PROFESSIONAL SPORTS and the LAW

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LNS Captioning Helps Sports Facilities Satisfy ADA Requirements and Meet the Needs of the Hearing Impaired

By Cadie Carroll

Carol Studenmund started her career in captioning services working with typists in the Oregon court reporting business.

Then technology opened the door to a new business – helping sports entities become compliant with the Americans with Disabilities Act (ADA) and meet the needs of the hearing impaired.

"Technology is what made this possible," she explained. "Inexpensive PCs made it very feasible to get into closed captioning without spending thousands of dollars."

With that, Studenmund, along with coworker Robin Nodland, decided to launch their own business, utilizing technology as its prime advantage. Thus, LNS Captioning was born.

One of the company's longest-standing relationships traces back to its partnership with the Portland Trail Blazers for which it provides captioning for the team's TV broadcasts.

A few years later came its first stadium work, a partnership with the National Basketball Association when in 2003 the league sought out LNS's services to provide live captioning for its annual All-Star game. LNS has since continued to provide its services for the NBA's all-star weekends, proving just how valuable its services are.

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Deadlines and Delays – Why Waiting Until the Last Minute Is a Bad Negotiation Strategy

By Bob Wallace, Sports Law Group Chair, Thompson Coburn LLP

How many times, and especially recently, have we heard "nothing will get done until they're at the deadline"? We heard it during the NFL labor dispute, and now we are hearing it during the NHL work stoppage.

Despite the fact that hundreds of NHL games have been cancelled as of this writing, and the whole season is in jeopardy for the second time in eight years, the power brokers for both the NHL and the NHL Players' Association apparently have not reached the point where they feel they are at a deadline. Who cares that millions of entertainment dollars are not being spent on NHL hockey or that thousands of people who make a living on the periphery of the sport are being harmed by their inability to reach an agreement to resume play? If we accept the deadline strategy premise, arguably there is still time left before the league and the players' association reach the drop-dead point and finally reach the

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Coach Files Suit Against United Football League Founder

By Scott A. Andresen

As the United Football League continues to be the professional football equivalent of Bernie Lomax, the league took yet another legal hit in its ongoing existence in a state of bardo[1] on October 15, 2012 when notable coach Marty Schottenheimer filed suit against league founder Bill Hambrecht and other unnamed parties in San Francisco Superior Court.

In his one-count complaint for breach of contract, Schottenheimer alleges that Hambrecht and others affiliated with the UFL contacted him in early 2011 to be the head coach and general manager of the Virginia Destroyers UFL team. Schottenheimer subsequently entered into a two-year contract whereby he was to be paid $970,000 during his first year of employment and $1,000,000 in the second, as well as being entitled to reimbursement of business expenses incurred in the course of performing his duties. Schottenheimer was further entitled to a bonus of $50,000 if his team played in the UFL championship game, and an additional bonus of $100,000 if his team won the championship game.

Although Schottenheimer agreed to enter into a two-year agreement with the Virginia Destroyers team, he (rightfully, it would now appear) had serious concerns about the financial stability and ongoing viability of the league. To that end, Schottenheimer and Hambreach allegedly agreed that Hambrecht would personally guarantee payments due to Schottenheimer as a third-party guarantor during the first year of Schottenheimer's two-year contract with the team, regardless of whether the UFL became insolvent or ceased to operate.

During the 2011 season, Schottenheimer's Virginia Destroyers team enjoyed great success and won the UFL championship in November 2011. However, it is alleged that the team failed to pay Schottenheimer much of what he owed pursuant to his contract to the tune of $1,100,000 in salary, $150,000 in bonus compensation and $100,000 in expenses incurred on behalf of the team for hotel costs and otherwise advanced by Schottenheimer.

Although the team acknowledged that Schottenheimer was due all sums demanded, it informed Schottenheimer that it was financially unable to live up to its contractual obligations. Schottenheimer then made demand upon Hambrecht as the personal guarantor of the team's obligations. Hambrecht made no payments in response thereto, leading to the initiation of the lawsuit.

In Schottenheimer's Prayer for Relief, he requests general damages, special damages, reasonable attorney's fees, costs of suit, interest at the maximum legal rate on all sums awarded, and such other relief as the court deems just and proper.

Hambrecht has until November 14, 2012 in which to file an answer to the complaint. A case management conference is set for March 20, 2013, with the filing and service of a case management statement required no later than March 5, 2013.

1 Prior to the initiation of the Schottenheimer lawsuit, a collection of UFL parties (i.e., the United Football League, UFL, UFL Management LLC, Bill Hambrecht, Paul Pelosi and Hambrecht 1980 Revocable Trust) have had not less than 27 separate actions initiated against them since May 2010— Most (if not all) of which arise out of failure to pay amounts contractually due.

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Potential Role of Criminal Law in NFL Concussion Cases

By Jordan Kobritz, J.D., C.P.A.,

Introduction

The thousands of plaintiffs–former players and their family members–suing the NFL in the so-called concussion lawsuits have one thing in common: They all seek monetary compensation for the injuries, disabilities, and medical expenses allegedly incurred as a result of playing football.

If the plaintiffs are successful, and a settlement is a likely resolution, what incentive do the defendants have to change both the nature of the game and how they deal with injuries suffered on the field of play? Even if the damages are substantial, we're only talking about money. Furthermore, whether the money is paid by the NFL or an insurance company, which may result in higher premiums paid by NFL teams, it's merely a cost of doing business. The NFL grossed an estimated $9.5 billion in revenue last year, a sum that is predicted to reach $20 billion by the end of this decade. The league can afford to absorb a settlement, even if it runs into the billions- of-dollars.

Is there a better deterrent to the wave of injuries and concussions occurring in the NFL and other sports? Maybe.

The Case for Criminal Charges

In the Master Complaint filed in the NFL concussion cases, the Plaintiffs make a number of allegations against the league, including: fraudulently concealing information; negligently misrepresenting information; failing to disclose information of which it had knowledge; having significant influence on the original concussion study committee; failing to take appropriate preventative measures; and belatedly acknowledging that there was a concussion crisis.

Can criminal charges be brought if the allegations in the complaint against the NFL are proven? Here are a few possibilities based on the allegations in the complaint: perjury; obstruction; conspiracy; wanton endangerment; and negligent homicide.

Who might the defendants be? Depending on the role they took in encouraging, promoting, ignoring, fostering and participating in violence on the field of play, potential defendants could include NFL Commissioner Roger Goodell, team owners, front office personnel including general managers, members of the coaching staff, and team medical personnel–doctors and

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Potential Role of Criminal Law in NFL Concussion Cases

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athletic trainers – along with their predecessors. Who knew what, when they knew it, and what they did – or did not do – with that information are key questions a prosecutor needs to answer prior to bringing any charges.

Other potential defendants could include the NFLPA, its executive director, DeMaurice Smith, and other union employees. Based on recent disclosures detailing the NFL Pension and Disability Board's (PDB) concussion related disability awards to former players, including former Steelers' center Mike Webster, it appears that the NFLPA has long been aware of the effect concussions have on its members. Three of the seven members of the Board are appointed by the NFLPA, yet the union failed to disclose information obtained in the PDB hearings to the players.

The Case Against Criminal Charges

Historically, the criminal justice system has been reluctant to become involved in addressing violence and injuries in sports for a variety of reasons. First, we're talking about playing sports, "games." We don't equate a linebacker's violent hit on a receiver cutting across the middle with a street mugging, although the physical consequences can be just as severe, even life changing or permanent.

