PROFESSIONAL SPORTS and the LAW

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Pom Poms and Picket Lines

Might Professional Cheerleaders Unionize?

*By Scott Andresen and Kevin McCoy**

For the uninitiated, the National Labor Relations Act ("NLRA") can be a tough nut to crack. The federal labor relations law that we know today was created by the Wagner Act in 1935, and later amended by the Taft-Hartley Act of 1947, which together form most of the private-sector unionization provisions that predominate today. Renowned labor unions such as The Teamsters, AFSME, the AFL-CIO, and The Laborers can all trace the beginning of their rise to prominence back to those early pieces of legislation. The purpose behind the NLRA was to regulate the field of union-management relations and provide an agency to oversee and, where necessary, resolve disputes born out of the union-management relationship.

Over the last few decades, union membership has declined precipitously. According to the Bureau of Labor Statistics, in 2013 only 11.3% of the workforce was unionized (counting both private and public employees). Only 6.7% of private sector employers had unionized workforces. Consider, by contrast, that in 1983, the total percentage of unionized workers in America stood in excess of 20% and you begin to understand why the NLRB's influence has waned.

These statistics are not news to the

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Reinsdorf Secures Legal Victory in Retaliation Case

A federal judge from the Northern District of Illinois has granted a motion to dismiss filed by Jerry M. Reinsdorf, the principal owner of the Chicago White Sox, and others, who were sued by the former executive director and chief executive officer of the Illinois Sports Facilities Authority (ISFA), who claimed they orchestrated her firing.

The ISFA is a unit of local government created by the Illinois General Assembly, whose purpose is to use public funds for the provision of sports stadiums in Illinois. Its principal asset is U.S. Cellular Field, and the relationship between the ISFA and the White Sox is governed by a management agreement that runs through 2029. Under that agreement, the White Sox "have enjoyed a very favorable taxpayer-financed stadium deal," according to the court. "Among other advantages, the ISFA paid 100 percent of the costs of building U.S. Cellular Field and continues to pay for improvements. The White Sox also paid no rent for the first 18 years and currently pay only token rent."

Plaintiff Perri Irmer was named the executive director of the ISFA in December 2004 and continued in that role until her termination on April 25, 2011.

As the most senior employee, Irmer reported directly to the ISFA's board of

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Lawsuit Averted after Vikings Reach Settlement with Former Punter, Who Advocated for LGBT People

Late in August, the Minnesota Vikings and one of their former players, punter Chris Kluwe, reached a settlement over what the player described as the organization's intolerance toward lesbian, gay, bisexual and transgender (LGBT) people.

The settlement calls for the team to donate an undisclosed sum to five charities over the next five years that benefit LGBT groups as well as sponsor a fundraiser. Kluwe, who was cut by the Vikings prior to the 2013 season, will receive no money as part of the settlement.

The controversy began last January when Kluwe penned an article for sports website Deadspin, which accused special teams coach Mike Priefer of saying, "We should round up all the gays, send them to an island, and then nuke it until it glows."

That revelation led the Vikings to conduct an independent investigation, which spawned a 150-page report. The Vikings, however, were reportedly hesitant to release the report, which led Kluwe and his attorney, Clayton Halunen, to threaten the filing of a lawsuit. The team, and the NFL by extension, became a whipping boy for some sports law experts, such as Howard Wasserman, a Professor of Law at the Florida International University College of Law. He offered his thoughts in the Sportslawblog.com.

"The report concludes that the Vikings were not concerned with the content of Kluwe's advocacy, but with the fact of his advocacy and the 'distraction' it was creating," wrote Wasserman. "While it perhaps gets the team out from liability for retaliation, the notion that players are doing something wrong—something that justifies cutting them—by being politically engaged is a pretty reprehensible stance for the team to take. The NFL (and all professional sports leagues) makes a big deal of how all the charitable work players do—in fact, much of this work is required of the players. The league supposedly wants its players to be engaged. But it is beyond hypocritical and paternalistic to punish a player for having enough of an engaged mind to pick his own causes."

After the settlement, all was hunky-dory between the parties.

"This will help a lot of people that really need that help," Kluwe said. "I think the Vikings are committed to making changes. I think they're committed on this issue in the NFL, and I think it will make a difference over the upcoming year."

Kevin Warren, Vikings executive vice president of legal affairs, elaborated, discussing the sensitivity training that will be undertaken.

