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Case Summaries

Onyshko Appeal Knocked Out by Pennsylvania Superior Court

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Editor's Note: The following will appear as one of several stories in the next issue of Esports and the Law, a complimentary subscription publication available at https://esportsandthelaw.com/*)*

On January 8, 2021, a panel of three judges from the Superior Court of Pennsylvania denied an appeal by Matthew Onyshko, former linebacker for California University of Pennsylvania ("Cal U"). In our Summer 2019 issue, we discussed the 2014 lawsuit alleging that the National Collegiate Athletic Association ("NCAA") was negligent for failing to warn of the long-term effects of repeated head injuries from participating in football. This article serves as an update on recent developments in the case.

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Onyshko Goes Head-to-Head with NCAA

As a brief recap, Onyshko suffered upwards of twenty concussions—three of which resulted in lost consciousness—while playing for the Cal U Vulcans from 1999-2003. Thereafter, Onyshko progressively suffered from "frequent severe headaches, numbness, twitching, muscle atrophy, fatigue, loss of mobility, slurred speech, difficulty swallowing, weakness and other neurological symptoms."[1] Onyshko was ultimately diagnosed with amyotrophic lateral sclerosis ("ALS"), despite having no genetic predisposition to the disease. ALS, also known as Lou Gehrig's disease, is a neurodegenerative disease that affects nerve function in the brain and spine. There is currently no cure for ALS. Onyshko is confined to a wheelchair and relies on an eye-tracking computer system ("ETCS") to speak.

On June 27, 2014, Onyshko and his wife filed their negligence action against the NCAA in the Pennsylvania Court of Common Pleas, seeking $9.6 million in damages.[2] Onyshko alleged that the NCAA breached its duty to warn him of the effects of repeated head trauma. The NCAA moved to dismiss the case twice, claiming it did not owe a duty and that Onyshko assumed the inherent short and long-term risks of playing football. Judge Katherine Emery rejected these arguments and held that the jury must decide the scope of the NCAA's duty and whether the NCAA breached this duty. Notably, Judge Emery acknowledged the NCAA's argument that "getting hit in the head is an inherent risk of football." In rejecting the motions to dismiss, however, Judge Emery cited the Plaintiff's assertions "that the NCAA increased Mr. Onyshko's risk of long-term injury by failing to disclose crucial information as well as failing to have procedures in place with respect to returning to play after sustaining serious head injuries."

NCAA Emerges Victorious After Battle with Onyshko

In May 2019, a sixteen-person jury heard Onyshko's case, marking it as the first football-related case concerning ALS to go to trial. Onyshko's case came shortly after the highly publicized and first-ever football-brain disease case—*Ploetz v. NCAA*—went to trial. However, *Ploetz* settled three days into trial, providing no guidance on how juries would view negligence cases against the NCAA and other similarly situated defendants. Both Ploetz and Onyshko were represented by the same attorney, Gene Egdorf.

During trial, Onyshko presented expert testimony from renowned sports-related brain disease doctors, Dr. Bennet Omalu and Dr. Robert Cantu. Dr. Omalu referred to Onyshko's condition as trauma-induced ALS, CTE-ALS, and chronic traumatic myeloencephalopathy ("CTME"). Omalu asserted that Onyshko's repeated head trauma contributed significantly to his ALS diagnosis, citing the high level of ALS found in football players compared to the general public. The NCAA countered by arguing that Onyshko did not report any of his concussions to coaches or athletic staff while playing football in college, which prevented Cal U from diagnosing or treating his head injuries.

The jury returned a verdict in favor of the NCAA – the verdict slip read "Was the [NCAA] negligent? No." This verdict provided little clarity with regard to the NCAA's duty, as the sole governing body of collegiate athletics, to inform student athletes of the lasting effects of repeated head trauma and whether it breached that duty. Shortly thereafter, Onyshko's attorney, Gene Egdorf, stated that he planned to appeal the case and file a wrongful death action once Onyshko passes.

1 *Onyshko v. Nat'l Collegiate Athletic Ass'n*, No. 1611 WDA 2019, 2021 WL 73954, at *1 (Pa. Super. Ct. Jan. 8, 2021).

2 The case was initially filed in the United States District Court for the Western District of Pennsylvania on December 17, 2013 but was voluntarily dismissed and refiled in the Washington County Court of Common Pleas in Pennsylvania.

NCAA Dodges Appeal, Left Unscathed

In August 2020, Onyshko asked a three-judge panel from the Superior Court of Pennsylvania for a new trial.[3] One of Onyshko's attorneys, Diana Nickerson Jacobs, argued that testimony from Cal U administrator William Biddington, not a party to the litigation, regarding repeated head trauma warnings given by the university "improperly muddied the water about the NCAA's responsibilities."[4]

Biddington testified that he created and implemented policies to warn and educate student athletes on concussion indicators and the related long-term effects. Biddington admittedly did not attend the team meetings in which the information was delivered to the players. He instead provided the trainers with the information, who in turn presented the practices and policies to the team. The head athletic trainer testified to being present in a preseason meeting in which the concussion policies were discussed.

The NCAA's attorney, Lewis W. Schlossberg, argued that the warnings provided by Cal U were relevant to refute the allegation that the NCAA's failure to provide this information caused Onyshko's injuries. Schlossberg stated, "Even if [the NCAA] didn't produce the information, Cal U did…Because Cal U in fact provided this very information, the NCAA could not have been the cause of the development of his injuries."[5] Jacobs countered that the "jury had no method to consider the evidence from Cal U, whether these actions were reasonable or whether they negated the harm caused by the NCAA's conduct."[6]

On January 8, 2021, the panel adopted Judge Lucas' opinion from October 1, 2019, holding that Onyshko was not entitled to relief. Once again, this appellate decision does not provide concrete guidance as to how negligence arguments in subsequent sports-related latent-brain-disease cases will fare.

The panel's rejection reinforced the notion that these are fact-dependent cases, to be decided by juries. Further, the NCAA's efforts to offer evidence that the university informed student athletes of the effects of repeated head trauma were allowed by the court and proved successful, despite possible confusion of the jury. It is unclear whether this strategy will be permitted by future courts hearing similar cases.

NCAA Fending Off Future TBI Negligence Lawsuits

One of Onyshko's lawyers, Jason Luckasevic, initiated the first lawsuit against the National Football League ("NFL") on behalf of 120 former players.[7] The suit cascaded into a class action lawsuit on behalf of thousands of former NFL players and ended in a $1 billion settlement in 2016 to be distributed over 65 years.

Luckasevic decided he was going to "take [the NCAA] on case by case by case" next. The *Onyshko* case was the first in his pursuit to hold the NCAA liable for its negligence. Thereafter, Luckasevic brought multiple individual suits against the NCAA on behalf of former student-athletes in numerous states. He plans to continue his crusade as more courts resume civil jury cases that were put on hold due to the COVID-19 pandemic.

Separate from Luckasevic's efforts, in 2013, similar TBI suits brought by student-athletes against the

3 Matthew Santoni, *Ex-College Athlete Seeks to Revive NCAA Concussion Suit*, Law 360 (August 25, 2020), https://www.law360.com/articles/1304271/ex-college-athlete-seeks-to-revive-ncaa-concussion-suit.

4 *See id.*

5 *See id.*

6 *See id.*

7 Jason Schwartz, *The Lawyer Who Took on the NFL Over Concussions Has a New Strategy That Could Devastate the NCAA*, Sports Illustrated (Oct. 16, 2020), **https://www.si.com/college/2020/10/16/ncaa-concussion-cases-daily-cover**.

SPORTS LAW EXPERT

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Barbara Osborne, J.D.
Expertise: Gender Discrimination, Title IX, Sexual Harassment, Sexual Orientation Discrimination, Student-Athlete Pregnancy; Legal Issues in College Sport
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NCAA were consolidated.[8] United States District Judge John Lee granted final approval of the $75 million dollar settlement in August 2019.[9] Seventy million dollars were directed to fund concussion and TBI sports injury scanning for former and current players and $5 million was dedicated to concussion-related research.

