, Murat Marc, was allegedly injured during a flag football game, when he jumped to catch a pass and landed on a sprinkler head, which he claimed to be concealed. The game was being played on a field located on the grounds of Newfield High School, owned by Middle Country School District. Prior to playing in the football game, plaintiff executed a Waiver and Release of Liability, releasing the League as well as the owner of the field from liability for personal injuries arising out of his participation in the League.

In support of the motion, defendants argued that that by signing the Release, the plaintiff effectively released the defendants from liability for any injuries plaintiff sustained during the game.

When a participant pays a fee to use recreational facilities, or pays fees to the league, which are used to pay for the use of those facilities, a waiver and release of liability executed by the participant is void pursuant to GOL § 5-326. In order to void a release pursuant to GOL § 5-326, there must be an evidentiary showing that the individual paid a fee for use of the facility.

At the outset, Justice Mayer found that defendants had established a prima facie entitlement to dismissal of the plaintiff's complaint by producing the

subject Release. The documentary evidence further established that plaintiff did not pay a fee to use the field where he was allegedly injured, and that no portion of the League fees were used to pay for use of the subject field. As such, Justice Mayer determined that the Release signed by the plaintiff is not void as against public policy pursuant to GOL § 5-326, and all claims against the defendants were dismissed.

Representing Attorneys: Carla Varriale, Lindsay Kaplow, and Michelle Bochner represented Middle Country Central School District, and Long Island Flag Football, Inc.

Murat Marc v. Middle Country Center School District, Long Island Flag Football League, Inc., et. al.

Supreme Court, Suffolk County

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Georgia Court Dismisses Coaches' Breach of Contract Claim Against Georgia Southern

A Georgia state court has dismissed the claim of two former Georgia Southern University (GSU) assistant football coaches, who alleged breach of contract, fraud and interference after GSU failed to fulfill the 18-month contracts the coaches had initially signed.

In so ruling, the court dismissed the claims of plaintiffs David Dean and Rance Gillespie against the GSU Board of Regents, Athletic Director Tom Kleinlein, Associate Athletic Director for Business Operations Jeff Blythe, Director of Football Operations Cymone George and former head coach Tyson Summers on sovereign immunity grounds.

Dean and Gillespie signed 18-month contracts with GSU on Jan. 27, 2016 with an end date of June 30, 2017. Both coaches alleged that a little over nine months later, they learned the school's Board of Regents and the GSU Athletic Foundation never signed the contracts.

Summers then notified the men on Nov. 3, 2016 that new contracts were being prepared, according to the lawsuit. These contracts had changed the end of the agreement to Feb. 28, 2017.

The plaintiffs alleged that the defendants made this change to save money, because they knew that coaching changes were going to be made at the end of the season. Specifically, Blythe and George "conspired to change the terms of the January Contract and specifically the employment end date."

Then court's decision was likely impacted by a ruling earlier in the summer by the Georgia Supreme Court - www.ajc.com/news/special-reports/sweeping-ruling-says-state-cannot-sued-without-its-consent/MzWbabK9ynereDP1ASItjJ/ - which found that the state cannot be sued without its consent.

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Articles

Attorneys Examine Trademark Issues in the Sports Industry

By Lawrence Stanley, Josh Dalton, and Peter Byrne, of Morgan Lewis

Particularly with sports teams, names matter.

A team's name and logos come to invoke deep-running loyalties and a sense of community. As with any other business, a team's name is its brand, and the goodwill attached to that brand is protected by trademark law. The year 2017 saw court decisions and trends in trademark law and practice that will have a significant impact on how teams select, maintain, and protect their identities—their names and logos.

The Supreme Court rules that prohibition on "disparaging" trademarks is unconstitutional.

Although *Matal v. Tam* arose in the context of the music industry, the case may well have been the most impactful development in sports trademark law over the past year. The case began when Simon Tam, a musician, sought to register his band's name, The Slants. Tam selected the name as a way to "reclaim" stereotypes about Asian people and culture. After the United States Trademark Office ("USPTO") rejected Mr. Tam's application pursuant to the Lanham Act's prohibition on disparaging trademarks, 15 U.S.C. § 1052(a), due to the fact that "a substantial composite of persons . . . find the term in the applied-for mark offensive," Mr. Tam appealed to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit held that the disparagement clause violated the First Amendment. *See In re Tam*, 808 F.3d 1321, 1358 (Fed. Cir. 2015). The case was appealed to the United Supreme Court and, on June 19, 2017, the Court unanimously affirmed the Federal Circuit's holding that the disparagement clause was unconstitutional. *See Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017).