"What we're doing now is breaking it up into four different seminars," Warren told the Minneapolis Star-Tribune. "We'll have players, coaches and staff people so that we can make sure that the training that we do is much more focused for that individual group. ... We just want to continually enhance what we've already been doing ... to make sure we're doing the proper training to help educate our organization."

Vikings owner Zygi Wilf also issued his own statement.

"We appreciate Chris Kluwe's contributions to the Minnesota Vikings as a player and a member of this organization during his eight seasons in which he established many team records as our punter, and we wish him and his family the best in the future," he said. "In regards to this matter, our focus remains on maintaining a culture of tolerance, inclusion and respect, and creating the best workplace environment for our players, coaches and staff."

Braves Blocked by Court of Appeals in Foul Ball Case

A Georgia court of appeals has declined to put the brakes on a lawsuit brought by the family of a 6-year-old girl, who was struck by a foul ball, while attending an Atlanta Braves game, and subsequently sued the team.

The Braves had sought to overturn a trial court's decision not to grant the baseball team's motion for a declaratory judgment. The declaratory judgment would have recognized the baseball rule in Georgia and would have likely absolved the team of any liability in the case. The rule provides that a team has satisfied its duty of care, but shielding some seats from foul balls and making those seats available to the public.

The incident leading to the litigation occurred on August 30, 2010, when plaintiff M. F., a six-year-old girl, was sitting with her father behind the visitors' dugout at a Braves at Turner Field. The plaintiff was struck by a foul ball, causing a skull fracture and brain injuries. M. F.'s parent and guardian sued the Braves and three other defendants for negligence on July 16, 2012.

After the trial court denied the Braves' motion to dismiss for failure to state a claim or for summary judgment, the Braves moved for a declaratory judgment as to the applicable standard of care. The trial court denied this motion, but granted the Braves' application for interlocutory review, leading to the instant opinion.

The appeals court noted that there is safety netting behind home plate, which protects 2,791 of the stadium's 49,856 seats. But the netting does not extend to the seats directly behind the dugouts on either side of the field. "Although a Braves representative testified that M. F. and her family would have been free to move to unsold protected seats behind home plate by notifying an usher, the same representative testified that a surcharge would apply to seats purchased in this way," wrote the court.

Turning to the Declaratory Judgment Act, OCGA § 9-4-1 et seq., the appeals court cited case law from the state's Supreme Court:

"While it has often been said that our declaratory judgment statute ... should be liberally construed, it manifestly was never intended to be applicable to every occasion or question arising from any justiciable controversy, since the statute does not take the place of existing remedies." Mayor of Athens v. Gerdine, 202 Ga. 197 (1) (42 SE2d 567) (1947). Thus "a declaratory judgment is not the proper action to decide all justiciable controversies." Porter v. Houghton, 273 Ga. 407, 408 (542 SE2d 491) (2001); see also Fortson v. Kiser, 188 Ga. App. 660 (1) (373 SE2d 842) (1988) (although OCGA § 9-4-2 (c) authorizes declaratory relief even when a party has other legal remedies, "that statute obviously does not require the availability of such relief")."

The appeals court continued, noting that "a party seeking such a judgment 'must establish that it is necessary to relieve himself of the risk of taking some future action that, without direction, would jeopardize his interests.' Porter, 273 Ga. at 408. Thus "a declaratory judgment action will not lie where the rights between the parties have already accrued, because there is no uncertainty as to the rights of the parties or risk as to taking future action." Thomas v. Atlanta Cas. Co., 253 Ga. App. 199, 201 (1) (558 SE2d 432) (2001)

"Here, the event giving rise to the Braves' potential liability has already occurred, and a declaratory judgment is not the proper means by which to test their defense that their observation of the baseball rule, or some variant of it, satisfied their duty of care to plaintiffs."

One other issue that could surface as the litigation continues is whether the exculpatory language applies to youths.

The Atlanta Journal Constitution recently noted:

"In 1984, the state Court of Appeals declined to dismiss a lawsuit filed on behalf of an 8-year-old boy whose teeth were knocked out when he was struck by a foul ball at Atlanta-Fulton County Stadium. The case settled before going to trial."

Meanwhile, the Atlanta attorney representing the plaintiff was pleased with the decision in his case.

"We, of course, agree with and appreciate the Court of Appeals' decision to allow the case to continue," said Mike Moran. "We believe there is no compelling public policy reason for courts to grant the Braves and their owner Liberty Media de facto immunity from claims when children are seriously injured in these seats."