The NCAA has faced a slew of similar class actions by former student-athletes. Currently, in the Northern District of Illinois, a multi-district litigation ("MDL") is proceeding against the NCAA, as well as various leagues and numerous colleges and universities. Four bellwether cases are advancing through fact discovery for determining class certification for student-athletes who played football and sustained head trauma from 1952 to 2010.

The NCAA will likely be thwarting off individual suits, piloted by Luckasevic and others, and class action suits concerning its failure to warn student-athletes of the lasting health effects from head trauma for the foreseeable future.

Other Defendants Surviving Repeated Blows by Negligence Suits

Plaintiffs in sports-related head injury cases at the collegiate level typically bring negligence suits against the university and all relevant parties employed by the university, including athletic trainers, athletic directors, team doctors, and coaches and staff. As previously mentioned herein, (and for a host of other reasons including sovereign immunity) there is a trend for Plaintiffs to sue the NCAA and other defendants more removed from the day-to-day interaction with the student-athletes, such as the athletic conferences and divisions.

These entities have and likely will continue to use the "No Duty" argument that the NCAA benefited from in the *Onyshko* case. If a duty is established, these defendants will refute the breach and causation elements of these negligence claims by attacking the Plaintiff's attempts to use expert testimony to bridge the causal gaps in their claims. The science is still unsettled, particularly concerning CTE, which creates further uncertainty for parties bringing and defending these actions.

It is clear Plaintiffs in these cases can survive the procedural thresholds and get these cases before a jury. It is unclear, however, how juries will continue to decide these cases should they go to trial. The *Onyshko* verdict will not provide the NCAA and similar defendants with a get-out-of-jail-free card as these cases are factually dependent and will be decided by juries on a case-by-case basis. But defendants beware: if just one jury finds the NCAA, a conference, or a division negligent for not warning collegiate athletes of the effects of repeated head trauma, legal experts presume the litigation floodgates may open.

8 Todd Hatcher, *NCAA Faces Proposed Class Action Lawsuit Over Student Athlete Concussions*, Expert Institute (Feb. 12, 2021), https://www.expertinstitute.com/resources/insights/ncaa-faces-proposed-class-action-lawsuit-over-student-athlete-concussions/.

9 Joseph M. Hanna, *NCAA $75 Million Settlement Gets Final Approval with $14 Million in Fees*, Lexology, https://www.lexology.com/library/detail.aspx?g=7c0a3f50-4b9e-48f7-96dc-88ce3b306d68 (last visited Feb. 26, 2021).

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Second Circuit Upholds Decision that Interscholastic Basketball Officials Are Not Statutory Employees

By William J. Robers, of Sparks Willson, P.C.

The 2nd Circuit Court of Appeals is the latest court to decide that interscholastic basketball officials are not "employees" of either the assigning organization or the schools. Girard v. International Association of Approved Basketball Officials, Inc. et al., 20-981-cv (2d Cir. Jan. 22, 2021).

Ginger Girard, a middle and high school basketball official in Connecticut sued the International Association of Approved Basketball Officials, Inc. ("IAABO") and Central Connecticut Board No. 6, alleging gender discrimination in assignments, and retaliation for complaining about the alleged discrimination, both in violation of 42 U.S.C. § 2000e-2 ("Title VII")

The 2nd Circuit affirmed the District Court's dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Title VII requires the existence of an employer-employee relationship, including an element of control. In Community for Creative Non-Violence v. Reid, 490 U.S. 30 (1989), the Supreme Court identified thirteen non-exhaustive factors to assist courts in determining

whether an employer-employee relationship exists, including without limitation, the right to control the manner and means of the services provided, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the method of payment, and the provision of employee benefits.

In dismissing the complaint, the court found that the plaintiff had admitted that the defendants do not pay her for officiating and do not provide any type of employment benefits. Rather, the defendants assign officials to games, and the schools pay the officials directly. As a result, the defendants could not be "employers" as a matter of law.

In the alternative, Girard alleged that the defendants were "employment agencies," which are also barred by Title VII from discriminatory practices and retaliation. The court found that the definition of an "employment agency" requires a person who "procures employees for an employer." Although the schools do pay the referees, Girard had not plausibly alleged that she was an employee of the schools. The schools did not exercise meaningful control over Girard, and Girard officiated for a number of different schools, none of which provided any employment benefits other than pay for the games officiated.

The 2nd Circuit has therefore provided further support that interscholastic officials are independent contractors, provided they are paid by the schools, and are not subject to significant control of the schools or the assigning organization.

William L Robers is a shareholder at Sparks Willson, P.C. in Colorado Springs, Colorado, and is chair of the firm's Sports and Entertainment Law Practice Group. In addition, Mr. Robers is an adjunct professor of sports law at University of Colorado – Colorado Springs, and an NCAA Division I football Official.

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Minor League Baseball Team Has Two Causes of Action Dismissed

By Jeff Birren, Senior Writer.

Tough economic times often leads to litigation as companies try to sue their way out of their financial difficulties. In 2020 minor league baseball was shut down by COVID-19, and many teams filed lawsuits against their insurance companies that denied the claims. Three teams sued their insurance carriers in the U.S. District Court in New Jersey, alleging breach of contract, anticipatory breach of contract, and seeking declaratory judgment. Recently the Court granted a motion to dismiss the causes of action against one defendant because the policies specifically "exclude coverage for any 'loss, cost or expense caused by resulting from or relating to any virus'" (7th *Inning Stretch LLC et al v. Arch Ins. Co., et al*, U.S.D.C, N.J. Case No. 20-8161 (SDW) (LDW) ("*7th Inning"),* (1-19-21)).

Background

COVID-19 brought havoc to many businesses and baseball was no exception. On March 12, 2020 Major League Baseball cancelled what remained of spring training and postponed the start of the regular season by at least two weeks. Four days later MLB announced that the regular season was postponed indefinitely as was minor league baseball. On June 23, 2020 a number of minor league teams sued their insurance companies for denying coverage for the losses caused by COVID-19 (*Chattanooga Professional Baseball, LLC d/b/a Chattanooga Lookouts et al v. Philadelphia Indemnity Insurance Co, et al,* U.S.D.C. E.D. Penn., Case No. 2:20—cv-03032-TJS (6-23-30)). Just two days later the Court noted that the class case for breach of contract and declaratory judgment was "filed by fifteen plaintiffs located in eleven different states against five insurance companies involving different contracts of insurance" and consequently severed each case (Id., Order (6-25-20)).

On June 30, 2020 the remaining minor league baseball season was cancelled. Two days later, *7th Inning* was filed in New Jersey federal court. The complaint was 25-pages and with 391 pages of exhibits that included the insurance policies. 7th Inning Stretch, De Wine Seeds Silver Dollars Baseball, LLC (the Asheville Tourists) and Whitecaps Professional Baseball

Corporation (the West Michigan Whitecaps) were the plaintiffs. Arch Insurance Co. ("Arch") and Federal Insurance Co. ("Federal") were the defendants. The case was assigned to Judge Susan D. Wigenton.

The plaintiffs subsequently filed an Amended Complaint that was 36 pages with 491 pages of exhibits. Arch and Federal were given an extension to respond. Count One was brought by the Whitecaps against Federal. Federal answered the Amended Complaint on October 10, 2020. Arch had a different plan.

Arch filed a Motion to Dismiss the second and third causes of action asserted against it by 7th Inning and DeWine Seeds on October 14, 2020. The two plaintiffs naturally filed an opposition and Arch replied. The plaintiffs tried to file a sur-reply but that was denied by the Court. COVID-19 also led to the cancelling of oral argument in cases across the country, and the Court "reached its decision without oral argument" (*7th Inning* at 2).