When the *Tam* decision came down, commentators immediately recognized the potential impact on professional sports. The clearest fallout related to the ongoing Washington Redskins trademark case. In 2014, the USPTO cancelled six Washington Redskins' trademarks that include that term, citing the disparagement clause. At the time that *Tam* was decided, the Redskins' appeal was pending before the Fourth Circuit. Following *Tam*, however, the Department of Justice and Native American litigants agreed to dismiss the case, as the Supreme Court's decision rendered the disparagement clause issue moot.

The Redskins are not the only team impacted by the *Tam* decision. Several other sports teams own registrations for names and/or logos that large groups of people may find offensive. For example, Major League Baseball's Cleveland Indians own several U.S. registrations for various iterations of their mascot, "Chief Wahoo." Other notable trademarks that are now apparently safe under *Tam* include those owned by the Chicago Blackhawks of the National Hockey League, the Atlanta Braves of Major League Baseball, and the Florida State University Seminoles, among others.

(U.S. Reg. No. 1259795 owned by the Cleveland Indians)

Prohibition on registration of "immoral and scandalous" trademarks is struck down.

Five months after *Tam*, the Federal Circuit decided *In re Erik Brunetti*, No. 2015-1109 (Fed. Cir. December 15, 2017). In that case, the applicant, Erik Brunetti, applied to register the mark FUCT for use in connection with clothing. His application was initially rejected by the USPTO under the Lanham Act's prohibition on immoral and scandalous trademarks and the Trademark Trial and Appeal Board ("TTAB") affirmed. Mr. Brunetti appealed the TTAB's decision to the Federal Circuit, and, citing *Tam*, the Federal Circuit held that the prohibition against immoral or scandalous marks violates the First Amendment.

Although teams in the four major American professional sports leagues are unlikely to rush to file for offensive, immoral or scandalous trademarks in the wake of *Tam* and *Brunetti*, the same might not be true of minor league teams or less-established sports leagues. Emboldened by those recent decisions, trademark applicants have already applied for marks that would never have stood a chance before those decisions. *See, e.g.* https://www.theverge.com/2017/7/25/16020666/us-trademark-law-disparaging-the-piss-tape-is-real (discussing application for THE PISS TAPE IS REAL, filed shortly after the *Tam* ruling). It stands to reason that upstart professional leagues or minor league teams looking to make a splash may try to garner publicity with edgy team names.

Continued tension exists between confidentiality and trademark protection.

Another notable development in 2017 has been the trend of media outlets looking to the USPTO's trademark register as a source of "breaking news."

Recently, for example, it was widely reported that WWE Chairman and CEO Vince McMahon was exploring a reboot of the short-lived XFL professional football league after it was discovered that a related entity had filed five applications for the mark on December 16, 2017. Similarly, speculation that the city of Seattle will be awarded an NHL franchise was fueled when an attorney for prominent Seattle-based business, Microsoft, filed a trademark application for SEATTLE STEELHEADS on December 12, 2017, for use in connection with various hockey-related goods and services.

The XFL and SEATTLE STEELHEADS applications highlight a potential conflict between sports entities wishing to keep sensitive business plans confidential and the fear that squatters may swoop in and hijack valuable trademark rights. There are a multitude of reasons why an upstart professional sports league or a new hockey franchise may want to keep its plans secret until the last possible minute. In the former case, established leagues may be better able to fend off threats to viewership if given an early head start. As for the latter, relocation and/or expansion of sports teams is rife with uncertainty and it may behoove the new franchise to keep its plans close to the vest until they are finalized. Yet, at least in the XFL and SEATTLE STEELHEADS cases, it appears that worries of being beaten to the Trademark Office won out over secrecy.

Events surrounding the Raiders move from Oakland to Las Vegas demonstrated what can happen when teams relocate. On January 29, 2016, news broke of the possible relocation of the Raiders franchise. That same day, five individuals filed applications for the trademark LAS VEGAS RAIDERS. The USPTO refused each application based on the finding that the applied-for marks falsely suggested a connection with the Oakland Raiders club as well as posed a likelihood of confusion with the team's prior registrations for trademarks that include the term "RAIDERS."