Spurs' Long-Time GC to Manage Charitable Foundation

J. Tullos Wells, the long-time de facto general counsel for the San Antonio Spurs, has left the team to become the managing director of the Kronkosky Charitable Foundation, the single largest source of philanthropic funding in San Antonio.

J. Tullos Wells

Wells' role with the Spurs was unique in that he also served as a partner in the San Antonio office of Bracewell & Giuliani.

In an interview with Sports Litigation Alert two years ago, Wells was asked what was the most rewarding aspect of his job? "It's twofold. First, I'm flattered to have the relationship I do and they have been gracious to me for a long time. Second, this is just a terrific organization. If you look at what the Spurs have done over the last decade, being identified as one of the best franchises in professional sports, I really am enormously fond of the people I work with. Very close relationships. Pop has been there off and on since 1992. Peter is on the team since 1996. We have grown up together."

Moore, Bertuzzi, Canucks Reach Settlement Over Injury

A decade after Todd Bertuzzi's hit on Steve Moore in an NHL hockey game caused a concussion and effectively ended Moore's career, a settlement has been reached between the two men and the Vancouver Canucks, which was also named in Moore's lawsuit.

The hit occurred when Bertuzzi struck Moore from behind in retaliation for a hit made by Moore on Canucks captain Markus Naslund in a previous game. Moore suffered a concussion and three broken vertebrae. Shortly thereafter, Moore sued the defendants for $38 million. His attorney, Geoff Adair, would later increase the demand to $68 million

The Canucks confirmed the settlement with a statement.

"Canucks Sports & Entertainment confirms that a mutually agreeable and confidential settlement of the action commenced by Steve Moore against Todd Bertuzzi and the Vancouver Canucks has been reached," the Canucks organization confirmed. "The settlement is a result of mediation sessions with former Ontario Chief Justice Warren Winkler. No further details will be disclosed and the Canucks respectfully decline requests for comment."

Jon Heshka, Associate Dean of Law at Thompson Rivers University, told Concussion Litigation Reporter that "with a trial scheduled to start on September 8th, the out-of-court settlement between Moore and Bertuzzi is not entirely unexpected. Despite Bertuzzi pleading guilty to assault causing bodily harm and receiving a conditional discharge in the criminal case, Moore winning the asked-for $68 million in damages was far from scoring an empty-netter."

NHL officials may be breathing "a sigh of relief," according to Heshka.

"The out-of-court settlement denies fans an opportunity to hear first-hand accounts in court of the culture of violence that pervades hockey," he said. "The settlement further means fans won't hear the extent to which — if at all — the Vancouver Canuck's coaching staff and ownership directed Bertuzzi to assault Moore as retribution for Moore's concussing Canuck star captain Marcus Naslund with an open-ice hit earlier in the season.

"What the settlement does mean, if one has indeed been reached and there appears to be some uncertainty on that front, is that Moore is finally compensated for the injuries sustained on March 8, 2004 and the NHL can breathe a sigh of relief that this embarrassment will finally come to an end."

Ex-CFL Player Has Hard Road to Hoe in Concussion Lawsuit

By Jon Heshka, Associate Dean of Law at Thompson Rivers University (British Columbia, Canada)

Canadian football has finally seen its first concussion lawsuit. Filed in the Supreme Court of British Columbia in July 2014, former professional football player Arland Bruce has sued the commissioner of the Canadian Football League (CFL), all nine teams in the CFL, an internationally renowned doctor who specializes in sports concussions, a medical centre which employs the doctor, and the president of the players association.

Bruce claims he was knocked unconscious during a game on September 29, 2012 and was permitted to return to play on November 18, 2012 despite not being 100% recovered and still suffering from the effects of a concussion. He alleges that he sustained multiple sub-concussive and concussive hits in that same game. Bruce further claims that he was permitted to return to play in 2013 for the Montreal Alouettes even though he was still displaying the ongoing effects from the concussions sustained the year before.

At its essence, the lawsuit alleges negligence and negligent misrepresentation. Tearing a page from the NFL class action lawsuit, Bruce claims that, "Part of the CFL's marketing strategy is to promote and glorify the brutality and ferocity of CFL football, in part, by lauding the most brutal plays and ferocious players and collisions; yet the CFL is claiming to take on a leadership role in the promotion of concussion awareness, prevention, research and treatment." The claim also dramatically includes the lyrics from a promotional song of the league which includes the lines, "This is a league of fast and crush where there is no safety in a sideline ... This is a league of black and blue" which purports to show the extent to which violence is promoted.

The lawsuit devotes seven pages to "The History of Concussion and CTE" citing studies dating back to 1928 to the present.