The District Court Decision

The Court stated that "an adequate complaint" must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." This "requires more than labels and conclusions" and the factual "allegations must be enough to raise a right to relief above the speculative level." The Court had to "accept all factual allegations as true" and "construe the complaint in the light most favorable to the plaintiff." This "tenet" "is inapplicable to legal conclusions" and "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" (Id., internal citations omitted).

The Court "writes only for the parties and assumes their familiarity with the procedural and factual history of this matter." Governors "across the county, including the governors of North Carolina and Washington" (where the Tourists and 7th Inning play), had "issued emergency orders" designed "to prevent the spread of the virus, which led to the cessation of the minor league baseball season" and that caused the "Plaintiffs to suffer 'catastrophic financial loss" (Id.). "Plaintiffs seek to recover under commercial property insurance" which provided coverage for "direct physical loss to covered property at a 'covered location' caused by a covered loss"; for "lost earnings and expenses 'during the restoration period'" when the business "is necessarily wholly or partially interrupted by direct physical loss of or damage to property at a covered location"; and for "coverage for earnings and extra expense to include loss sustained while access to 'covered locations' or a 'dependent location' is specifically denied by an order of civil authority." The seasons were shut down by civil authorities, but to be covered this "order must be a result of direct physical loss of or damage to property" and that is not what happened to the ballparks as a result of COVID-19. That, however, was just the beginning of the Court's coup de grace.

The policies specifically excluded "coverage for any 'loss, cost or expense caused by, resulting from or relating to any virus, bacterium or other microorganism that cases diseases, illness or physical distress that is capable of causing disease, illness or physical distress'" (Id. at 2/3). The plaintiffs therefore had "failed to meet their burden to show that the claims fall 'within the basic terms'" of the policies (Id. at 3). The policies "unambiguously limit their coverage to physical loss or damage to Plaintiffs' commercial property" and they had "not alleged any facts that support a showing that their properties were physically damaged." The plaintiffs asserted that the Stay-At-Home orders and the "resultant actions by the government forced the cessation" of the minor league season and this "caused Plaintiffs to lose income and incur expenses. This is not enough." Furthermore, the Stay-At-Home "orders were issued to mitigate the spread of the highly contagious novel virus. Plaintiff's losses are tied inextricable to that virus and are not covered by the Policies" (Id. at 4).

The plaintiffs argued that the virus exclusion was "unavailing" because the defendant "obtained the exclusion 'through misrepresentation to regulators.'" That was a "New Jersey State law defense" that "has not been adopted by either North Carolina or Washington" (Id. at 3, FN 6). The Court also cited fourteen decisions from "other federal courts" that "have reached the same conclusion in suits involving similar policy terms" (Id. at 4, FN 7). Though the Court "was sympathetic to the very real losses business have suffered during this pandemic, it cannot grant Plaintiffs the relief they seek" (Id. at 4). The Court dismissed "Counts Two and Three of the First Amended Complaint" "with Prejudice" (Id.).

Two weeks later two of plaintiffs' counsel filed a motion to withdraw on February 2, 2021. The Court granted their motions the following day. Federal then sought leave to file a motion for judgment on the pleadings. The motion was granted on February 19, 2021. Federal was given one week to file its me-too motion. The plaintiffs have until March 4, 2021 to file an opposition, and Federal can reply by March 11, 2021 (Order (2-19-21)).

The Court's opinion was cited with approval soon after it was issued by New Jersey federal District Court Chief Judge Wolfson in *Causeway Automotive, LLC, et al v. Zurich American Insurance Company, et al,* Case No. 20-8393 (FLW (DEA) at 13 (2-10-21)). It also cited another minor league baseball case that came to the same conclusion, *Chattanooga Prof. Baseball LLC v. Nat'l Cas. Co,* No. 20-1312 2020 WLL 6699480 at 3 (D. Ariz. (11-13-20). Judge Wolfson noted that in *Chattanooga* there was "no allegation" that "absent the pandemic, the government would have been prompted to issue stay-at-home orders or otherwise inhibit access to the ballparks" (Id. at 13).

Conclusion

The Court will likely grant Federal's motion for judgment on the pleadings, so the plaintiffs will soon be in the Third Circuit should they appeal. One wonders if any of the minor league team/plaintiffs ever read their insurance policies before they filed the lawsuits, or, if they ever asked for virus-related coverage. It is also interesting to speculate if they knew that their claims were dubious but hoped for a settlement or some other *deus ex machina* relief. The losses are substantial but that does not mean their carriers are financially responsible.

The lesson may be that ballclubs should carefully read their insurance policies before they purchase the policy and make sure that they have the coverage they need; recognizing that although no one in sports could have predicted the COVID-19 pandemic and what it has done to sports across the world, that does not mean that insurance policies that exclude virus-related coverage will be retroactively re-written to provide coverage.

As always, I must thank David Stern, Esq., of Blaney McMurtry of Toronto, Canada for his constant assistance.

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Right to Publicity Litigation Further Defines What Is A Transformative Use for Video Game Companies

By Courtney Seams, GW Law 2L, (Contributing Research, Joseph La Vine)

In a recent US Court of Appeals for the Third Circuit decision, *Hamilton v. Speight*, 827 Fed. Appx. 238 (3rd Cir. 2020), Microsoft and Epic Games prevailed when the court found that their video game character in the popular Gears of War video game franchise did not misappropriate the character's likeness from the Plaintiff, Lenwood 'Skip' Hamilton.

Hamilton worked as a professional wrestler in the 1990s and was known as 'Hard Rock' Hamilton, the wrestler with a distinctive wardrobe. His out-of-the-arena persona focused on spreading the "message to kids about drug awareness, and the importance of getting an education," according to Court documents. Prior to wrestling, he played NCAA Division I football, followed by a brief career at the professional level with the NFL Philadelphia Eagles.

During his wrestling career, he worked at a wrestling event with Lester Speight, a defendant in the case. Following a match, Hamilton claims Speight discussed plans for developing a violent shooting game, wanting Hamilton to be involved. Hamilton turned down the project due to its highly violent gameplay, as it was the complete opposite of his persona, he had worked so hard to develop. Hamilton's lack of interest did not deter Speight, who went on to create the Gears of War franchise, which follows fictional human characters who fight "exotic reptilian humanoids known as the Locust Horde" on an earth-like planet named Sera.

In the complaint, Hamilton alleges Gears of War is the same violent shooting game discussed after the wrestling match and that upon seeing one of the main characters, Cole Train, it was like "looking in the

mirror." Not only was Train an athletic African American male who played the fictional game of thrashball, the game's highly fantasized version of football, but the game permitted the purchase of skins that allowed the character to dress in a civilian look or a thrashball outfit.

For Hamilton, this was too close to home and he decided to file an action against Microsoft and Epic Games, (developers and distributors), as well as Speight, for violating his right to publicity. The Defendants moved for summary judgment, claiming that the First Amendment right of free expression outweighed Hamilton's right to publicity since the Train character was a 'transformative use'.

The transformative use defense comes from the doctrine of 'fair use', where copyright law allows an 'infringer' to make limited use of an author's work (in this case, Hamilton's name, image, and likeness), without asking permission. Courts consider four primary factors in determining whether a particular use qualifies as 'fair', with one of them being 'transformative'. Specifically, the court will determine fair use if the original work is transformed to such a high degree that the use no longer qualifies as infringing. *(Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)).

The lower court, the US District Court for the Eastern District of Pennsylvania, found that video games are protected as expressive speech by the First Amendment and applied the transformative use test to determine whether the character containing Hamilton's likeness was so transformed that it became the defendants' own expression instead of Hamilton's likeness. If found as such, the Defendants' rights to expressive speech under the First Amendment would outweigh Hamilton's right to publicity and Hamilton's claims fail.