While the Raiders ultimately prevailed over these trademark squatters due to their existing goodwill and prior registrations in the RAIDERS mark, expansion franchises or teams that change their names upon relocation (e.g. the Oklahoma City Thunder) enjoy no such rights. This may require particular diligence, as can be seen in the case of the new NHL franchise in Las Vegas. On June 26, 2016, NHL owners unanimously approved a bid for an expansion franchise based in Las Vegas. Approximately two months later, on August 23, 2016, an entity called Black Knight Sports and Entertainment LLC filed several trademark applications for various "KNIGHT" team names: VEGAS DESERT KNIGHTS (Serial Nos. 87147222 and 87147229), LAS VEGAS DESERT KNIGHTS (Serial Nos. 87147254 and 87147261), VEGAS SILVER KNIGHTS (Serial Nos. 87147242 and 87147247), LAS VEGAS SILVER KNIGHTS (Serial Nos. 87147273 and 87147274), VEGAS GOLDEN KNIGHTS (Serial Nos. 87147236 and 87147239), and LAS VEGAS GOLDEN KNIGHTS (Serial Nos. 87147265 and 87147269). Another two months later, on November 22, 2016, the team name was announced as the VEGAS GOLDEN KNIGHTS. Shortly

thereafter, the team abandoned the SILVER KNIGHTS and DESERT KNIGHTS applications.

While expansion teams and relocating teams that are changing their team names may do well to follow the Vegas Golden Knights' lead of applying to protect potential team names before rumored names leak, the strategy does raise a separate issue. The various "KNIGHTS" applications were all filed on the basis of the team's intent to use the marks. When filing an intent-to-use application, the applicant must submit a sworn declaration that it has a bona fide intention to use the mark in commerce. Since professional sports teams ultimately choose a single name, there is some question as to whether the Las Vegas franchise truly possessed the requisite bona fide intent for any of its name variations. While the USPTO "will not evaluate the good faith of an applicant during the ex parte examination of applications…[c]onsideration of issues related to good faith may arise in an inter partes proceeding." Trademark Manual of Examining Procedure §1101. The Vegas Golden Knights were able to secure their trademark rights by applying for multiple variations of the "KNIGHTS" name before it was finalized but that strategy may render the marks vulnerable to attack by other rights' holders who assert that the team did not have a bona fide intent to use it at the time of application.

Whether in the context of defending legacy names or selecting new ones, these decisions and trends will continue to impact how sports teams develop and manage their goodwill. A new—if slightly less gentle—trademark playing field awaits. Game on.

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Court Hears Summary Judgment Motions in NCAA Compensation Cap Cases — an Analysis

By Jeff Birren, Senior Writer

The NCAA was back in federal court in Oakland California on Tuesday, January 16, 2018 arguing its own motion for summary judgment while seeking to fend off the plaintiffs' motion. There are currently two such cases. One is entitled *In Re: National Collegiate Athletic Grant-in-Aid Antitrust Litigation*. The other is a subset of those plaintiffs in the case entitled *Martin Jenkins et al v NCAA et al.* That case, filed by Jeffrey Kessler from Winston & Strawn in New Jersey Federal Court and transferred to Oakland for pretrial matters, does not include women's basketball players.

The plaintiffs filed their motion for summary judgment in August 2017. (For a discussion of those filings, see "College Athletes Seeking Relief From NCAA's Cap on Athlete Compensation," Ellen Staurowsky, *Sports Litigation Alert*, September 15, 2017." The NCAA opposed that motion and filed their own summary judgment motion. (Ellen J, Staurowsky, "NCAA Opposes College Athletes" Motion for Summary Judgment in Athlete

Compensation Cap Case & Files Its Own Motion For Summary Judgment" *Sports Litigation Alert*, October 13, 2017.)

For the parties in the two cases, fundamental issue in the case now pending before Judge Wilken is what did the decision in the prior *O'Bannon* case foreclose and what issues did it leave open? (*O'Bannon v. NCAA*, 802 F. 3d 1049 (Ninth Circuit, 2015)). Judge Wilken issued her opinion following a bench trial in 2014. The Ninth Circuit affirmed in part and reversed in part Judge Wilken's decision. After a very lengthy discussion affirming much of the decision, the Circuit determined that college athletes were not entitled to receive "cash payments untethered to their education expenses."

The United States Supreme Court subsequently declined both sides' petitions for a writ of certiorari. Thereafter, the NCAA filed a motion to dismiss the *Jenkins* case. Judge Wilken denied that motion in August 2016. ("What to Make of Martin Jenkins et al v. NCAA in Light of O'Bannon," *Sports Litigation Alert* December 9, 2016.). As Judge Wilken noted at the time, *O'Bannon* "is binding on this Court" but the *Jenkins* plaintiffs also sought "other benefits" and "in-kind compensation as well as cash compensation." That ruling set the stage for Tuesday's summary judgment motions.

Judge Wilken took the bench at 2:30 PM and announced that she had an appointment at 4 PM so the hearing would end at that time, and it did, using all ninety minutes. Jeffrey Kessler argued for the plaintiffs and Beth Wilkinson of Wilkinson Walsh + Eskovitz from Washington, D.C. argued for the NCAA and the other defendants. However, they were far from alone as at least twenty-four other attorneys were present in the courtroom and still more appeared by teleconference. One side also brought at least nine bankers' boxes worth of documents, that all remained in the box, yet somehow this vast cast is considered "reasonable" when billing clients or setting statutory attorneys' fees.