Bruce claims that the CFL denied a scientifically proven link between repetitive traumatic head impacts and later in life cognitive brain injury including CTE, that the CFL misled, downplayed, and obfuscated the true and serious risks of these hits, that the CFL failed to warn him of the long term medical risks associated with repetitive head impacts and that he relied upon these statements in playing professional football.

Bruce similarly alleges that Dr. Charles Tator, whom the CFL partnered with as part of its Canadian Sports Concussion Project at the Krembil Neuroscience Centre, is negligent and for an article entitled, "Absence of chronic traumatic encephalopathy in retired football players with multiple concussions and neurological symptomatology" published in Frontier in Human Neuroscience. Bruce claims that the findings in the article were against the weight of the medical evidence, that there was no provable connection between concussion and sub-concussive injuries and CTE in CFL players, and that the research overlooked the work of prominent concussion experts, Dr. Omalu and Dr. McKee.

By wanting to hold the author of an academic article published in a peer-reviewed medical journal, Bruce appears not to understand either the nature of research in general or the scientific method specifically. The article does not make the sweeping statements suggested by Bruce and did not overlook the work of Omalu and McKee but instead offers a more nuanced view:

"[O]ur findings advocate caution in the clinical diagnosis of CTE in patients with histories of contact sports and neurocognitive decline, *as other diagnoses of neurodegenerative diseases are also possible* [emphasis added]. Our findings are consistent with a literature review by Nowak et al. (2009), in which dementia in retired boxers could be explained by pathologies aside from dementia pugilistica (Nowak et al., 2009—see also McKee et al., 2013). In contrast, other previous studies either focused on describing CTE in professional athletes (Omalu et al., 2005, 2006, 2010b,c; McKee et al., 2009, 2010) or found that a majority of professional athletes had CTE (Omalu et al., 2011). These findings raise questions regarding the relationship between multiple concussions in professional football alumni and CTE, the prevalence of CTE in this population and the risk factors. Previous post-mortem research with larger samples of professional athletes with multiple concussions has suggested a very high incidence rate; however, such studies have been limited by biased samples restricted to clinically symptomatic cases and a lack of medical post-mortem controls ..."

At the CFL Players Association AGM in 2011, players learned, according to Winnipeg Blue Bombers defensive tackle Doug Brown who was present and wrote about it in the *Winnipeg Free Press* the following:

"According to information from a UNC study we were shown, "Repeatedly concussed NFL players had five times the rate of mild cognitive impairment (pre-Alzheimers) than the average population." The same study also showed that, "...retired NFL football players suffer from Alzheimer's disease at a 37 per cent higher rate than average." Going into this conference we were all somewhat familiar with the long term consequences of playing football, but not to the depth that was introduced at our meetings. Next

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Timing Is Everything When Negotiating NFL Contracts

When renegotiating a contract in the NFL, timing is of the essence — the player can benefit financially the earlier in the offseason the contract is signed, while the team can benefit by waiting.

And timing can mean a difference of hundreds of thousands of dollars, according to new research from the University of the Chicago Booth School of Business.

"This paper is about a seemingly very small part of the NFL contracting — when do you get paid in the offseason?" says Gregor Matvos, an associate professor of finance at Chicago Booth. He says that whether football players get paid early in the offseason or later in the offseason shouldn't matter, because regular-season games don't start until September.

"It turns out it matters hugely — the timing of these payments, how they're staggered," Matvos says. "In a lot of markets we don't quite understand how important timing is."

No NFL contracts are guaranteed — though players are bound to the teams with which they have their contract, the teams can cut ties with the players at any time. Thus, with no safeguards, teams could delay renegotiation with a player until late in the offseason, giving teams an upper hand because there would be few if any openings elsewhere and the player would have little option but to take whatever the team offered.

For veteran players, though, a roster bonus often is part of the payment package and must be paid early in the offseason, forcing teams to decide whether to keep or cut a player at a time that is more opportune for the player. The rest of the salary is paid at the end of the offseason.

In his paper, "Renegotiation Design: Evidence from National Football League Bonuses," which was published in May in the Journal of Law and Economics, Matvos looked at 4,220 contracts signed in the NFL from 1994 to 2003, focusing on the 1,428 contracts in that span that were two years or longer, as well as corresponding player performance data.

Matvos focused on the NFL because of conversations he had with Andrew Wasynczuk, a former chief operating officer with the New England Patriots who now teaches at Harvard Business School, and a realization that "sports are a really nice lab to think about contracting because things are very constrained."