Second, you have the issue of "implied consent." Although parents, family and friends may put pressure on young people to play sports, no one "forces" anyone to play football in the NFL. Participants choose to play professional sports, and generally accept the risks of injury inherent in the sport.

Third, there is an expectation that teams and leagues, and even the players themselves, will self-regulate the sport and their actions. Every sport has rules that are designed to regulate fair play along with a penalty system to discipline those who exceed the rules. However, those rules by and large regulate participants–the players–rather than non-participants such as coaches and management personnel.

As we saw in BountyGate, off-field personnel who have a hand in violence aren't immune from disciplinary action. In addition to penalizing a number of New Orleans Saints defensive players for allegedly instituting a bonus system, or "bounties," for a teammate's in-game performance that was designed to injure an opponent, the NFL also disciplined coaches, administrative

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Potential Role of Criminal Law in NFL Concussion Cases

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personnel and the team. Defensive coordinator Gregg Williams was suspended indefinitely and will not be allowed to apply for reinstatement until the end of the 2012 season; head coach Sean Peyton was suspended for the entire 2012 season; General Manager Mickey Loomis was suspended for the first eight games and linebackers' coach Joe Vitt was suspended for the first six games of the 2012 season. In addition, the Saints were fined $500,000 and also stripped of their 2nd round draft pick next year.

Because the NFL determined that these individuals violated the rules of the sport, it isn't beyond the realm of possibility that they could also be charged criminally for the consequences of their actions.

The Potential Hurdles of Criminal Prosecution

Where to begin? We can start with the difficulty in proving mens rea, or criminal intent. In sports, an act of violence is often reflexive and occurs in the heat of the game.These fast-paced actions make it hard to distinguish what is outside the realm of the sport.

A second hurdle is the issue of consent or assumption of risk in sport. When players take the field of play, they imply that they are assuming the risk of possible injury.

Third, you can make a strong argument that the purpose of the criminal justice system does not align with the concept of prosecuting individuals who are involved in sports. That argument says when a violent act takes place on the field of play, it does not harm society; therefore, there is no justification for criminal prosecution. A contrary argument is that the more society legitimizes excessive violence in sports, the greater the likelihood that violence will spill over into social settings. That was one of the arguments used to justify the prosecution of Barry Bonds and Roger Clemens, with the illegal use of drugs substituted for violence.

Another criticism of the use of the criminal justice system in this context is that the system is ill equipped to handle such matters compared to teams and leagues. The governing body of each sport understands their sport better than any court, lawyer or jury, so the argument goes. Therefore, they are better equipped to govern the sport and administer punishment than the criminal justice system is.

While that may be the case, governing bodies have a strong interest in promoting their sport, which sometimes involves preserving and promoting violence as a marketing tool. That's especially true in the NHL and perhaps to an equal extent in the NFL. However, when teams and leagues police themselves we have a classic case of a conflict of interest, something which may or may not be true of the criminal justice system. We can't discount the potential political ramifications of criminal prosecutions for violence in sports.

Additional hurdles inherent in criminal prosecutions vs. civil actions include the more difficult standard of proof–beyond a reasonable doubt in a criminal case vs. a preponderance of the evidence in civil cases–and the fact that criminal cases have double the number of jurors as is usually required in a civil case. Of course, a criminal conviction also requires a unanimous verdict vs. a majority vote in a civil case.

The time and expense to the judicial system will also be factors in criminal prosecutions, not to mention which system – federal or state – is most appropriate.

Proving cause and effect–which act, or acts, of violence caused the injury–will be a major hurdle in a criminal case, not unlike the challenge faced by plaintiffs in the NFL concussion suits. The NFL is sure to present evidence that concussions have a cumulative effect, perhaps going back to grade school. The statute of limitations will also be raised as a defense.

Summation

My goal here isn't to reach conclusions, but to raise the possibility of using criminal law as an approach that might be more effective in changing the culture in the NFL towards concussions and violence in general than the civil litigation currently underway. Every NFL owner values money, but even if the concussion lawsuits result in a huge payout, there is always more money to be made. Indict an owner – threaten him with the loss of freedom and a criminal record along with its attendant consequences – and one thing is certain: You are guaranteed to get his attention.

Jordan Kobritz *is a former attorney, CPA, and Minor League Baseball team owner. He is currently a Professor and Chair of the Sport Management Department at SUNY Cortland. This article is adapted from a presentation Jordan made during a conference at the Thomas Jefferson School of Law in San Diego titled: Gladiators of the 21st Century: Violence and Injuries in Athletics. Jordan wishes to acknowledge the contribution of his research assistant, James Harwood, LLM, MSc, SUNY Cortland.*

Court Sides with Colts Over Body Painted Cheerleader

A federal judge from the Southern District of Illinois has granted the Indianapolis Colts' motion for summary judgment in a case where one of the team's cheerleaders sued the club for race discrimination after she was fired.

Plaintiff Malori Wampler alleged that the Colts discriminated against her because of her Indonesian heritage when the team fired her after learning she had posed in body paint at a Playboy-sponsored party before joining the Colts.

The Colts based its rationale to terminate her on the fact that Wampler failed to reveal the alleged transgression during the screening process and that such behavior violated its morality clause.

To that point, the court noted Indianapolis Colts Cheerleaders "are, in the club's view, 'ambassadors in the community and throughout the state.' As such, club cheerleaders must abide by the 'Indianapolis Colts Cheerleader Agreement,' which contains the following covenant:

"'Cheerleader agrees not to commit any act that will or may create notoriety (including, but not limited to, posing nude or semi-nude in or for any media or publication whatsoever), bring Cheerleader into public disrepute, or reflect adversely on Club or its sponsors. Cheerleader understands that she will serve as a public representative of the Club from time to time and that it is important to this employment relationship that she be viewed in a positive manner. Cheerleader agrees to behave in accordance with socially acceptable mores and conventions.'"

The court went on to note that during her pre-hire interview, Wampler informed the Club's cheerleading coordinator that she had been involved with the Playboy organization in the past. Specifically, she was selected to be a 'Girl of Golf' (i.e., a host) at various golf scrambles throughout the country sponsored by Playboy Golf. Not surprisingly, Playboy-sponsored parties were often held following the Playboy golf scrambles. Prior to two of these parties, one in 2009 and one in 2010, a Playboy Golf employee asked Wampler to wear latex-based body paint to the Playboy golf parties. But Wampler told the Colts that she had not posed nude for any photographs during her stint with Playboy. "This arguable fib unraveled on November 12, 2010, when the Club received an anonymous letter from a fan, which included photographs," wrote the court.

Wampler's discrimination claim triggered the burden-shifting framework inaugurated by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The plaintiff's first challenge was to make her case for a prima facie case of discrimination "by showing that: (1) she is a member of a protected class; (2) she was meeting the Club's legitimate performance expectations; (3) she suffered a material, adverse employment action; and (4) she was treated less favorably than similarly situated individuals outside of her protected class. Pantoja v. American NTN Bearing Manufacturing Corp., 495 F.3d 840, 845 (7th Cir. 2007)."

"The real dispute … is whether she was treated less favorably than a similarly situated individual outside of her protected class," wrote the court.

"Relevant factors for making this determination include 'whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications. . . .'" Bio v. Federal Express Corp., 424 F.3d 593, 597 (7th Cir. 2005).