Judge Wilken also stated that she had questions for counsel and her questions controlled the hearing, so that neither side was allowed to simply make their prepared oral argument. She immediately noted that the *O'Bannon* decision foreclosed arguments on both sides. As to the NCAA, they cannot claim that there is no restraint of trade in a relevant market. As to the plaintiffs, they cannot seek compensation "untethered" to educational expenses. Kessler claimed that the plaintiffs can challenge the "pro competitive: justifications offered by the NCAA. Wilkinson in turn responded that the *O'Bannon* decision "covers this case." Judge Wilken then asked if that also applied to the women's basketball players are they were not part of the *O'Bannon* case. Wilkinson responded affirmatively because they are "similarly situated."

Judge Wilkins then asked Kessler if there were any NCAA-justifications for the restraints that he would like to contest. He said yes, adding that the facts are different than were before the court in *O'Bannon*. Wilkinson

responded by stating that they should not be back in in court "every time something changes a little." Calling this the "Whack-a-mole" game, as the Supreme Court had stated in *NCAA v. Board of Regents*, 468 U.S. 85 (1983) that the NCAA needed "ample latitude" to supervise college athletics, 468 U.S. at 120.

These three themes were constantly repeated whether in the form of questions by Judge Wilkins or in answers given by counsel. What did *O'Bannon* allow, or not allow; what new material facts exist; and when are new the claimed new facts merely small changes that should not open the door to antitrust courts?

Kessler continued to assert his claim that there were "new facts" and was consequently questioned on this issue by Judge Wilkins. He also stated that the plaintiffs were claiming that over eighty separate NCAA or conference rules violated antitrust law. All such rules were attached to their motion for summary judgment as Appendix A. Twenty-three of those challenged rules are redacted from the file that is available to the public. Of the remaining challenged rules, some apply to the NCAA members and not their athletes. Some twenty-six related to what the athlete may receive. Those specific challenged rules are found in NCAA Bylaw 5, Bylaw12, Bylaw 15 and Bylaw16, and deal with such topics as "Permissible Grant-in-Aid," (Bylaw 12.01.4), "Pay," (Bylaw 12.02.9), "Amateur Status" (Bylaw 12.1.2), "Prohibited Forms of Pay" (Bylaw 12.1.2.1), "Specific Prohibitions" (Bylaw 13.2.1), "Improper Financial Aid" (Bylaw 15.01.2), and "Excessive Expense" (Bylaw 16.02.3) among the challenged restraints.

As part of their opposition, the players also submitted "Appendix B" which is a listing of various benefits disallowed by the NCAA. The players claim that all of the seventeen benefits listed are "tethered to education. So, to a great extent the two antitrust cases come down to that list. As result, the entire list will be quoted here.

1. "A guaranteed post-eligibility scholarship to complete a bachelor's degree at any time after eligibility expires.
2. Subsidized tutoring costs associated with completing a bachelor's degree at any time after eligibility expires.
3. Expanded opportunities to participate in study-abroad programs.
4. A guaranteed post-eligibility scholarship or grant for a graduate degree.
5. Subsidized vocational training.
6. Subsidized professional certifications or licensure programs and fees.
7. A health savings account funded by schools with a maximum contribution for each year of academic progress and an additional contribution upon graduation.
8. A cell phone and call/texting/data plan subsidized by the member school.
9. A local/campus travel stipend.

10. A clothing stipend.
11. Subsidized travel costs for family to attend regular season and post-season games.
12. Money placed in trust by the Conference Defendants and schools that could then be used by the trustee to pay in cash for in-kind benefits for fundamental living expenses—that achieve specified benchmarks that are tethered to educational objectives, such as making academic progress toward a degree, earning academic all-conference recognition, graduating, or pursuing postgraduate education.
13. Incentive payment of up to $10,000, made in installments, for each school year in which a class member completes at least 1/5th of the units required to earn a degree and also has a GPA at or above the NCAA eligibility minimum.
14. A one-time incentive f up to $10,000 for a class member who earns an undergraduate degree, with the payment made available for those class members who earn their degree after their eligibility expires.
15. Cash payments for computers, science equipment, musical instruments, and other items not currently included in the cost of attendance amounts permitted by current NCAA rules but nonetheless related to the pursuit of various academic studies.
16. Cash compensation to pay for study abroad during he summer or a semester abroad.
17. Supplemental compensation to replace the lost income that Class Members cannot earn due to the long hours devoted to basketball or football while also completing schoolwork."