The lower court found that the Train character satisfied the Transformative Use test because (1) Hard Rock Hamilton was not the "very sum and substance" of Train's identity and (2) the context Train appears in is transformative. In coming to the first conclusion, the court found that the Train character does not share the same name as Hard Rock Hamilton, wears heavy armor, carries heavy weaponry, and has a vastly different persona of the family-friendly Hamilton, which Hamilton himself admitted. The only similarities between Train and Hard Rock Hamilton that the court found were that they were both muscular African American males who played similar sports and had similar faces, skin tones, and large body builds. Thus, the court found that the similarities in likeness were too broad for Hard Rock Hamilton to be the "sum and substance" of Train's identity. In coming to the second conclusion, the court found that Cole does not and cannot wrestle like Hard Rock Hamilton, but instead battles reptilian humanoids on another planet. The court classified this major difference between the two characters' environment and actions as a transformative change.

In sum, the District Court took into account the minimal similarities between the two characters and the transformative change and granted the Defendant's motion for summary judgment, finding that Hamilton's likeness was so transformed it became the defendants' expression and his claims were thus barred by the First Amendment.

On appeal, the Third Circuit Court found that no reasonable jury would conclude that Hamilton is the "sum and substance" of the Train character. The Court admitted there were similarities between the two, but found that the differences show that Hamilton was, at most, just one source of inspiration for the creation of Train. As did the lower court, the Third Circuit found that the transformative use test was satisfied and that the First Amendment barred Hamilton's claims, affirming the District Court's grant of summary judgment.

Hamilton is now appealing his case to the Supreme Court, asking for the court to define the scope of publicity rights and create a standard for all right to publicity cases to be evaluated on. This case is yet another example of the Transformative Use standard, seen previously in a case about the NCAA college football video game, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013), and it may become the common defense for video game manufacturers accused of imitating someone's likeness. Should the Supreme Court take Hamilton's case, it is possible a uniform standard regarding publicity rights in video games could be developed.

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TopGolf Again Defeats Antitrust Claims Arising from Its Acquisition of ProTracer

By Rob Harris

Almost three and a half years ago, a Texas federal court denied SureShot's claim that TopGolf's acquisition of the Protracer technology constituted an antitrust violation in that it threatened SureShot's ability to utilize this technology, thereby threatening its ongoing viability as a TopGolf competitor (Positively Neutral's discussion of the initial decision **is available here**). Since then, the lower court's decision was affirmed by the Fifth Circuit, leading to SureShot–which had terminated operations–filing a new lawsuit, again alleging antitrust violations by TopGolf. Again, SureShot's claims have been **dismissed by the Texas federal court**.

By way of background, SureShot was established in 2014, ostensibly to provide a competitive alternative to TopGolf's driving range/entertainment centers. To enhance its brand differentiation, SureShot acquired rights to the Protracer technology with which television golf fans are familiar. SureShot contracted for a five-year licensing arrangement, with annual one-year renewals that would be automatic unless either party provided advance notice of termination.

One year later, TopGolf acquired Protracer, creating concerns by SureShot that TopGolf would terminate SureShot's access to the Protracer technology as soon as the contract permitted. As the court recently explained, "SureShot contends that under these circumstances, its financial backing began to unravel, and its business became economically unfeasible. At some point, SureShot ceased operations before ever opening a facility." And the court agreed that "[i]t remains inescapable that the perceived but unspoken (or unconveyed in any fashion) threat of the possibility that Topgolf might withhold Protracer in the future was the motivation for SureShot's decision to cease operations."

Nonetheless, the court has reaffirmed its earlier decision that SureShot has failed to state a cognizable claim for antitrust violations against TopGolf: "SureShot has not alleged any kind of denial of access to establish that it suffered an injury-in-fact."

SureShot failed to allege that TopGolf terminated SureShot's contractual rights to the Protracer technology, or–especially since SureShot terminated operations before the agreement's initial term expired–that TopGolf failed to agree to extend the agreement.

Even though the court concluded that the complaint's allegations may have alleged "a monopolistic intent by Topgolf" in its acquisition of Protracer, "this alleged monopolistic intent is not adequately tethered to any antitrust activities or to an antitrust-related injury allegedly suffered by SureShot."

Ron Harris is an attorney, who publishes the site ***www.GolfDisputeResoluton.com***

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Articles

The University of Pittsburgh Uses the Dragonetti Act to Attempt a Reversal on Its Former Wrestling Coach

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

Jason Peters, one-time coach for the University of Pittsburgh's wrestling team, had his racial discrimination and breach of contract lawsuit against the University dismissed by a federal court in September 2020. Because the court rejected Coach Peters' legal case, the University is now attempting a 'reversal' by suing its former employee to recover expended attorneys' fees and other damages allegedly caused by the coach's "frivolous" litigation.

By way of background, Jason Peters was hired by the University of Pittsburgh in 2013 as the school's head wrestling coach. During a 2017 winter break wrestling tournament in Evanston, Illinois, while at the hotel after the event, a number of the team's wrestlers were purported to be under the influence of alcohol and to have used the internet to secure the services of three alleged prostitutes. Two of the wrestlers,

however, sustained a "gut wrench" when they allegedly had $100.00 stolen from them by their "invited guests." Police were called to investigate the purported theft, wherein it was discovered that the Pittsburgh wrestlers solicited the services of the women through *backpage.com,* a now-defunct website, which federal authorities subsequently seized as part of a sex trafficking investigation.

On January 13, 2017, the University suspended both Coach Peters and the wrestlers involved while it investigated the matter. Six days later, on January 19, 2017, Pittsburgh by means of a "technical fall" terminated the employment agreement it had with Coach Peters. The University released a statement indicating that the termination was due to the incidents that occurred during the winter break tournament in Evanston and because Coach Peters failed to timely inform the athletic director of these occurrences as mandated per his employment contract.

As of result of his dismissal, Jason Peters attempted to "takedown" the University by filing a federal lawsuit claiming that the termination was without "just cause" and that he was "discharged and otherwise discriminated against [by the University] on the basis of his race."[10] The federal judge, after "grappling" with a series of pre-trail motions, in September 2020, dismissed all of Coach Peters alleged claims.

Not willing to allow Coach Peters to "escape," the University of Pittsburgh responded with its own attempt at a "takedown" by filing an action against Coach Peters. Per its lawsuit, the University claims that the former coach was negligent when he used the court system to file his "wrongful" and "frivolous" legal claims and in doing so, he violated the State of Pennsylvania's Dragonetti Act.

The Dragonetti Act, the State of Pennsylvania's codification of the common law tort of wrongful use of civil proceeding, was passed by the state legislature in 1980. The statute is designed to allow those initially named as defendants in a dismissed civil action, to then counter-sue those that frivolously or wrongfully filed the initial civil proceeding against them. In order for a party to prevail on a claim under the Dragonetti Act, the plaintiff must establish the following two statutory requirements:

a. The person who was responsible for the legal action acted in a grossly negligent way, pursuing the case without probable cause and primarily for a purpose other than the stated basis of the lawsuit, and

b. The original claims are terminated, and the ruling was in favor of the person who was the original defendant.[11]

In other words, if a party is sued maliciously and without reasonable cause, such party can file a lawsuit under the Dragonetti Act as long as it prevailed in dismissing the original claim or claims. Note, however, the mere fact of successfully defending oneself does not automatically mean that the courts are going to find that the original plaintiff's cause of action was wrongful or frivolous. As per the matter of *Hart vs. O'Malley*, the plaintiff has to prove that the actions of the original plaintiff were grossly negligent. "An action for wrongful use of civil proceedings pursuant to the Dragonetti Act does not require a *prima facie* showing of actual malice, but such action requires proof that the defendant acted in a grossly negligent manner."[12]

In addition to the above, a Plaintiff (former Defendant) has the burden of proving to the court the following:

a. It was indeed the defendant (former plaintiff) that filed the initial civil proceedings.

b. That proceedings were terminated in the plaintiff's (former defendant) favor.

c. The defendant (former plaintiff) did not have probable cause for the initial/underlying action.

d. The primary purpose for which the initial proceeding was brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based.

e. The plaintiff has indeed suffered damages.[13]

To show it can meet its burden that Coach Peters' actions were grossly negligent, the University claims that his racial discrimination and breach of contract lawsuit was actually an "illegal hold," absent of any actual basis. Pittsburgh alleges in its complaint that "Peters knew there were no facts that would support a race discrimination claim. In fact, a year after Peters

10 Jason Peters vs. Univ of Pittsburgh Civil Action No. 2:18-cv-732.

11 Title 42 Pa.C.S.A. Judiciary and Judicial Procedure Section 8351.

12 *Hart v. O'Malley,* 781 A.2d 1211, 1218 (Pa. Super.2001).