"I started thinking about renegotiation — how it happens, why timing of renegotiation is very important," he said. "You really want to think about how you're going to structure your contract.

"In the NFL we can measure dollars. If you slightly mis-structure your contract on the timing, then that could potentially cost you hundreds of thousands of dollars."

Matvos says NFL contracts are interesting because teams and players have to "buy" trade-offs — through signing bonuses, roster bonuses and salary.

"What does a nonguaranteed contract mean for a player? It means that if I, the team, want to keep you, I have to pay you this money (roster bonus), but if I don't want to keep you I can just terminate the contract," he says. "So in some ways as a team, I have an option on your play. But of course there is a price for this contract ex ante. ... Just because a player doesn't have a roster bonus doesn't mean they're worse off. Hopefully they got compensated appropriately for it, with a bigger signing bonus or a bigger salary. It's stunning that such a little difference could matter so much."

Ex-CFL Player Has Hard Road to Hoe in Concussion Lawsuit

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we were shown that Time Magazine had produced a story about football called The Most Dangerous Game, and the author, Sean Gregory, concluded that, "Men between the ages of 30 and 49 have a one in a thousand chance of being diagnosed with dementia, Alzheimers, or another memory related disease. An NFL retiree has a one in fifty-three chance of receiving the same diagnosis." This was around the moment in Las Vegas where a collective 'thunk' was heard as all of our jaws hit the floor. These are not CFL statistics, but *you would have to be pretty naive to think that these facts do not apply to our game as well* [emphasis added]."

The figures cited were from studies published in 2005 and 2006. While it is disconcerting that it took the CFL more than five years to tell its players about these known dangers in March or April 2011, it is noteworthy that Bruce was injured in September 2012, a full year-and-a-half later after these statistics were revealed.

Though not mentioned in the claim, Bruce began playing in the CFL in 2001 and played a total of 12 seasons in the league before retiring. Given his choice of profession, its occupational hazards and inherent risks, and the recent history of concussion litigation with the NFL which began with the first lawsuit in April 2011, Bruce has a hard row to hoe in proving the CFL and Dr. Tator were negligent and that he was unaware of the risks of brain injuries in professional football.

NFL Disciplinary Process in Jeopardy after Rice Incident

By Michael James, Jr.

The NBA, NHL, and Major League Baseball all have seem to have their fair share of internal problems in recent years that garnered public attention and criticism of how the situations were handled. The other leagues' dilemmas, however, pale in comparison to the NFL's handling of Ray Rice's suspension stemming from him assaulting his wife in a New Jersey Casino.

Initially, Ray Rice received a two game suspension from the league after he plead not guilty to one count of third-degree aggravated assault and instead sought entry into a pre-trial intervention program for first-time offenders. The diversionary program allowed him to clear his record of charges. The league received public criticism expressing that the suspension was essentially a slap on the wrist for such a serious offense. The NFL would respond with a harsher, indefinite suspension. However, this punishment also garnered public controversy because the indefinite suspension was imposed on Rice only after TMZ published a second video that graphically captured Rice knocking his then-fiancée unconscious in a New Jersey casino.

Notwithstanding the second video controversy, the league still has adequate standing to impose the two game suspensions through its personal conduct policy. The league has discretion to punish players for conduct detrimental to the NFL under the personal conduct policy. Regardless of who saw the elevator video and when, Rice was indicted by a grand jury for aggravated assault and was sentenced by a judge for his conduct.

Rice's indefinite suspension is vulnerable to legal challenge though. The crux of the controversy stems from the double jeopardy provisions contained in Article 46 of the collective bargaining agreement. Under the Article 46 "one penalty" clause, the NFL cannot punish a player twice for the same conduct or act. The clause bars the league and teams from double-penalizing a player for the same conduct or act. While the elevator video shows a different sequence of Rice hurting Palmer, it is arguably the same act and occurrence.

NFL has implied that Rice was untruthful about what happened in the elevator in an attempt to shield their double-penalization liability. The NFL could better justify its indefinite suspension if Rice was in fact untruthful in speaking with Roger Goodell because the NFL would have impose a punishment based on misinformation. Rice has disputed the accusation by claiming that the TMZ footage was altered and depicts an alternative occurrence than of the actual event. If true, Rice will have a high likelihood of filing a successful grievance because the original penalty was based on correct information.