Judge Wilken continued to ask questions. She asked both sides to explain if what *O'Bannon* presented the court was *stare decisis,* claim preclusion or *res adjutica*. No final answer to that question was forth coming by the time the hearing ended.

Judge Wilken asked Kessler if he meant attack the prior finding concerning integration of the athlete into the academic community. The NCAA had maintained that providing more support to the athletes would diminish support for the athletic programs. Kessler responded in the affirmative, pointing out that since the *O'Bannon* trial, support for the schools' athletes had risen but so had overall support for college athletics.

Judge Wilken asked Kessler about the form of injunction that the plaintiffs were seeking. He stated that they wanted the court to enjoin the current rules, then stay the injunction for sixty days so that the athletic conferences can adopt whatever rules they wish, or, alternatively, the NCAA could step in and rewrite the rules. When pressed by the Court, Kessler continued to insist that the conferences could adopt rules as they saw fit.

Judge Wilken then asked Kessler about the trial site for his *Jenkins* case. Kessler ducked, by stating that a decision on whether to transfer it back to

federal court in New Jersey could come before or after the rulings on summary judgment. Wilkinson stated that it could not be remanded until after the summary judgment rulings. Moreover, the *Jenkins* case is a subset of the entire class action*, In Re: National Collegiate Athletic Grant-in-Aid Antitrust Litigation*, that will remain with Judge Wilkins, as *Jenkins* does not include women's basketball players.

Wilkinson continued to argue that the NCAA must be given "ample latitude" to determine benefits to be given to college athletes. There was also interchange between Court and counsel about the possible need for more briefing on various questions, especially including the "less restrictive alternatives." Wilkinson also stated that what they were arguing about was included in the *O'Bannon* case, as "benefits incidental to education is not materially new" to the dispute between the NCAA and their athletes. What was decided in *O'Bannon* "precludes these clams" and the Ninth Circuit decision stated that the NCAA needs "ample latitude" to make and enforce their rules.

As to a possible injunction, she stated that the court needed "to give the NCAA guidance" as to what would be permissible. Kessler responded by pointing out in a case he had participated in against the NCAA, that court enjoined the NFL's "Plan B" and left it up to the NFL to come up with "Plan C."

Wilkinson also pressed the court stating that all of the challenged rules "could have been brought forward" at the last case and thus should now be barred.

Judge Wilkin next asked questions about the expert challenges and then asked the parties about mediation. Kessler stated that they had used Professor Eric Green for those discussions and that they had an agreement as to damages, but were not close to an agreement on liability issues. Judge Wilkins asked counsel to resume those discussions.

The hearing was included a status conference, and Judge Wilkins finally turned to a trial date. The case is to be tried to the court, (as was *O'Bannon*). She then stated that it was set for three weeks but it would likely not take that long as it is heavily based on expert testimony. She asked about December. Wilkinson stated that she had a trial in October and would need time to prepare for this trial, but Judge Wilkins ended the hearing by telling counsel to "think about December."

She left the bench at 4 PM. She did not give any hint of when she might rule on the pending motions, but it was clear that she might send counsel specific questions to answer. She might also ask counsel if there were specific issues that they wished to further brief, including less restrictive alternative and "integration" (of the athlete into the academic community.) So, there is no current timetable, except a schedule that would be consistent with a December trial. With that, Judge Wilkin left the

bench and the hordes of counsel began to huddle. The next day they began to order the transcript of the hearing. That will not be immediately forth coming, as there was no court reporter present at the hearing. It was recorded, so somewhere someone will have to transcribe the audio record, a less than envious task.

The author would like to thank Steve Berkowitz for the extremely timely assistance that he provided.

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NCAA Answers Concussion Lawsuit Brought by Water Polo Player

The NCAA has responded to a concussion lawsuit filed by a former water polo player at Mercyhurst University, addressing each of the six counts in a bid to have the lawsuit dismissed.

Plaintiff Rachel Stock filed the lawsuit in Erie County Court (Pennsylvania), alleging that the Mercyhurst board of trustees and the NCAA exhibited negligence, fraudulent concealment of information about the risks of repeated head injuries, breach of contract and unjust enrichment.

Stock suffered at least four concussions during her two seasons as a goal keeper during the 2014 and 2015 seasons at Mercyhurst, according to the complaint.

As a result, she allegedly experiences or is at risk for loss of memory, inability to focus and an increased risk of developing chronic traumatic encephalopathy (CTE).

Stock further claimed in her lawsuit that she "relied upon the guidance, expertise and instruction of Defendants in understanding the risks associated with the serious and life-altering medical issues attendant to TBIs suffered while playing water polo."

Representing the plaintiff, Pittsburgh lawyer Jesse Drumm claimed that Mercyhurst and the NCAA were "willfully blind to and/or knowingly concealed" the risks of concussions to student-athletes participating in water polo.