13 Title 42 Pa.C.S.A. Judiciary and Judicial Procedure Section 8353.

filed his race discrimination claim, he admitted under oath that he was still unaware of any evidence that the university discriminated against him based on his race."[14]

In addition, the University intends to prove that it has suffered significant monetary damage by exhibiting how Peters, on multiple occasions, went out of his way to increase the University's litigation costs. The University asserts in its complaint that the former coach 'fled the hold' on numerous occasions by needlessly and unnecessarily extending out the discovery process when he deliberately and knowingly failed to turn over "thousands of documents, text messages, and information about dozens of witnesses."[15] In some of those texts, the University points out, the former coach stated that he wanted to embarrass the university, allegedly texting, "I love fighting" and "(expletive) those guys," according to the lawsuit.[16]

All in all, the University of Pittsburgh has a tough match ahead in attempting to prove that Jason Peters' act of filing a federal complaint based upon racial discrimination and breach of contract was grossly negligent. But if the University can, the State of Pennsylvania's Dragonetti Act provides a viable opening for the University to attempt a 'reversal' against its former employee that would allow it to recoup some, if not all of the litigation costs it incurred in defending against the lawsuit which could possibly include attorneys' fees and costs associated with discovery. The University of Pittsburgh may not end up "pinning" Jason Peters, but the "jury of appeal" may allow for a "major decision."

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Secrecy Abounds in Washington Football Team Lawsuit

By Tom Raffin

Despite their disagreement on just about everything else, Dan Snyder and the Washington Football Team minority owners are in agreement on one thing: they do not want the public to know what is going on in their dispute over the partial sale of the team.

Minority Owners Robert Rothman, Dwight Schar, and Frederick Smith filed a motion to seal all details and documents relating to the suit that has stalled their attempt to sell their combined 40% stake in the controversy ridden franchise to an anonymous group for approximately 1.5 Billion dollars. The three minority owners are suing team owner and chairman of the board Daniel Snyder, who has sought to prevent the sale of the shares by exercising his right to first refusal. While the initial sealing was filed by the Plaintiffs, both Snyder and the NFL have supported the filing and have submitted findings of fact and law to justify the secrecy.

Having written extensively on the matters at the core of the controversies with the Washington Football Team, the *Washington Post* intervened to oppose the motion to entirely seal the documents relating to the case, stating in a December 14, 2020 filing with the court.

> *The Post does not anticipate that it would take a position on more than a small number of the dozens of documents at issue, but believes that the public must at least be given an opportunity to challenge the arguments made before the revised motion is adjudicated. (Gamse, 2020, p. 3)*

The Washington Post had originally broken the story in a late August bombshell that detailed the alleged exploitation of the Washington Football Team's cheerleaders and a work environment "in which women say they have been marginalized, discriminated against, and exploited." (*Washington Post*, p. 14) That same article was deeply critical of Snyder and even detailed a story where one of the team cheerleaders "was more or less propositioned" (*Washington Post*, p. 49) by Snyder.

Citing the importance of following the procedure that determines whether or not documents included in filings should be sealed, Maryland District Court Judge Peter Messitte examined each filing and determined if it must be sealed or not, and what parts must be sealed if it is not fully unsealed. The decision to seal a document is based on what judicial documents fall under the constitutional presumption, and which fall under

14 https://triblive.com/sports/pitt-sues-former-wrestling-coach-claims-he-manufactured-discrimination-lawsuit/

15 The court eventually ordered Jason Peters to turn over any and all text to the University.

16 https://triblive.com/sports/pitt-sues-former-wrestling-coach-claims-he-manufactured-discrimination-lawsuit/

the common law of presumption of public right of access (Rothman v. Snyder, II).

The Courts found on a preliminary level that the filings of record fell under the less rigorous common law presumption of access. This common law presumption of access is tied to all judicial records and documents but can be overruled if countervailing interests significantly outweigh the public interests to accessing the documents. In total, the Plaintiffs, Defendants, and NFL proposed sealing the record for a variety of reasons that came down to three points laid out by Judge Messitte in a December 17th order "(1) confidential business information, including the confidential proposal to purchase Plaintiffs' shares in [the Washington Football Team]; (2) information pertaining to confidential arbitration proceedings involving the same parties; and (3) private personal information. (Rothman v. Snyder, II. B)"

In laying out these three main points as a part of his December 17th opinion and order, Judge Messitte stated that confidential business information would be revealed that could compromise the sale of the shares. Furthermore, some of the information in the court filings is confidential to a degree that the release of said information would provide the opportunity for an opponent to take advantage of that information essentially amounting to the release of trade secrets. As such, Judge Messitte deemed that information subject to narrow redactions. The NFL and the Defendant argued that since there is an ongoing arbitration involving the NFL, the sensitive information from those proceedings should also be sealed. Judge Messitte concurred with that position and allowed for a narrow redaction of information as it related to the ongoing arbitration proceedings and could also compromise the NFL and the related parties involved in the arbitration. Additionally, on a narrow basis, the proposed sealing of any personal information found in the records such as phone numbers and addresses was granted. Judge Messitte also found fit to seal in their entirety, documents that contain the private information of parties that are not included in the suit, as their relevance in the broader context of the case was not of significance to the degree that would merit a targeted redaction.

In total, the Judge Messitte ordered that 44 filings be unsealed in their entirety, while an additional 27 filings were subject to narrow redactions before also being placed on the public docket. In ruling to limit what is sealed to a very specific set of information the Court is ruling to uphold protections for the public to have access to the records as is their right. While this case is far from resolved, the determination of the degree to which Court filings will remain sealed allows for Suit to go forward and will allow for a greater level of public scrutiny as it relates to a case that will very much have the eye of the public as it moves towards a conclusion.

Tom Raffin is a first-year doctoral student at Florida State University in the Department of Sport Management.

Citations :

Lewd cheerleader videos, sexist rules: Ex-employees decry Washington's NFL team workplace. (2020, November 20). Washingtonpost.com, NA. https://link.gale.com/apps/doc/A642373842/ITOF?u=tall85761&sid=ITOF&xid=00fd59cb

Rothman et al. v. Snyder, Civ. No. PJM-20-3290, Document 66 (2020, December 14)

Robert Rothman et al., Plaintiffs, v. Daniel Snyder, Defendant. Civil No. 20-3290 PJM. United States District Court, D. Maryland. December 17, 2020.

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Swimmers and Divers Sue Michigan State University for Title IX Non-Compliance

By Jiaying Wang

On January 15, 2021, eleven current student-athletes on the Michigan State University (MSU) women's swimming and diving team filed a class action against MSU, its Athletic Director Bill Beekman, President Samuel Stanley, Jr., and Board of Trustees for their alleged longstanding Title IX violations. The case was filed to the United States District Court – Western District of Michigan less than three months after the university announced the "final and irreversible" decision to discontinue its women's swimming and diving program after the 2020-2021 season. While the case was brought by the eleven swimmers and divers in their individual capacities, the plaintiffs claimed in the statement that they sought to "redress the undisputed historic and ongoing discriminatory conduct perpetrated by MSU," and they brought the action on

behalf of "all similarly situated student athletes now and in the future" (p. 3).