To satisfy the similarly situated element, Wampler pointed to Breanna Fonner, a fellow Club cheerleader who is Caucasian. "At first blush, Fonner's circumstances appear quite similar to those of Wampler," wrote the court. "Fonner posed in lingerie as part of a promotional advertisement for a jewelry store, and the photos appeared on the photographer's website. Although the photographer for her photo shoot was also the Club's photographer, Fonner did not get prior approval for the photo shoot, as required by the Colts Cheerleader Agreement. In the photos, Fonner is on top of a bed with one or two men."

After the club learned of the pictures and confronted her, she informed officials that she thought it was ok because the photographer was the club photographer. For her transgression, the club denied Fonner an all-expense paid trip to the Pro Bowl, but did not terminate her.

The court disagreed with Wampler that the two scenarios were similarly situated, citing two reasons.

"First, Fonner wore lingerie in her photograph, whereas Wampler did not wear any clothing, but wore only body paint," wrote the court. "From the Club's vantage point, Wampler's photos were more scandalous than Fonner's. Second, Wampler arguably lied about posing nude, whereas Fonner simply did not address the issue with the Club before modeling for the photo shoot. See Spath v. Hayes Wheels Int'l-Ind., Inc., 211 F.3d 392, 397 (7th Cir. 2000) (holding that former employee who lied about misconduct until his termination meeting was not similarly situated to employee who came clean at an earlier time). Perhaps Fonner's conduct could be construed as a lie by omission, but the ethical disclosure duties of NFL cheerleaders is a question best left for another day. In the end, it might be a close call whether these differentiating variables are enough to defeat the similarly situated element. But, as explained below, the court finds that Wampler's claim fails for a separate reason. Therefore, the court will assume that Wampler can meet this element."

Thus, the next step in McDonnell is for the Colts to demonstrate a legitimate, non-discriminatory reason for firing Wampler, which the club did.

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Wampler would then need to show that the club's reasons were pretextual, something the court was unwilling to hold.

"The club clearly had reasonable grounds for terminating Wampler's employment, and no evidence casts doubt on the honesty of the club's rationale for its decision," it held. "Simply stated, the pictures at issue violated the 'Indianapolis Colts Cheerleader Agreement.' Moreover, during her pre-hire interview, Wampler arguably lied about posing nude. Whether it was actually a lie depends on your conception of nudity. If a person uses latex body paint to cover his or her private parts, does that constitute nudity? Perhaps reasonable minds could disagree on this issue. (And the answer may turn on the quality and opaqueness of the paint at issue.) The relevant point is that the Club reasonably construed Wampler's statement as a lie.

"In the end, perhaps the club overreacted by terminating Wampler's employment. After all, qualitatively, what Wampler did at the Playboy mansion may not be significantly different than posing for a swimsuit calendar in a slinky bikini or performing a titillating dance number while wearing a bra-like top and booty shorts. In this sense, Wampler's frustration is understandable. But, when it comes to a pretext analysis, 'we look not at the wisdom of the employer's decision, but rather at the genuineness of the employer's motives.' Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285, 288-89 (7th Cir. 1999). As the Club notes, it has a legitimate interest in drawing 'a line between its cheerleaders dressing provocatively and being naked.'

"This is presumably what (Pete Ward, the club's chief operating officer) was referring to when he professed that the club expects its cheerleaders to be 'alluring without being trashy.' In the end, no evidence casts doubt on the club's stated reason for firing Wampler or suggests that her Indonesian race or national origin was in any way a motivating factor in that decision. In the Court's view, this case has nothing whatsoever to do with race and everything to do with perceived nudity and perceived lies. Because no reasonable juror could reach a different conclusion, the club's motion must be granted."

Malori Wampler v. Indianapolis Colts; S.D. Ind.; Case No. 1:11-cv-0606-TWP-TAB, 2012 U.S. Dist. LEXIS 113605; 8/13/12

Attorneys of Record: (for plaintiff) Kimberly D. Jeselskis, JESELSKIS LAW OFFICES, LLC, Indianapolis, IN. (for defendant) Andrew M. McNeil, Daniel C. Emerson, Jonathan A. Bont, BOSE MCKINNEY & EVANS, LLP, Indianapolis, IN.

Conference Touches on Pivotal Sports Law Topics

By James Wold

A final, wide-ranging discussion on current business and legal issues in sports was the culmination of the National Sport Law Institute's Current Legal and Business Issues Affecting International and Professional Sports conference at Marquette University on October 15.

The event, held at Eckstein Hall on the campus of Marquette University, was organized by NSLI Director Matthew Mitten and Associate Director Paul Anderson.

Perspectives on Sports Facility Development

After the break, Mary K. Braza of Foley and Lardner LLP led a panel on "Perspectives on Sports Facility Development" that featured three main areas of emphasis.

Braza talked about the trend of stadiums going away from fully public financing to more partnerships with the private sector. In that line of thinking, prospective facilities should also think about developing the neighborhood surrounding the stadium in order to drive revenue. Braza pointed to examples of the L.A. Live experience in downtown Los Angeles as well as AT&T Park in San Francisco and Petco Park in San Diego as to how facilities can used ancillary development in order to provide economic impact.

Mike Duckett, executive director of the Southeast Wisconsin Professional Baseball Park District, discussed the numerous lessons learned from planning and building Miller Park. Duckett's biggest takeaway was that if taxpayers are involved, transparency is a must.

Martin J. Greenberg, managing member of the Law Office of Martin J. Greenberg, LLC, then added to Duckett's discussion by stating that sports stadiums should be the anchor in the investment of a community. Greenberg looked at three different areas where growth was seen with a correlation to the building of Miller Park.

Current Issues in Sport and Business

The last panel was a question and answer session on current issues in sport and business that helped summarize the three previous panels.

The hottest topic and one that affected the most on the panel was the issue of day-to-day operations within a sports league or franchise during labor turmoil.

Arena Football League Commissioner Jerry Kurz has just emerged from a lengthy

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collective bargaining agreement that saw the league take a full season off. It recently agreed with the players on a five-year deal lasting through 2017.

"Last year, we went through a challenging CBA," Kurz said. "Getting there is always a challenge."

In terms of how much the CBA governs operations of his sport, it affects almost all day-to-day operations. "Player contracts, tryouts, player's rights – everything has to be governed by the CBA."

For the National Football League, an organization that until recently had experienced a lengthy labor peace, the 2011 lockout of its players provided its own challenges, starting with the simple question of when it was starting.

"It was clear in 2010 there wasn't going to be an extension of the CBA," said Cliff Stein, Vice President of Football Administration and General Counsel of the Chicago Bears. "We had to have a model for a (potential) uncapped and a capped year."

When the lockout began in the spring of 2011, it was as though everything regarding player movement and contracts froze. But that wasn't the case for sponsors and fans who were banking on a full season taking place.

"We had to keep our season-ticket holders, fans and sponsors on board," Stein said.

Panelists Michael Sneathern, associate counsel of the Milwaukee Bucks and Nyea Sturman, director of legal services with the Orlando Magic, dealt with similar issues with the National Basketball Association's lockout that ultimately emerged with a 66-game regular season after its agreement.

Attempting to keep sponsorships was as much about timing as it was about money.

"We didn't have many sponsorships up for renewal (at the time)," Sneathern said. "That was key for us."