In its answer, the NCAA countered that the claim for fraudulent concealment "is not viable because the plaintiff has entirely failed to plead with the necessary specificity that any fraudulent concealment ever occurred." Specifically, it tackled the plaintiff's claim that the NCAA was "aware of the significance of 'the published medical literature'" about the risk of concussions and their danger. "Publicly available information, however, by definition cannot be 'concealed' from others, and the plaintiff has not identified any material, non-public information allegedly concealed from the plaintiff," argued the NCAA. "Thus, the plaintiff's fraudulent concealment claim is legally deficient and should be dismissed."

Turning to the breach of contract claim, the association wrote that the plaintiff "has not attached any contract to her complaint as required, nor has she provided any justifiable basis for failing to do so." It added that another deficiency was a lack of "specificity" around the "essential terms" of the alleged contract.

As for the unjust enrichment argument, the NCAA assailed the fact that the plaintiff "failed to identify any direct benefits she conferred upon the NCAA, which were appreciated, accepted and retained by the NCAA."

As for the negligence and fraudulent concealment claim, the association argued that, if the breach of contract argument survives, the claim should be dismissed because of the "gist of the action doctrine." The doctrine "precludes a plaintiff from recasting breach of contract claims as tort claims.

"If the substance of a plaintiff's allegations is determined to center upon contractual obligations between the parties, then the plaintiff will not be permitted to maintain tort claims relating to those same obligations. Here, plaintiff has asserted multiple tort and contract claims against the NCAA, involving a common core of allegations regarding the NCAA's alleged failure to warn and protect plaintiff from the dangers of head injuries in collegiate water polo. To the extent the plaintiff is permitted to maintain these allegations as contract claims, then pursuant (to the doctrine), the plaintiff's tort claims involving these same allegations should be dismissed."

Turning to the demand for punitive damages, the NCAA maintained that the plaintiff has not pled "sufficient facts ... to maintain such a demand for extraordinary relief." Elaborating on this, it cited Pennsylvania law, which requires that such an award may only be made if the defendant has "acted in an outrageous fashion due to either the defendant's evil motive or the reckless indifference to the rights of others."

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Proposed Pepsi Center Consent Decree Requires Open Captioning at Games and Concerts

By David Raizman, of Ogletree Deakins

In a proposed consent decree submitted for preliminary approval to the federal district court in Denver on December 29, 2017, the owners and operators of the Pepsi Center arena in Denver reached an agreement with a proposed class of deaf and hard of hearing plaintiffs to provide open captioning of all aural (spoken or heard) content at games played and concerts held at the arena. Kurlander v. Kroenke Arena Company, LLC, U.S.D.C. D. Colo. Case No. 16-cv-02754-WYD-NYW.

The idea that aural content must be effectively communicated to arena fans is not new (for example, Feldman v. Pro Football, Inc., 419 Fed. Appx. 381, 392 (4th Cir. 2011); 28 C.F.R. § 36.303(c)(1)).The novelty in this proposed consent decree is that it requires open captioning (in four locations in the corners of the arena) as a required means of providing such communication and that it covers all aural content, including, for example, lyrics to prerecorded songs.

Many arena operators and owners currently have sought compliance with the Americans with Disabilities Act's "effective communication" obligation by providing live-time transcriptions to fans' phones or tablets or through devices available for checkout, by open captioning certain aural content (like the National Anthem or player introductions), and/or by providing sign language interpreters upon request. Open captioning will not necessarily work for all deaf fans or in all facilities because there may be issues with poor viewing angles to static locations from certain seats, deaf fans' varying facility with written English, or the lack of available space for adequate (or any) open captioning.

Because the agreement to use open captioning as the sole compliance solution is the product of a negotiated settlement, arena operators may not want to read the court's eventual approval of the consent decree as a directive or even blessing for this approach. But, arena operators can be reasonably certain that the settlement will prompt deaf fans at other venues to request more open captioning and perhaps even a few legal claims for the failure to provide such open captioning.

To prepare for this likely result, owners and operators of arenas and stadiums may want to review their current practices for providing aural content to deaf fans and guests, including an exploration of the viability and effectiveness of new means of communicating aural content, including the potential for open captioning. If asked in a court proceeding, an arena operator will likely want to say that the open captioning option was recently reviewed and considered, whether or not it is adopted or rejected. Whatever general approach may be adopted does not, however, absolve operators from considering alternative requests for communication from individual fans.

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Parents Sue School and Others for Negligence after Son Suffers Injury Playing Football During Recess

The parents of a youth, who suffered a concussion while playing football during recess, have sued Immanuel Lutheran Church and School in Batavia (Illinois), three teachers and another student and his parents in Kane County court.