The filed complaint consists of four counts against MSU, Beekman, Stanley, and the Board of Trustees. In the first count, the plaintiffs addressed on the defendants' unequal allocation of athletic participation opportunities to male and female students at MSU, arguing that the university failed to pass the Title IX three-prong test. In the second count, the plaintiffs complained about MSU's unequal allocation of financial assistance to male and female student-athletes, asserting that "MSU does not provide athletic financial assistance to its female athletes that is substantially proportional to its female athletic participation as required to comply with Title IX" (p. 49). In the third count, the eleven female swimmers and divers stated that the university has been allocating athletic treatment and benefits for male student-athletes more than for female student-athletes. Fourth, the plaintiffs also sued MSU as an educational institution for its gender discrimination.

The plaintiffs asked the court to grant them injunctive relief that would require MSU, Beekman, Stanley, and the Board of Trustees to: (1) stop their longstanding sex-based discriminatory behaviors and conduct; (2) stop cutting the university's women's swimming and diving program; and (3) offer more intercollegiate athletic participation opportunities to current, prospective, and future MSU female students with the goal to meet their interests and abilities.

According to the plaintiffs, the harm associated with the defendants' discriminatory actions is far more severe than any possible harm to the defendants should the injunctive relief be granted. Some damages and difficulties the eleven MSU women's swimmers and divers had experienced or will likely experience in common include economic and compensatory damages, lost educational and athletic opportunities because of sex, risk of losing academic credits due to possible transfer, risk of delayed graduation, and distress related to emotion and self-esteem. The defendants, on the other hand, will suffer no loss except "the monetary cost of the program that it has already borne for many years" (p. 44) if the injunctive relief is granted, as stated by the plaintiffs. This money, however, could be obtained by "shifting [the university's] longstanding favoritism toward men to an equitable allocation between men and women" (p. 44), added the plaintiffs.

The eleven MSU women's swimmers and divers pointed out that while their team does not receive any financial assistance directly from the federal government, the team is a program affiliated with and recognized by the university, a public institution that receives federal funding. Thus, the university's athletic department has the obligation to comply with all Title IX requirements, argued the plaintiffs. As a result, the current, prospective, and future female student-athletes at MSU should not be discriminated in any form based on their sex.

But according to the plaintiffs, MSU failed to comply with Title IX. Based on the data provided by the plaintiffs in their complaint, the school's female athletic participation rate is about 48.65%, whereas the female undergraduate enrollment rate campus-wise has reached 51.34%. In addition, the number suggests that before the women's swimming and diving team is cut, there is a 25-women participation gap for MSU to fill if the university wants to reach "participation parity with their undergraduate enrollment gender breakdown" (p. 41). However, the actual gap between male and female student-athletes at MSU is even larger, given the common phenomenon of roster padding on the women's rowing, cross country, and track and field teams. That is, the roster size for those teams at MSU are a lot bigger than the national average, which has resulted the lack of real sport participation opportunities for a large number of female student-athletes due to their extremely limited playing time.

Moreover, according to the complaint, no female varsity team has been added by the MSU administration since 1998. Given this, the plaintiffs contended that MSU lacks the history of providing an increasing number of opportunities for women to participate in intercollegiate sports. Now instead of adding new sports, the university has decided to eliminate women's swimming and diving program at the end of the season. The team currently has 38 student-athletes, and the plaintiffs believe the action to cut the team will further exacerbate the existing gender inequality problem at MSU.

The plaintiffs suggested in the complaint that a letter from the plaintiffs' counsel was sent to the defendants in November 2020, in which the plaintiffs first

explained why they thought the elimination of the women's swimming and diving team is a violation of Title IX and then expressed their desire for further discussion on reserving the team. As stated by the plaintiffs, the defendants replied the letter, indicating that to their knowledge, the university's decision is in compliance with Title IX requirements. The plaintiffs claimed that besides the MSU Equity in Athletics Disclosure Act data, no other information in relation to Title IX compliance was specifically addressed by the defendants in their response. Consequently, the plaintiffs were not satisfied with the defendants' response to the letter, which in turn led to the lawsuit.

In the current COVID-19 environment, this Title IX lawsuit brought by the eleven MSU women's swimmers and divers could have a profound impact. Due to the outbreak and continuance of the COVID-19 pandemic, many college athletic programs have been heavily affected financially. As a result, cutting varsity teams that are not profitable has become a common trend for universities to reduce the cost. Should the eleven MSU women's swimmers and divers be granted the injunctive relief, there might be a good chance for female student-athletes from other eliminated teams to bring similar Title IX legal actions against their universities. As of February 15, 2021, the MSU case remains pending, and the defendants have not yet responded to the alleged charges.

Jiaying Wang is a first-year doctoral student in the Department of Sport Management at Florida State University.

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Biden Administration to Review Title IX Policies and Regulations and Establish Gender Policy Council

By Susan D. Friedfel, Monica H. Khetarpal, Joshua D. Whitlock, Crystal L. Tyler and Amanda Brody, of Jackson Lewis

The Department of Education has been directed to review all policies on sex and gender discrimination (including sexual violence) in schools under an executive order issued by the Biden administration on March 8, 2021.

The order further reiterates the administration's position that laws such as Title IX of the Education Amendments of 1972, which prohibits sex discrimination, bars discrimination on the basis of gender identity and sexual orientation.

The order calls on the Secretary of Education to consult with the Attorney General to conduct a review within the next 100 days of all existing regulations, orders, guidance documents, policies, and any similar agency actions, including the final rule issued May 19, 2020 ("Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 85 Fed. Reg. 30026). The order expressly directs the Secretary to consider whether existing agency rules and policies conflict with the current administration's policies. It also directs the department to consider suspending, revising, or rescinding any existing agency directives that it finds during its review to be inconsistent with the Biden administration's policies.

On the same day, the Biden administration issued another executive order establishing a Gender Policy Council within the Executive Office of the President. The council will work to advance gender equality in domestic and foreign policy development, combat systemic bias and discrimination (including sexual harassment), and focus on increasing female participation in the labor force and decreasing wage and wealth gaps. President Joe Biden will designate two co-chairs to lead the council, which also will include other cabinet secretaries. The order establishing the council also creates two council staff positions: Special Assistant to the President and Senior Advisor on Gender-Based Violence. It further requires the council to develop and submit a government-wide strategy for advancing gender equity and equality to the president within 200 days of the order.

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Will it be Game Over for Loot Boxes?

By Omar Imtiaz, GW Law 3L, (Contributing Research, Joseph La Vine)

In the past few years there has been growing scrutiny, especially internationally, on the legality of loot boxes which are prominent on mobile, computer,

and console games. Loot boxes are essentially booster packs that can be obtained through comprehensive in-game feats or instantly by purchase. Usually, the contents of any given loot box are unknown but the best loot crates, which are also extremely rare, contain legendary characters, special items, or powerful weapons depending on the game. Disappointed players can, of course, try their luck again by purchasing more loot boxes in the hopes of finding greater treasures. It is exactly this incentive that has attracted the attention of courts, regulators, and litigants, both internationally and more recently within the United States.

Regulators in a handful of nations, including Belgium, Japan, China, and the Netherlands, have labeled loot boxes as a form of gambling, and thus illegal without a license. Loot boxes that do not display the crates' contents before purchase are illegal in Belgium and the Netherlands, as a form of gambling. In the United States, there is so far no official federal or state legislation declaring loot boxes as illegal gambling. However, developers should remain vigilant for any action taken by state and federal legislatures or by the Federal Trade Commission (FTC).

To predict how American regulators might choose to pursue this issue, it is useful to look at measures other countries have taken. Ultimately though, the biggest immediate concern for video game companies in the United States will likely come from private lawsuits.

Belgium

Belgium has been on the forefront among European countries to regulate loot crates. In April of 2018, the Belgian Gaming Commission declared loot boxes illegal for violating the country's gambling laws. This statement was the result of an investigation by the Commission on four popular games at the time: FIFA 18, Overwatch, Counter-Strike: Global Offensive, and Star Wars Battlefront II.