One final voice to the discussion was Ricky Olczyk, assistant general manager and director of hockey operations and legal affairs for the Edmonton Oilers. Currently, the Oilers are caught in the middle of the National Hockey League's labor negotiations which have locked out the players for the second time in seven years and third since 1995.

With three straight No. 1 overall draft picks on its roster, the Oilers decided the best way to cultivate its youth was to send those players to its minor league affiliate, the Oklahoma City Barons of the American Hockey League.

"We're conducting our business in a unique way," Olczyk said. "We were able to send our young guys to the minors as a way to develop them. The AHL benefits us."

Economic Challenges

While a majority of the panelists had issues with labor relations, all of them have felt some impact of the global economic slowdown. With fans unlikely to have as much disposable income as in the past, maximizing the "bang for the buck" has become the mantra for several organizations.

"Disposable income doesn't exist anymore," Kurz said. "We have to provide value to the fans. We have to have value added. Something has to be going on all the time. Premiums – fans want to take something home. We give away 100-200 shirts/game. We had to convince owners to not cut costs but find ways to drive revenue."

In baseball and football, there's another factor that is cutting into the game-day profit potential of organizations – television. With the continuing rise of high definition television as well as sports tier packages (NBA League Pass, MLB.TV) where people can pay to sit at home and watch every game in the convenience of their own home, competing for that dollar has never been tougher.

"Everybody in the office is a salesperson," Chicago Cubs executive vice president, community affairs and general counsel Michael Lufrano said. "We're not only competing against events downtown but also against HD TV."

Milwaukee Brewers vice president and general counsel Marti Wronski echoed a similar sentiment but added that her staff took advantage of a unique opportunity to capitalize on success on the field.

"We had the good fortune to be performing well in the playoffs (reaching the National League Championship Series)," Wronski said. "We were enjoying it but also trying to leverage it toward getting tickets sold for 2012."

Brand Identity

Wronski's comments served well to lead into a discussion on generating brand identity with organizations. Each team tackles the question differently and those choices also come with some risks.

"It's a tricky balance," said Atlanta Braves legal counsel Greg Heller. "You have to tap into the marketability of the player. But sports are also unpredictable. Promoting the team and its brand is key. We have a seven-state territory that we call Braves Country."

The Braves had the benefit of a beloved player in Chipper Jones – a life-long Braves player – announcing that 2012 would be his final season.

"With Chipper Jones retiring at the end of the year, we had an opportunity to market him through the end of the year," Heller added.

Some teams have chosen to go on the other end of the age spectrum.

"We consider branding the most important thing we do," said Olczyk. "We're going with a youth movement. We had a unique opportunity with three No. 1 picks on our team at one time."

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While players come and go – even players who spend their entire career with one organization – getting fans to identify the team brand is vital to maintain consistency.

"We're looking toward our mascots (Bernie Brewer and the Sausages)," Wronski said. "History and tradition are always important and it's something the Cubs do very well with."

Social Media

Reaching out toward fans through advertising and branding is one skill. With the rapid rise of social media (Twitter, Facebook, Tumblr, etc.), it allows for more fan-to-player interaction but also creates numerous legal and administrative issues to deal with.

"It's a real fear for us," Wronski said. "As a lawyer, you live in fear of it. Sometimes, it's not just about the players you have but its tweets from family members against other players on the team."

Kurz echoed a similar sentiment and added that seeing something on a screen is much different than hearing it in context.

"The first time some bad language comes out, I live in fear of it," Kurz said.

Rather than looking at social media in an adversarial fashion, organizations are starting to use its near instantaneous access on multiple fronts. From analyzing trends in what fans are looking for to simply screening potential new hires, it allows companies to access a greater wealth of knowledge.

"We certainly use social media as an information gatherer," Lufrano said.

Sneatheran added that social media has created rules in the game. He recalled when former Bucks player Charlie Villanueva was tweeting during game action. Since then, the NBA has stepped in with rules that require players not to use social media immediately before or after the game.

Commissioners and Their Power

While labor negotiations are between ownership and players, ultimately it's the league commissioner who has the final say. Acting as the owner's representative in negotiations as well as disciplinary issues, they must stay above the fray as much as possible.

"It was a contentious subject to be negotiated (in the AFL)," Kurz said. "If the commissioner was going to be judge, jury and executioner, it's a tough position to be in. If you adjudicate the case and then hear the appeal, it looks bad."

One of the more thoughtful answers on the issue came from Foley's Braza. Rather than focus on the more routine operations, Braza believes that the most important role of a commissioner is when major issues arise.

"The real test for a commissioner is when there's a crisis," Braza said. "The natural reaction is to close down the hatches. But to look after the sport as a whole and stepping out, even while being criticized, takes leadership."

Other Issues Discussed

Three other questions were discussed during the panel interview – concussions, personal conduct and discipline as well as market globalization.

Regarding concussions, Stein addressed the issue by saying the NFL is trying to get ahead of the curve through education as well as through rules changes.

"Any football player who plays in the NFL, you see a player who's played between 10-14 years of football," Stein said. "The first thing is education – learning how to tackle properly, making sure coaches know how to spot symptoms. It's also getting them to understand that this is something that can also be cumulative over time.

"We've also started hiring neutral trainers to diagnose head injuries and pulling (players) them out of the game. We've also moved the yard-line on kickoffs to the 35, which has led to fewer returns. We've eliminated the 3-man wedge and the rules on contact on a defenseless player."

Stein also addressed the NFL's personal conduct policy, adding that it includes all league employees and not just players and coaches.

"The commissioner talks about protecting the shield or the brand of the league," Stein said. "There is a proactive approach to a player's character. You have a whole separate criterion when evaluating players."

Finally on marketing globally, leagues are taking a proactive approach to try and obtain sponsorships and brand recognition. With 75 international players in the NBA, a global perspective is needed but it also comes with some logistical challenges. Sturman said having translators are key when dealing with marketing and sponsorships in order to make sure that a team's message is understood.

Despite these challenges, it's an opportunity that leagues and teams seek to take advantage of.

"Everybody believes there's gold in them [sic] hills," Kurz said. "But it takes a lot of work."

Court: Reebok Must Produce Documents Relating to NBA

A federal judge from the Northern District of Illinois has granted American Needle's motion to compel Reebok International to produce documents involving its license agreement with the NBA. The discovery ruling was made as part of American Needle's ongoing antitrust litigation against Reebok, NFL, its teams, and NFL Properties.

"American Needle has demonstrated the importance of the NBA information to the market definition and market power issues," wrote the court. "The benefit of producing the NBA information to American Needle's theory of market definition outweighs the burden to Reebok."

For more than 20 years, American Needle maintained a non-exclusive license with the NFL to design and manufacture headgear bearing the NFL teams' names and logos. Then, a little over a decade ago, the teams collectively decided to offer an exclusive license to

American Needle's main rival, Reebok.

Upon being foreclosed from the ability to sell NFL headgear, American Needle sued the teams in federal court, contending that the new NFL licensing arrangement violated Section 1 of the Sherman Act by illegally restraining trade in the market for purchasing rights to NFL logos. The teams, in turn, responded by not only alleging that their licensing arrangement was pro-competitive under antitrust law's Rule of Reason, but also by contending that the teams combined to form a single-entity that was entirely exempt from antitrust scrutiny. Both the district court and the Seventh Circuit Court of Appeals granted summary judgment to the teams based on the single-entity theory. American Needle appealed to the U.S. Supreme Court.