Plaintiffs Hasana and Rodney Sisco of North Aurora allege that their son was holding a football in place during recess on Oct. 26, 2015 when another

student ran toward him to kick the ball, and instead “violently” kicked him in the side of the head, causing a concussion.

The lawsuit claims that the school was negligent because it failed to provide “proper supervision.” The three teachers named in the lawsuit were reportedly tasked with overseeing approximately 60 students.

The lawsuit also ascribes negligence because the students were allowed to engage in such activities without proper safety equipment. In addition, there allegedly was a failure to provide proper and prompt treatment of the student’s severe head injuries as well as a failure to call for medical assistance.

The plaintiffs alleged that their son was "injured, both internally and externally, and suffered among other things a severe blow to the head, injuries to his wrist and a severe concussion that resulted in several problems including, but not limited to, post-concussive syndrome, vision problems, cognitive and memory problems, seizures and depression."

The lawsuit seeks unspecified damages of more than $50,000 and is next due in court Jan. 9.

The law firm of Wagenmaker and Oberly is representing the school and church.

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Study Finds Inebriation at Sporting Events Is a Growing Problem

In many western countries, public concern about violence and other problems at sporting events has increased. Alcohol is often involved.

Research shows that approximately 40 percent of the spectators drink alcohol while attending U.S. baseball and football games, especially when alcohol is served within the arenas themselves. Alcohol-related problems can be compounded at large sport stadiums that hold tens of thousands of spectators. This study examined occurrences of overserving at licensed premises both inside and outside the arenas, and allowing entry of obviously intoxicated spectators into the arenas.

To determine the level of overserving and inappropriate entry, trained professional actors portraying individuals who were “obviously” intoxicated visited licensed premises inside and outside sporting arenas, and attempted to gain entrance to the arenas. The settings were three arenas hosting matches in the Swedish Premier Football League that were held in the largest and second-largest cities in Sweden. The scenarios were developed by an expert panel, and each attempt was monitored by observers who assessed the rate of denied alcohol service and denied entry to the arenas.

Overserving and allowing entry of "obviously" intoxicated spectators were frequent at these sporting events. The rates of denied alcohol service were only 66.9 percent at licensed premises outside the arenas (101 of 151 attempts), and 24.9 percent at premises inside the arenas (59 of 237 attempts). The rate of denied entry to the arenas was only 10.8 percent (11 of 102 attempts). The authors noted that the variation in server-intervention rates could reflect a lack of training in responsible beverage service among serving staff at licensed premises inside the arenas as well as entrance staff. This lack of training could contribute to unacceptably high intoxication levels among spectators and contribute to increased alcohol-involved problems within the arenas in Sweden. These findings have implications for alcohol consumption at sporting events in other countries as well, including the United States.

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The Safety-Last Culture May Be Trickling Down to High School Football

By Eugene Egdorf, of Shrader & Associates

As lawyers for folks who have suffered sports-related injuries, we are acutely aware of the risks involved in playing football. However, many young athletes are not, and coaches who should know better sometimes make football even riskier by subjecting the kids in their care to poorly-planned training exercises even before the first game of the season.

These unfortunate truths sprang to mind as we read the complaint in *Mileto v. Sachem Central School District and Sachem East Touchdown Club, Inc.*, a case filed on December 20, 2017 in Suffolk County, New York. The complaint's key allegations:

- Sachem C.S.D.'s football staff took part in a summer football camp owned by a Sachem C.S.D. football booster club;
- On August 10, 2017, sixteen-year-old Joshua Angelo Mileto attended the camp;
- On that day, Joshua was instructed to participate in a relay race in which he and other attendees carried a log over their heads;
- The log—weighing several hundred pounds—struck Joshua when he fell during the race; and
- Joshua died as a result.

It should go without saying that football players of all ages need to be physically fit. But it should also go without saying that coaches who train kids for physical fitness need to do it in a way that minimizes the risk of injury. The risks inherent in having kids carry a heavy log over their heads which could then fall and kill one of them—as the complaint alleges occurred—far outweigh any benefits the kids could derive from the exercise. Even the most basic weight-lifting program calls for a spotter to

ensure that heavy objects (like barbells or logs) lifted by the athlete do not fall and cause injury. We expect that the coaches in this case will have to answer tough questions about the log-carrying exercise and whether they truly considered the risks it posed to the kids in their care.