Koen Geens, Belgium's Minister of Justice at the time, described loot boxes as a mix of gaming with gambling which was "dangerous for mental health", especially in the case of children. Developers were liable to fines as high as €800,000 and prison sentences of up to five years if purchasable loot boxes were not removed. The law was met with a high degree of compliance and support both by the general public and by gamers. Loot crates in Belgian games can now only be unlocked through in-game achievements.

The Netherlands

The Netherlands Gaming Authority also declared that loot boxes are a form of gambling, and consequently illegal without a license. The agency ruled that FIFA's Ultimate Team, a game mode in which gamers build their own teams with the additional possibility of unlocking the best soccer players through game packs, was a form of gambling and fined Electronic Arts as well as its Swiss subsidiary €250,000 each for every week that loot boxes remained in the game.

Electronic Arts appealed against the Gaming Authority's interpretation of the Dutch Betting and Gaming Act. The company was unsuccessful as the District Court of The Hague certified that the Gaming Authority correctly identified loot boxes as "games of chance" making them fall within the purview of national gambling laws. Videogame creators in the Netherlands have found creative solutions to comply with the new law. For example, loot boxes in the game Dota 2 in the Netherlands now display all the items contained in any given box, removing the element of uncertainty. So far, the Netherlands Gaming Authority has considered this practice permissible.

The United States

Regulators in the United States have not been as aggressive as some of their European counterparts. So far, loot boxes are legal in the United States, despite some movement in a handful of state legislatures, a bill labeled "The Protecting Children from Abusive Games Act" sitting idle in Congress, and a cursory examination of the issue by the FTC. For video game companies in the United States, private lawsuits could present a more pressing concern.

One such example is a lawsuit filed in the Northern District of California. Plaintiff Kevin Ramirez asserts that FIFA's Ultimate Team violates California gambling law due to its use of loot boxes to unlock the top soccer stars. The plaintiff, who represents a potential class of over a hundred individuals and is trying to claim $5 million in damages, asserts that Electronic Arts "relies on creative addictive behaviors in consumers to generate huge revenues" and that "Buying the packs are nothing more than a gambling bet." It will

be fascinating to observe how this case develops and whether a favorable result for the plaintiff encourages more litigants.

California's definition of gambling defines an illegal gambling device as "a machine, aperture, or device; something of value is given to play; and the player may receive something of value by element of chance." Given the fact that superstar Lionel Messi's ultimate team card can be worth around $40, the plaintiff might just have a shot in the random lottery known as the American jury.

In sum, it might behoove the game companies to keep an eye on what is happening in Europe when making their best predictions on how American regulators will draft their gambling laws as well as how the Judiciary hearings will aid in shaping their views.

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Former College Football Player Withdraws from Concussion Lawsuit Against Pittsburgh, Claiming He Never Intended to Sue

Former University of Pittsburgh football player Craig Bokor was as shocked as former coaches at his alma mater when he was listed as a plaintiff early last month in a concussion lawsuit against Pitt.

Yes, he was interviewed by the attorneys who brought the suit. But Bokor, a defensive lineman at the school from 2005-09, claimed he never consented to being a party.

"There was never any idea of a lawsuit getting filed," he told the media. "We had no clue it was going to come to that. It wasn't anything we agreed to or wanted to happen."

Joining Bokor in the lawsuit was former Pitt wide receiver Joseph DelSardo, who also withdrew his complaint. The plaintiffs were represented by Napoli Shkolnik, in federal court in Pittsburgh.

Bokor, reportedly, reached out to the firm that filed after he learned of it, but was allegedly told that the statute of limitations on his claim was running out, which is why he was added. The player further added that the lawsuit suggested he was suffering from migraines, anxiety, and memory loss, attributable to the concussions. Bokor said he has none of those symptoms.

In the original lawsuit, the would-be plaintiffs named the university and the NCAA as well as the Big East and Atlantic Coast conferences. The claimed, as most of the previous suits have, that the defendants were aware of the risks, but did not adequately protect the plaintiffs. Specifically, they alleged claims of negligence, fraudulent concealment, breach of contract and unjust enrichment.

"The NCAA was created to protect the students that participate in various college sports, including football. Despite its alleged purpose, the NCAA has failed to take reasonable actions to protect players from the chronic risks created by such injuries and fraudulently concealed those risks from players," according to the complaint.

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Hackney Publications Recognizes Sports Law Profession with '100 Law Firms with Sports Law Practices You Need to Know About' Portal

Hackney Publications announced today the launch of "**100 Law Firms with Sports Law Practices You Need to Know About**," a portal that serves as a resource for those in need of experienced and capable legal counsel in the sports law arena.

The firms are listed alphabetically, an ode to the difficulty in actually ranking such firms.

"There are firms on this list that offer a complete menu of sports law specialties, while there are others that specialize in one particular area," said Holt Hackney, the founder of Hackney Publications, which has been publishing sports law periodicals for more than two decades.

"The firms selected for the list were chosen based on our objective perspective as journalists," added Hackney. "They were included in the list as a service to the industry and as a way to give sports industry participants a guide from which to select legal representation."

Among the many firms included are:

- Boies Schiller Flexner

- Drew Eckl & Farnham
- Global Sports Advocates, LLC
- Harris Beach PLLC
- Herrick Feinstein
- Hogan Lovells US LLP
- Jackson Lewis
- Loeb & Loeb LLP
- Miller Canfield
- PARRON LAW ® | Entertainment & Sports
- Ricci Tyrrell Johnson & Grey
- Rifkin Weiner Livingston LLC
- Segal McCambridge
- Skadden

Hackney noted that the portal has synergy with Sports Law Expert, a blog that features regular free content as well as a directory of legal experts and their particular specialty. "This directory has been around for a decade and has led to new business for many attorneys as well as expert witness engagements for the academic community," said Hackney.

Of the 12 periodicals Hackney publishes, Sports Litigation Alert (subscription-based) is the core periodical, publishing 24 times a year. Each Alert features five case summaries and eight to ten articles. All pieces are written by expert attorneys, professors, law students, and staff. The Alert is a staple in higher education, where it is used in close to 100 sports law classrooms in any given semester.

Hackney also publishes five other subscription-based periodicals, two in the collegiate athletics space – Legal Issues in Collegiate Athletics and the Journal of NCAA Compliance – as well as Legal Issues in Collegiate Athletics, Concussion Litigation Reporter, and Professional Sports and the Law.

In addition, there are six complimentary publications, including Sports Facilities and the Law, Esports and the Law, My Legal Bookie, Title IX Alert, Sports Medicine and the Law, and Concussion Defense Reporter.

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College Student Who Suffered Heat Stroke During Outdoor Jogging Class at University Receives Almost $40 Million in Settlement

Marissa Freeman, who was catastrophically injured after suffering heat stroke during an outdoor class at California State University San Bernardino, received $39,500,000 in a settlement.

It was reportedly the largest settlement ever for an injury case involving the California State University system.

On September 26, 2018, Freeman was participating in a jogging class at CSU San Bernardino, along with other students with varying jogging experience, from novice to expert.

The students were required to complete activity classes, similar to the jogging class, to graduate. On the first day of exercise, the CSU instructor assigned a run on a 5K course on the concrete and asphalt surrounding campus, even though temperatures were at a dangerous 95 degrees and students were not yet acclimated to working out in these conditions.

"This presented an extreme risk of heat illnesses, including heat stroke," according to Panish Shea & Boyle LLP, the law firm representing the plaintiff. "Near the end of the run and while the instructor was at another location, Freeman collapsed on the hot concrete outside of Coussoulis Arena with severe heat stroke. University personnel, including an athletic trainer, responded but did not provide any recommended rapid whole-body cooling to treat her heat stroke or move Freeman to the air-conditioned arena 20 feet away as they were waiting for paramedics to arrive. Evidence established that neither the instructor nor the other CSUSB employees had received required CAL-OSHA training in heat illness prevention and treatment before the incident."