On May 24, 2010, the Supreme Court rejected the NFL's "single entity" argument as a shield against antitrust lawsuits based on Section 1 of the Sherman Antitrust Act and remanded the case.

Back to the discovery dispute, American Needle's request centered specifically on Reebok's license agreement with the NBA and "related royalty/sales data."

"American Needle's motion to compel is well-founded," wrote thee court. "With regard to the benefit of the information sought, American Needle argues that the NBA information is relevant to determining issues of market definition and market power.

"Under the Rule of Reason analysis, a plaintiff's threshold burden is to show a precise market definition in order to demonstrate that Defendants wield market power. Agnew v. Nat'l Coll. Athletic Ass'n, 683

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Court: Reebok Must Produce Documents Relating to NBA

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F.3d 328, 337 (7th Cir. 2012). 'Products are in the same market if they are reasonably interchangeable for the purposes for which they are produced.' ChampionsWorld, LLC v. U.S. Soccer, 2012 WL 3580536, at *30 (N.D.

Ill. August 17, 2012). 'The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.' Brown Shoe Co. v. United States, 370 U.S. 294, 325,

82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) The Supreme Court has identified seven 'practical indicia' that a separate market exists: 'industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.' Id. The Seventh Circuit requires 'actual data and reasonable analysis . . . to demonstrate that a product or service is a good substitute for another.' Reifert v. S. Cent. Wisc. MLS Corp., 450 F.3d 312, 318 (7th Cir. 2006)."

The court went on to restate American Needle's "view" that "each professional sports league's team licensed products constitute a separate product market. American Needle is entitled to discovery to support its theory that NFL licensed products and NBA licensed products constitute separate markets. The NBA information American Needle seeks may assist American Needle in defining the relevant product market, including determining the substitutability of NBA and NFL-licensed products. An analysis of cross-price elasticity of demand between the NFL licensed products and NBA licensed products may be also relevant to assessing whether American Needle's proposed market definition is reasonable. American Needle intends to use the NBA information to evaluate what effect price increases or decreases have had on consumer pricing activity. More specifically, American Needle seeks to discover whether Reebok has been able to raise the prices of NBA team licensed products significantly above competitive levels without losing business to products that bear other professional sports league's logos and trademarks.

American Needle further plans to use the NBA information to support its claim that the seasonal nature of major sports leagues evidences the separateness of the product markets for antitrust purposes."

The court added that "American Needle's proposed NBA discovery may aid in defining the relevant markets, and American Needle is entitled to discover facts which may support the relevant market definitions that it has alleged. For purposes of discovery, American Needle has sufficiently demonstrated the relevance of the NBA information to its claims in this case."

Next, the court examined the alleged burden to Reebok associated with producing the information.

"Reebok contends that the potential harm here is essentially twofold," wrote the court. "First, Reebok points out that the NBA license agreement prohibits disclosure of the requested NBA information. The NBA is not a party and it has declined to consent to the production of its confidential licensing terms and royalty/sales information.

Reebok argues that producing the requested NBA information would impose competitive hardships on both Reebok and the NBA. Reebok notes that American Needle is a competitor of Reebok and the NBA is a competitor of the NFL. Reebok thus contends that disclosing confidential, sensitive details of Reebok and the NBA's business dealings–including licensing terms, royalty rates, items sold, sales volumes, pricing, timing, buyers/customers, and the like–to American Needle and the NFL would put Reebok and the NBA at a competitive disadvantage. Reebok is particularly concerned because American Needle has no outside counsel in this action. American Needle is represented solely by its in-house general counsel, who it asserts is also routinely involved in

American Needle's business matters, including its licensing matters. Reebok contends that it is not possible for American Needle's in-house counsel to analyze the NBA's sensitive business information in this litigation context and then not be aware of it for other contexts of American Needle's business."

The court took apart Reebok's argument of confidentiality and business risk.

"Although the NBA has a valid interest in protecting its confidential business information, confidentiality is not a sufficient reason to altogether prohibit the disclosure of relevant material and the NBA's consent is not necessary for disclosure in litigation," wrote the court. "Third-parties cannot simply refuse to produce relevant, albeit confidential, information."

As to the business risk, the court highlighted the fact that American Needle "has agreed to retain outside counsel to review the NBA information if it is designated 'outside counsel only' under the provisions of the protective order. This renders moot any concern that American Needle's in-house counsel's access to the NBA information would create an impermissible risk of inadvertent disclosure to American Needle's business. Similarly, if the NBA information is marked 'outside counsel only,' that information may be disclosed only to the NFL's outside counsel of record who will be bound to protect the confidential nature of the information disclosed to them."

American Needle, Inc. vs. New Orleans Saints et al; N.D. Ill.; 04 C 7806. 2012 U.S. Dist. LEXIS 137401; 9/21/12

Kings Settle with Sporting Goods Companies in Garcia Case

The Sacramento Kings have announced "a very positive settlement" from Ledraplastic, M-F Athletics DBA, Perform Better and Ball Dynamics regarding the Gymnic fit ball failure on October 9, 2009, which resulted in significant injuries to Kings swingman Francisco Garcia.

The Kings and Garcia were represented by Roger A. Dreyer of Dreyer Babich Buccola Wood Campora, LLP and Brian Panish of Panish Shea & Boyle, LLP.

"The matter has been resolved in an extremely favorable manner for the Sacramento Kings franchise and Francisco Garcia," said Dreyer. "We are very pleased with the outcome and look forward to a stringent policy informing consumers of the potential danger of utilizing weights when working out with the Gymnic fit ball."

Filed in December 2010, the Kings organization and its ownership group indicated one of

the driving motivations behind this litigation was to publicize the dangers associated in using weights with this type of exercise equipment. Considering the method of weight training in conjunction with Gymnic fit balls had become widely-practiced by trainers and fitness centers, and it was the Kings' position that the manufacturer and the distributors were mindful of the potential dangers for the equipment to fail and result in severe injuries. The matter was set to be tried before the Honorable William Shubb in Federal District Court on January 29, 2013.

In an agreement to keep financial terms of the settlement confidential, the manufacturer,

Ledraplastic, agreed to circulate a letter informing and reminding all distributors that Gymnic fit balls should be used with body weights only and are never under any circumstances to be utilized in combination with weights in order to avoid risk of potential injuries, and advising its distributors to forward this letter to their customers as soon as possible.

"It was critical to the Sacramento Kings and the Maloof family that users were informed of the potential dangers of utilizing weights with this product, and doing so could lead to a devastating injury such as what happened to Francisco Garcia," said Dreyer.

Dreyer added that it was "apparent through the course of the litigation that distributors of this product were aware of the

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Disgruntled Customer Brings Claim Against NFL Teams

By Sonny Hoang

On October 24, 2012, Patrick Dang filed a complaint in the United States District Court of Northern California alleging several antitrust violations under California's Antitrust Law, the Cartwright Act.