Of course, this incident did not occur in a vacuum. Time and time again in football, we have seen player safety take a back seat to filling seats and earning profits, from the NFL on down to the college level. For instance, there was the notorious 2011 University of Iowa incident in which thirteen football players were hospitalized with rhabdomyolysis after participating in an unusually strenuous training program. The University's initial actions after that incident—including an involved strength and conditioning coach receiving an "assistant of the year" award less than three months later—left much to be desired from an athlete-safety standpoint. Sadly, we believe that the *Mileto* case may be just one example of how the safety-last ethos incubated at the NFL and college levels has trickled down to high school football.

Egdorf is a frequent contributor to Hackney Publications.

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Attorneys in Bouchard v. USTA Ready for Trial After Jury Selection Date Is Set

It's been more than two years since Canadian tennis star Eugenie Bouchard slipped and fell in a physical therapy room after a mixed doubles match at the U.S. Open, suffering a concussion.

A determination about whether the U.S. Tennis Association was negligent in the incident may soon be over. A proposed pre-trial order suggests that jury selection will begin on Feb. 20, 2018, and that the trial will begin shortly thereafter.

In her complaint, Bouchard alleged that she fell because of a "slippery, foreign and dangerous substance" on the floor of the physiotherapy room of the women's locker room.

Immediately after the incident, Bouchard withdrew from numerous tournaments. She attempted to return to the sport in a match at the China Open on October 5, 2015 against Andrea Petkovic. However, she was unable to finish the match, complaining of dizziness. While she has competed in other tournaments since that fateful day, she has failed to regain her form as one of the world's best tennis players.

In her complaint, she is seeking an unspecified amount of damages for "economic loss, medical expenses and loss of enjoyment life" resulting from her head injury. Through her attorneys, she asserted causes of action for negligence against both the USTA and the USTA's National Tennis Center, where the match was played. She alleged that they were collectively

negligent in “failing to maintain, clean and repair the women’s locker room and physiotherapy room in a reasonably safe and suitable condition” and that they “had actual and/or constructive prior notice of the dangerous condition” which allegedly caused her to fall.

The USTA Claims Bouchard Was ‘Contributorily Negligent’

Among the arguments contained in its answer was the defendants’ assertion that “any and all risks of injury or dangers connected with the incident alleged in the complaint were at the time and place mentioned obvious, apparent and inherent risks and dangers, which … were known or should reasonably have been known by the plaintiff.”

Thus, Bouchard was “contributorily negligent” because, based on her “prior experience and knowledge,” she “knew, or should have known, the physiotherapy room was closed at the time she attempted to enter."

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News Briefs

Swimming Industry Presents Award to Sports Lawyer Nancy Hogshead-Makar

SwimVortex has presented the Carlile Cup for Lifetime Achievement to Nancy Hogshead-Makar, a sports lawyer and Olympic Champion. This is not the first time Hogshead-Makar has been honored, having been recognized multiple times in the civil rights arena, especially the #AquaticsMeToo club of women who have, “by finding the courage to speak out and then through fearless and focused advocacy for women’s sports, raised awareness of a woefully deep and dark corner of Olympic sport.” The Carlile Cup is granted each year to those whose contribution “is not only deep in decades but delivered leadership and pioneering progress to swimming.” Hogshead-Maker is currently the CEO of Champion Women http://championwomen.org/

Big 12 Conference Reprimands and Fines of Texas Tech for Court-Storming Incident

In accordance with the Big 12 Conference Principles and Standards of Sportsmanship, the Conference has issued a public reprimand and $25,000 fine of Texas Tech University for its handling of postgame protocol at the conclusion of the men’s basketball contest against West Virginia University (WVU) on Saturday, January 13. “We have a duty to provide a safe game environment,” said Big 12 Conference Commissioner Bob Bowlsby. “The Texas Tech Department of Athletics has a written event management policy which was unsuccessful in ensuring the safety and security of the visiting team game participants. Although the Big 12 Conference does not currently have a policy prohibiting spectators from

entering playing areas for post-game celebrations, it is of utmost importance that home game management provide adequate security measures for our student-athletes, coaches, game officials and spectators." The following video shows a punch that was thrown by a WVU player against a fan during the incident: https://www.youtube.com/watch?v=GCWaQvp6Zsc

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Sports Law Icon Herb Appenzeller Passes Away at 92

Herb Appenzeller, an icon in the sport law industry as an attorney, teacher, consultant, coach, and publisher, has passed away at age 92. Appenzeller, who published the "From the Gym to the Jury" newsletter as well as wrote or edited 22 books on sports management, risk management and sports law, was a pillar of the Sports and Recreation Law Association (SRLA), the leading organization for sports law professors in higher education. Gil Fried, a sports law professor at the University of New Haven and long-time member of SRLA, noted that "Herb was a great man. I met him around 30 years ago and he served as a mentor, guide, and friend since then. He will be missed by everyone whose lives were impacted by him, and the numerous people who will never know how he made their participation in sports safer."

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