As a result of the heat stroke, Freeman suffered a severe brain injury, cardiac arrest, and multi-system organ failure, she underwent months of hospitalization and more than one year of in-patient rehabilitation before she could be released home to her family. Freeman's cognitive function, speech, and motor control remain severely impaired, and she will require 24/7

care, therapy, and medical attention, according to the firm.

"During the lawsuit, CSU denied responsibility and contended that Freeman negligently overexerted herself in the class," claimed the firm. "CSU also sued Freeman's medical providers, including the fire department, ambulance, hospital emergency room, and skilled nursing facility, claiming that they negligently caused her injuries in the process of attempting to save Freeman's life and provide care."

On October 26, 2020, pretrial hearings commenced in a makeshift courtroom created for trial proceedings during COVID-19 in the San Bernardino Historic Courthouse. Over three weeks, 105 pretrial motions were heard and decided. After extensive argument and submission of expert testimony by CSU, their claims that Freeman's medical providers and first responders were negligent and caused her injuries were dismissed due to lack of evidence.

As the trial, settlement negotiations between CSU and the Freeman family began I earnest, leading to the resolution.

In addition to the monetary settlement and as a condition of the agreement with the Freeman family, California State University agreed to develop and implement a system-wide policy for heat illness prevention, education, and protocols with input from Dr. Douglas Casa, the head of the Korey Stringer Institute, a heat illness research and advocacy organization. This policy will apply in all academic environments to the nearly 500,000 enrolled students at all 23 California State University campuses.

Andrew Jones, executive vice chancellor and general counsel for California State University, issued the following statement to the media.

"We are relieved to come to a resolution that will enable Ms. Freeman to receive the care she needs for the rest of her life," he said. "The university will continue to take steps to heighten the awareness of our faculty, staff and students to the potential for heat-related injuries and how to mitigate against them."

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Study–Lack of Heat Policies Put Athletes at Risk

Every year, sports coaches have to navigate how to safely get their teams in shape to compete while temperatures during outdoor practices soar. New research from the University of Georgia aims to help them do just that.

Different states have different heat policies guiding outdoor practices. In areas less prone to extreme temperatures—Alaska, for example—strong heat guidelines aren't as urgently needed as in hotter regions.

But for states that regularly see high heat and high humidity, a similar lack of rules could prove disastrous. And as temperatures rise across the globe, states that previously haven't experienced dramatic heat waves will need to adapt their policies as well.

"Heat is one of the leading weather killers," said **Andrew Grundstein**, a professor and climate scientist in UGA's **Franklin College of Arts and Sciences** and lead author of the study, published in the **Journal of Science and Medicine in Sport**. "It's one of the top three causes of death in sports, and we have a lot of states that are not prepared for heat right now."

Measuring Up

The researchers wanted to see how well suited those varying policies are to protecting against a given state's threat. To determine each state's heat vulnerability, the team analyzed each state's policies by how they lined up with established best practices for health and safety in sports and compared them to the state's climate.

The team examined how closely aligned high school sports policies were to best practices for health and safety. Policies like gradually acclimating players to practicing in the heat over time and adjusting outside activities based on how hot it is—like giving more breaks and having players take off some equipment.

Some of the findings were concerning.

"We have 29% of states that are in what we call the problem category," said Grundstein. "That means they're states that get very hot and don't have very good policies, so their players are highly vulnerable to heat."

Many of those "problem" states are in the South, like Mississippi, Alabama, Texas and Florida, among

others. But states can do a lot more to be proactive in protecting their players.

Positive Changes

For example, at the time of the study, Louisiana's policies placed it in the problem group. But in response to growing concerns about student-athlete safety, the governor signed a sweeping bill into law that now requires schools to acclimatize their students to practicing in the heat, monitor environmental conditions and mandate emergency action plans for heat-induced health threats.

For Grundstein, it was the perfect example of how states can turn things around.

"Louisiana was one of the worst states—it was really hot, and they had really weak policies," he said. "When they shifted the policy, they moved all the way over to our what we call fortified category, where they had much better policies and that means the players are going to be much less vulnerable."

Necessary Adjustments

As temperatures continue to rise across the globe, the implementation of adaptive policies that respond to environmental conditions will become increasingly important. Many states that previously didn't have to worry about extreme temperatures are experiencing more hot days than ever before, something Grundstein hopes will prompt them to reexamine their policies and make necessary adjustments to keep students safe.

"If you're in a hot climate, that doesn't mean you can't go out there and participate in sports," Grundstein said. "It just means you need better policies."

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News Briefs

Sports Lawyer Brad Corbin Named Associate Director of Athletics, Compliance at Washington State

Washington State Director of Athletics Pat Chun has announced the addition of Brad Corbin to guide the Cougars' NCAA compliance office efforts as the Associate Director of Athletics for the department. Corbin joins WSU after spending nearly six years at Miami University (Oxford, Ohio), where he ultimately served as the Associate Athletics Director for Academics and Compliance. Prior to Miami University, Corbin spent just over three years at Murray State University, where he began as the Director of Compliance, and was later promoted to the Assistant Athletics Director for Compliance. Corbin began working in athletics during his second year of law school as a compliance intern in the University of Louisville Athletics Department. Once he graduated, he accepted a position as the director of compliance at Murray State. A graduate of the University of Louisville in 2008 with a Bachelors' degree in Sport Administration, and in 2012, Corbin earned his Juris Doctor degree from the Louis D. Brandeis School of Law at the University of Louisville.

SRLA Presents Connaughton with Betty van der Smissen Leadership Award

The Sports and Recreation Law Association has presented its prestigious Betty van der Smissen Leadership Award, which recognizes an individual for leadership and vision in the study of legal aspects of sport and physical activity, to Dr. Dan Connaughton, Professor of Sport Management at the University of Florida. Connaughton's research is largely focused on the study of law and risk management in sport and physical activity programs. Adopting a multi-methodological approach, his research has specifically investigated (a) risk perception; (b) risk management policies and practices; (c) awareness of and compliance with statutes, standards, and guidelines; and (d) injury/death prevention in sport and physical activity. His research findings have implications for influencing policy, improving risk management practices, and decreasing injuries, fatalities, and liability. The American Heart Association has funded his research investigating "Implementation Constraints and Risk Management Practices Related to Automated External Defibrillators in Sport/

Recreation Programs." Additionally, since 2008, he has served as the principal investigator of the "Bicycle Safety and Risk Management Project" which is funded by the Florida Department of Transportation – Safety Office. The primary purpose of the project is to reduce the number of injuries and deaths to Florida's bicyclists (Florida regularly leads the nation in the number of bicycling-related injuries and fatalities).

Joint Statement on behalf of MLB, MLS, NBA, NHL, NFL and WNBA About Cardiac Screening

The study published today by JAMA Cardiology is an illustration of the collaboration amongst medical experts at MLB, MLS, NBA, NHL, NFL and WNBA and our respective players associations over the past year. Since the onset of the pandemic, we have worked more closely together than ever to share lessons learned to ensure the best possible care for players. As part of that ongoing collaboration, each league implemented a similar cardiac screening program for athletes with prior COVID-19 infection. The screening programs, which are based on American College of Cardiology recommendations, are used to detect serious conditions resulting from the virus and help promote an athlete's safe return to play after COVID-19 infection. Using de-identified data from the six leagues, the peer-reviewed study published today found very few cases of inflammatory heart disease and that a return to professional sports following COVID-19 infection can be safely achieved using this return to play screening program. In this study of 789 COVID-19 positive athletes from across our leagues, evidence of inflammatory heart disease was identified in 0.6% of athletes. The study also found no adverse cardiac events occurring in the athletes who underwent cardiac screening and subsequently resumed professional sport participation. The study additionally reflects the care provided by club medical and athletic training staffs who contributed to the study. As with other lessons professional sports have learned about COVID-19, the results of this study are being shared broadly to continue to contribute to the growing body of knowledge about the virus – a commitment we collectively share with each other and our players for the benefit of society beyond sports.

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