Dang is alleging that the NFL Properties' exclusive blanket licensing deals, covering every NFL team's trademarks, logos, and emblems, with Reebok and, subsequently, Nike are unlawful restraints of trade. He alleges that the monopoly priced exclusive licenses increased the prices of apparel bearing NFL trademarks, logos, and emblems that he bought. He also alleges that the exclusive blanket licenses foreclosed a substantial part of the market of apparel manufacturers who used to compete for individual team licenses before 2000. Patrick DANG, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. SAN FRANCISCO FORTY NINERS, LTD.; The Oakland Raiders, L.P.; Chargers Football Company, LLC; New Orleans Louisana Saints, LLC; Football Northwest LLC; The Detroit Lions, Inc.; Houston NFL Holdings, L.P.; Minnesota Vikings Football Club, LLC Ltd; Jacksonville Jaguars, Ltd; Tennessee Football, L.P.; Pittsburgh Steelers Sports, Inc.; Buffalo Bills, Inc.; Indianapolis Colts, Inc.; Pdb, 2012 WL 5249408 (N.D.Cal.)

Dang's Case Mirrors *American Needle*

Dang has initiated a class action covering anyone who has bought NFL apparel anywhere in the country since 2000. If this sounds familiar, it should. Dang's case mirrors American Needle v. National Football League in which the manufacturer, American Needle, is alleging federal antitrust violations against the NFL over its exclusive licensing agreements with Reebok, and now, Nike. American Needle won the first round of this case in which the Court ruled that, even though NFL Properties is a single corporation, the NFL teams will not be considered a single entity even if they submit all of their intellectual property rights to a single corporation. The Court's ruling merely removed one of the NFL's defenses. The case has since been remanded for discovery and further motion practice.

The California Cartwright Act Is Inapplicable Due to Its Substantial Effects on Interstate Commerce

However, Dang's first two counts against the NFL, NFL Properties, and the NFL teams are distinguishable in a very decisive way. He is alleging nationwide horizontal agreements and vertical agreements in restraint of trade in violation of California's Cartwright Act, the state's antitrust law. Dang, Pdb 2012 WL 5249408 (N.D.Cal.) Unfortunately for Dang, his lawyer may have failed to research the prior application of California's Cartwright Act. If he had done a quick search of the Cartwright Act's application to professional sports leagues, he would have found the act inapplicable to the NFL (Partee v. San Diego Chargers, 1983 34 Cal.3d 378 (1983)); state antitrust law's inapplicability to basketball (Robertson v. National Basketball Association (S.D.N.Y.1975) 389 F.Supp. 867, 881; *HMC Management v. New Orleans Basketball Club* (La.App.1979) 375 So.2d 700, 706–707); the Cartwright Act's inapplicability to baseball. (*Flood v. Kuhn,* 407 U.S. 258 (1972)).

Should Dang Just Stick with His §1 Sherman Act and §26 Clayton Act Claims?

There has been no case supporting a finding of state antitrust laws applicability to professional sports. This is probably due to the fact that state antitrust laws are designed to protect the public from the local effects of local antitrust violations in **intra**state commerce. Courts have focused on the negative Commerce Clause implications when striking down state antitrust law complaints because professional sporting leagues are primarily involved in **inter**state commerce across state borders. Additionally, the Court has concluded that there is an unreasonable burden on **inter**state commerce "where the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extraterritorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on **inter**state commerce." *Flood v. Kuhn*, 443 F.2d 264 at 267 (2d Cir. 1971), affirmed 407 U.S. 258 (1972). This unreasonable burden stems from the fact that any team in a national sporting league would have to conform with the strictest antitrust laws of any state, thereby granting unreasonable extraterritorial powers to that state. This unreasonable burden on interstate commerce far outweighs any state interest in regulating this issue, and there is a federal law already covering this issue which Dang can and has alleged in Count IV of his complaint.

If Dang focuses on his federal causes of action, he may be able to simply piggyback *American Needle* without his lawyer spending a substantial amount of time or money on the case. His lawyer may also want to consider dropping the Cartwright Act claims for another reason – the risk of court sanctions for bringing a frivolous claim.

LNS Captioning Helps Sports Facilities Satisfy ADA Requirements

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It has been this experience in the sports arena that has helped promote LNS as a trusted partner for all types of athletic entities in need of captioning services. That need is especially acute as a result of recent litigation requiring new stadiums to provide equal accommodation to the deaf and hard-of-hearing community.

In the case of Feldman v. Pro Football, Inc., for example, the Washington Redskins were ordered to make all information delivered aurally to patrons at the stadium accessible to patrons with hearing loss. Attorney John Waldo wrote about that case for Sports Litigation Alert article year ago.

"The court ruled that those patrons [of the hearing impaired community] are entitled to 'full and equal enjoyment,' not just of the game itself but of the entire spectrum of entertainment being presented," Waldo wrote. "Whatever is believed to enhance the total experience for hearing patrons should be made available to deaf patrons."

This meant that stadiums would need to go beyond captioning play calls and emergency announcements and include anything deemed to enhance the experience of a hearing individual such as song lyrics, advertisements and other announcements.

With that requirement, teams do have a choice in how they decide to provide individuals with captioning services, but many have found that one solution trumps the others.

Take for example the University of Oregon, which first sought out LNS's services after deciding that hand-held devices we not sufficient to the needs of the hearing impaired community.

"Our first attempt was captioning with hand-held devices, but because of some problems with the internal antenna that did not work as well as we had expected," said University of Oregon's senior associate athletic director Mike Duncan. "And that brought us to the captioning situation on the boards."

The University of Oregon, however, has not been the only one to run into problems with hand-held devices used to provide captioning. In fact, they are just one of many who have found problems with this method.

Studenmund explained how many hard-of-hearing individuals find it tedious to use a hand-held device when trying to watch a live sporting event and really gain the true experience that a hearing fan would enjoy.

"The purpose is defeated with hand-held devices," she said. "There can be problems with the reception inside a stadium which will cause the devices to not work correctly."

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LNS Captioning Helps Sports Facilities Satisfy ADA Requirements

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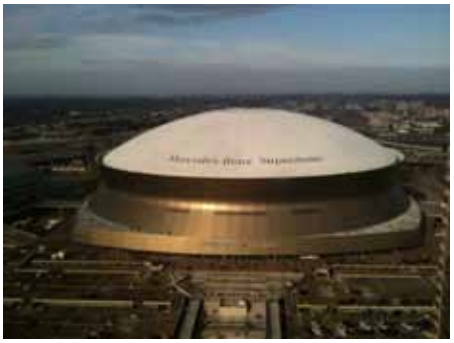
Reception isn't the only problem, however. Studenmund said that feedback from the hearing-impaired community listed several drawbacks of using hand-held devices such as having to constantly look back and forth between watching the game and reading the device as well as it being difficult to juggle the device when cheering on their team or simply carrying food or drinks.

Some have even compared the experience of using a hand-held device to virtually staying at home to watch the game. Fans come to the stadium for the experience and many have found that the best way to provide that experience is captioning on a scoreboard or ribbons around the stadium.

Duncan said that since installing and implementing captioning services on their big video board at Autzen Stadium, they have received nothing but positive feedback.

"I had a call from a father whose daughter was able to go to a football game [at Autzen] and actually understand what was happening," Duncan said. "She hadn't had that opportunity before."



In addition to benefitting the hearing-impaired community, feedback from LNS clients has shown that everyone can benefit from captioning services and that most hearing individuals actually appreciate the added convenience of being able to read about a recent play or penalty, et cetera, when the stadium becomes too noisy to hear calls as they are announced.

Studenmund noted that even beyond that, one of the greatest benefits to both hearing and hearing impaired individuals comes with urgent announcements and evacuation alerts in emergency situations.

"Tornadoes touched down in the New York City area, and MetLife Stadium [a client of LNS] had to evacuate to safer areas the entire football crowd," Studenmund said. "Our captioner captioned the same emergency message over and over during the storm… the captions were just there for everyone to read. No one had to dial up information on their smart phone or look at their handheld device."

It is clear from this example alone that scoreboard captioning is a prime choice when it comes to captioning options. Not only has the hearing impaired community deemed it their preferred method of receiving announcements while still feeling included in the game day atmosphere, but it is beneficial in numerous ways to all patrons attending an event.

LNS Captioning has truly revolutionized this business and continues to expand its client base across the nation. In addition to the NBA, Portland Trail Blazers, MetLife Stadium in New Jersey and Autzen Stadium at the University of Oregon, they now do work in Reser Stadium at Oregon State University and the Louisiana Superdome in New Orleans.

Ex-Punter Alleges Poor Field Conditions Caused Injury

By Alana C. Newhook, ESQ

Former Houston Texans punter, Brett Hartmann, filed a lawsuit in the State District Court of Harris county, Texas against Harris County Convention & Sports Corporation, the owners of Reliant Stadium, and SMG, the management corporation that operates the stadium. The complaint involves the injuries suffered by Hartmann in the December 4, 2011 game between the Houston Texans and the Atlanta Falcons. Specifically, the complaint contains three causes of action against the owners of Reliant Stadium and the stadium's management corporation: negligence, negligence under the Texas Tort Claims Act, and vicarious liability.

The complaint alleges that the stadium's poor field conditions caused him to tear his ACL and fracture his fibula jeopardizing his career in the National Football League. During the December 4, 2011 game, Hartmann caught his foot in the seam of the grass turf while playing against the Atlanta Falcons. According to the complaint, the grass trays used to comprise the grass field in Reliant Stadium had uneven seams creating an unreasonable hazard. It was the uneven seams in the grass trays in which Hartmann caught his foot causing his fall and subsequent knee injuries. The complaint alleges that Hartmann's injury was "severe and career-threatening" noting that knee injuries are rare amongst punters in the NFL.

The complaint notes that other stadiums in the National Football League use a single tray eliminating any risk that the players on the field will trip or injure themselves on seams. Hartmann alleges that he was an invitee to the stadium and that the defendants had a legal duty to eliminate any unreasonable hazards on the premises. In sum, Hartmann alleges that the defendants had a duty to maintain the field in a reasonably safe condition and their failure to do so caused his knee injuries.

Why Waiting Until the Last Minute Is a Bad Negotiation Strategy

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point where negotiators will sit down with an earnest desire to reach an agreement.

More troubling is the fact that our legislators in the federal government are also apparently subscribing to this eleventh-hour negotiating strategy. On CNN, Fox, MSNBC, and the network news shows, we tick off the days until the U.S. economy falls off the fiscal cliff. The president, senate and congressional leaders stand before us and pontificate on the perils the economy will face if we do not address our national debt and budget problems. But also they acknowledge that both sides are playing a game a of chicken to see who blinks before we reach the end of the year. In fact, both sides are questioning the agreed-upon fiscal cliff deadline date so they can continue to play this game of brinksmanship and extract more concessions from each other. It does not matter that this waiting game dampens enthusiasm in investing in our future and negatively affects the economy, our world credit rating, and consumer confidence. These consequences are not in our collective best interests, but they appear inevitable if we go past the deadline.

This deadline dynamic is not a new phenomenon by any means. It is a tried and true negotiation strategy that is employed by everyone from leaders in the highest levels of government to elementary student asking for additional time to complete a project. In 30 years of negotiating contracts in the sports industry, I have utilized the brinksmanship negotiating technique and been subject to it. I have witnessed the benefits of the strategy and seen harmful consequences as a result of it. I have come to recognize that there are times when waiting is a useful and effective strategy to achieve your best result. But I have also realized that one can also make a good deal — and sometimes a better deal — by striking early.

As a result, I have come to question why this brinkmanship strategy now seems to be the only strategy ever employed. Is there ever a time when delaying negotiations to the last minute is not the appropriate strategy? Or, put another way, is there ever a time when parties can sit across from each other and exchange constructive ideas to reach an agreement before the eleventh hour?

Different sports, different techniques

As mentioned above, for many years I negotiated NFL player contracts on behalf of teams. These negotiations, like all NFL negotiations, are subject to great media

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Why Waiting Until the Last Minute Is a Bad Negotiation Strategy

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interest. In fact, one columnist referred to the annual negotiating ritual as a mating game between two hippopotamus. In other words, slow and predictable are the rhythm of those talks.

George Young, the late great general manager of the New York Giants, used to say that the NFL negotiating period for signing NFL rookies didn't begin until after Bastille Day (July 14). Many NFL executives take the month of June off and do not even begin negotiating until after or around Bastille Day. The start of training camp also acts as an artificial deadline, while the playing of games (maybe the last preseason games and definitely the first regular season game) is really the deadline. But by waiting, players and teams risk several unwanted consequences. Players lose a chance to make an impact on the field and risk early injuries. Teams lose useful early play time for a player at great expense. Both the players and the team suffer career setbacks that cannot be made up, due to short average playing careers and coaches' tendencies to coach the players that are present, not the ones sidelined because of contract negotiations.

In contrast to the NFL method, Major League Baseball employs a salary arbitration system that calls for an arbitrator to pick between two submitted salary figures, a system that's engineered to encourage settlement. However, it still closely mirrors traditional litigation, where last-minute settlement often occurs on the "courthouse steps." In baseball arbitration cases, like in true litigation, the true deadline is when someone other than the parties to the eventual agreement is set to determine the result. Like a jury trial, your fate is outside your control, so the deadline risk becomes real and tangible.

The pace of negotiations

When negotiations occur between parties that have no previous history negotiating with each other, it is predictable and commonplace to find negotiations moving slowly. Unfamiliar parties may not know each other's styles and may not be able to pick up on subtle clues regarding deal points that are critical or not so critical to a respective party. Simply because their history working together is so limited, they may be unable to read when a party is making a real concession or a move that indicates a willingness to make a deal. They have not built up the necessary trust that fosters productive relationship negotiations. This dynamic may have affected the NFL labor dispute and could be at work now in the hockey labor dispute, as in both cases new lead

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Why Waiting Until the Last Minute Is a Bad Negotiation Strategy

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negotiators are at the helm. (Don Fehr for the hockey players' association, and Roger Goodell and DeMaurice Smith in the NFL dispute).

Time becomes a critical factor in other types of negotiations, particularly if circumstances change the dynamic of the deal for one or both parties. It's also a factor when the economics of a dispute force the parties to adjust their preconceptions about what they can accept as a reasonable outcome.

If we look again at the NHL dispute, as more games get cancelled, teams have less revenue to generate and the money pie becomes smaller to divide. Additionally, players lose paychecks and, given those players' limited career lengths, the owners gain the upper hand. Time becomes their ally and they use delays and waiting to their advantage. (We've seen this same technique in congressional budget negotiations and debt ceiling debates when elections or stock market fluctuations change the dynamic of those negotiations.)

Continuing relationships

Sports negotiations (and political party negotiations, by the way) are not normally negotiations between strangers. The parties have a relationship before the negotiation begins and in most instances have worked together in some manner before the "big" negotiation takes place. Additionally, sport negotiations are normally between parties that will have a continuing relationship even after the agreement is reached. These parties, unlike in a traditional litigation negotiation (such as "courthouse steps" settlement negotiations), are not going their separate ways after the conclusion of the negotiation. Whether it is in the collective bargaining setting or individual player negotiations, the parties are going to have to interact with each other and hopefully work together to solve problems, grow the product, and achieve desired competitive results.

In these types of continuing relationship negotiations, the best result is when a "win-win" situation is achieved. Neither side wins when there is a one-sided agreement that totally favors one side to the detriment of the other. When such a condition exists, the parties lose trust and lose the ability to work together to solve issues for the benefit of the collective sport. It seems fairly obvious that this circumstance is not in the sports industry's best interest.

Therefore, the question is this: What are negotiators in a continuing relationship achieving when they avoid negotiating in earnest until a deadline starts to loom? Are they looking to create a favorable, one-sided deal to the detriment of the other party? Are they not looking to grow the sport or to field a winning team? Are they intentionally discouraging cooperation in favor of creating an adversarial relationship? Common sense would conclude that these cannot be the goals of negotiators in this type of relationship.

Time is an asset, so use it well

I would argue that there is one negotiation strategy that makes more sense. It's the strategy where negotiations start and end in a time frame that doesn't favor one party more than the other. In this way, neither party gains an unfair advantage and negotiation talks don't result in an unfair agreement.

When parties reach a contractual agreement that requires continued cooperation, I believe that a negotiation with the goal of placing one side at a serious disadvantage is a recipe for a poor agreement. It clearly makes more sense for the negotiation to be conducted with enough time to have reasonable discussion about and consideration of important issues. It is counter-intuitive to believe that better results are achieved when parties rush to make decisions. Procrastination is not an asset in achieving good results. Sufficient lead time to make a deal should be asset, and solving problems or fashioning a system that fosters growth or productivity should be the goal of the negotiators.

Recent disputes illustrate that when the deadline strategy is used, it often leads to distrust, work stoppages, and negative effects for the industry. I, for one, would like to see another approach used, one that avoids the predictable result (work stoppage or shutdown) and actually benefits the collective good.

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failures of these balls when used with weights, yet the distributors, M-F Athletics and Ball Dynamics, had repeatedly failed to provide notice to any of its customers of these prior problems. Joe Maloof took the extraordinary step of notifying all members of the National Basketball Association of the incident and made certain all teams were mindful of the need to avoid what had become a standard exercise regime of using the fitness balls with barbells in order to increase core strength and balance."

Brian Panish of Panish Shea & Boyle, LLP added that "the word is now out in the fitness industry that these balls should absolutely not be used with weights."

Mancina v. Goodell and NFL: Aggrieved Fan Sues

By Ryan M. Rodenberg and Yoon Tae Sung

On October 15, 2012, David Mancina, a fan of the New Orleans Saints filed a lawsuit against Roger Goodell, commissioner of the National Football League ("NFL") and the league itself. Mancina's complaint was framed as a class action lawsuit representing all season and single ticket holders for the Saints games during the current 2012-2013 season. The premise of the lawsuit stems from the NFL's punishment in connection with the purported Saints bounty program scandal, an on-going issue that is being separately adjudicated. On March 21, 2012, following an internal investigation, the NFL meted out punishment against the New Orleans team, with the head coach, assistant coach, general manager, and several current and former players being suspended. Moreover, the team was required to forfeit its second round of draft choices in 2012 and 2013.

Mancina contended that the tickets he and other fans purchased were devalued since the quality of the Saints games would be lower than expected due to the punishments by Goodell and the NFL. Furthermore, as a result of all of the suspensions, he alleged that the quality of the team has been depreciated making the Saints less competitive and more likely to lose their (home) games. Additionally, he asserted that Goodell and the NFL did not consider fans who purchased tickets before he reprimanded the team.

Mancina believed that there was not sufficient evidence or due process to warrant the suspensions. In his complaint, Mancina also argued that "no opponent team member, news media representative, or NFL professional reviewer of game films of the New Orleans Saints for the years 2008-2011 reported any evidence of unusual, prohibited, or abnormal" performance by the Saints players, so the punishments and suspensions were groundless decisions by the defendants. Mancina further contended that the team could have been punished in an alternative way that would not have influenced the quality of play and caused harm to innocent ticker holders. Mancina concluded that he and the class of ticket purchasers should be monetarily compensated.

Mancina's complaint can generally be described as one falling under the "disappointed sports fan" umbrella and is by no means the first to do so.[1] At least two sports-specific lawsuits decided in the past six years have helped define the legal rights of aggrieved fans. The most recent example of such a lawsuit was based on the so-called "Spygate" scandal involving clandestine videotaping of opposing teams by New England Patriots employees working for head coach Bill Belichick. Plaintiff Carl Mayer, a New York Jets season ticket holder, sued Belichick, the New England Patriots, and the NFL alleging that such conduct "violated the contractual expectations and rights of New York Jets ticket-holders who fully anticipated and contracted for a ticket to observe an honest match played in compliance with all laws, regulations, and NFL rules."[2] Mayer's amended complaint included nine counts, largely a mix of state and federal breach of contract, fraud, and racketeering claims.[3] The Third Circuit Court of Appeals affirmed the District Court's dismissal of the suit, rationalized that Mayer "possessed nothing more than a contractual right to a seat from which to watch an NFL game between the Jets and the Patriots, and this right was clearly honored."[4]

Bowers v. Federation Internationale de L'Automobile stemmed from irate fans filing suit after "Indygate," a debacle at the Indianapolis Motor Speedway when only six of the twenty cars slated to race actually took part after tire problems sidelined the other drivers and their vehicles.[5] Bowers and other facing fans sued, claiming that they should be refunded the price of their ticket and other expenses (e.g. travel and lodging) incurred in connection with the event.[6] The plaintiffs' claims were based on theories of negligence, promissory estoppel, and breach of contract.[7] The Seventh Circuit Court of Appeals considered and rejected each, although the court did recognize that plaintiffs may have been justifiably upset based on what transpired at the race.[8]

The non-plaintiff-friendly result in each of the foregoing related cases does not bode well for Mancina in his suit against Goodell and the NFL stemming from "Bountygate." Defendants will almost certainly file a motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6), as Mancina's complaint includes fewer details than either of the complaints filed in the two tangentially analogous cases. In addition, Goodell and the NFL may seek sanctions in connection with Mancina's lawsuit.

Ryan M. Rodenberg *is an assistant professor of sports law analytics at Florida State University.* **Yoon Tae Sung** *is a doctoral student at Florida State University. He earned his master's degree from University of Illinois at Urbana-Champaign.*

1 For a discussion of related lawsuits pertaining to non-sports live entertainment (e.g. music concerts), *see* Brian A. Rosentblatt, I Know, It's Only Rock and Roll, but Did They Like It?: An Assessment of Causes of Action Concerning the Disappointment of Subjective Consumer Expectations Within the Live Performance Industry, *13 UCLA Entertainment Law Review* 33 (2005-2006).

2 *Mayer v. Belichick*, et al, 605 F.3d 223 (3rd Cir. 2010).

3 *Id.*

4 *Id.*

5 *Bowers, et al v. Federation Internationale de L'Automobile*, et al, 489 F.3d 316 (7th Cir. 2007).

6 *Id.*

7 *Id.*

8 *Id.*