The NFL has also justified the indefinite suspension on the NFL not having seen the elevator video prior to Monday. In claiming so, the NFL implies that the second video constitutes a separate occurrence, which justifies the additional and more stringent punishment. However, four independent sources claim informing the NFL and the Ravens organization of the incident and sending the video to the NFL. An independent review of the disciplinary process will favor Rice, if the sources are accurate.

Even if none of Rice's potential legal claims prove successful, Rice may still be in a good position to extract a settlement from the NFL that returns him to the NFL, but not necessarily the Ravens. Regardless of the NFL's problematic investigation, NFL teams have wide discretion to release players under contract. Rice committed a graphic domestic violence act and was sentenced for his conduct. As long as Rice is paid in accordance with his contract, he likely has no viable legal argument against the Ravens.

James holds a Juris Doctor degree from The Dickinson School of Law at Penn State University and is awaiting admission to the New York Bar. He is the former President of PSU's Sports and Entertainment Law Society.

FCC Eliminates Blackout Rules; Lawyer Questions Timing

The Federal Communications Commission has announced that it was repealing its sports blackout rules, which has prohibited cable and satellite operators from airing any sports event that had been blacked out on a local broadcast station.

The action removes Commission protection of the NFL's current private blackout policy, which requires local broadcast stations to black out a game if a team does not sell a certain percentage of tickets to the game at least 72 hours prior to the game.

The Commission concluded that the sports blackout rules "are no longer justified in light of the significant changes in the sports industry since these rules were first adopted nearly forty years ago. At that time, ticket sales were the primary source of revenue for the NFL and most NFL games failed to sell out. Today, television revenues have replaced ticket sales as the NFL's main source of revenue, and blackouts of NFL games are increasingly rare. The NFL is the most profitable sports league in the country, with $6 billion in television revenue per year, and only two games were blacked out last season.

The FCC also found that the NFL, "whose current contracts with the broadcast networks extend through 2022 — is unlikely to move its games from free, over-the-air broadcast television to satellite and cable pay TV as a result of elimination of the sports blackout rules. The Order therefore concludes that the sports blackout rules are no longer needed to ensure that sports programming is widely available to television viewers.

"Today's action may not eliminate all sports blackouts," the FCC continued, "because the NFL may choose to continue its private blackout policy. However, the NFL will no longer be entitled to the protection of the Commission's sports blackout rules. Instead, the NFL must rely on the same avenues available to other entities that wish to protect their distribution rights in the private marketplace."

Lawyer Calls Rule Obsolete

Irwin A. Kishner, an authority on sports law and the chairman of the Executive Committee at Herrick, didn't mince words in discussing the FCC's decision with Sports Litigation Alert.

"The FCC blackout rule was arcane relic from bygone days and frankly should have been dispensed with several years ago," Kishner said. "While the rule played an important role in the 1970s and perhaps the 1980s by protecting team ticket sales, as the prominence of nationalized television revenues grew in the 90's through the present, the rule's purpose became obsolete.

"The FCC should focus on matters of public interest and not concern itself with matters of revenue distribution among team owners."

NY Giants Memorabilia Case Stays in Federal Court

A federal magistrate judge has sided with the New York Giants and several individual defendants, including quarterback Eli Manning, denying a memorabilia collector's motion to remand a lawsuit, in which he alleged fraud and other improprieties, back to state court.

Plaintiff Eric Inselberg claims the defendants lied to him when they sold him "game-worn merchandise." He also alleged that the Giants inappropriately used patented intellectual property invented by Inselberg relating to technology for wireless audience interaction at football games. The latter claim is what torpedoed the plaintiff's motion to remand since patent claims "are exclusively federal, and can only be brought in federal court," wrote the magistrate judge.

Inselberg, a self-described inventor and sports memorabilia dealer, was the subject of a government investigation — along with the Giants, Manning, John K. Mara (the President, CEO, and co-owner of the Giants), William J. Heller, Esq. (Giants General Counsel), and others — that was initiated in 2006 by the United States Attorney's Office for the Northern District of Illinois.

Inselberg was eventually indicted in Illinois for mail fraud, specifically finding that he had "misrepresented unused jerseys as game-worn or game used in order to obtain higher prices for the merchandise." Inselberg says the indictment was the result of Giants employees giving false testimony. The indictment against Inselberg was dismissed on May 2, 2013, at the request of the U.S. Attorney's Office.

On January 29, 2014, the plaintiff filed a 16-count Complaint in New Jersey Superior Court, arguing that the false testimony led to his indictment and ruined him personally and financially. Inselberg also alleged that the defendants were involved in game-used memorabilia fraud, which ultimately damaged his reputation and business.

The plaintiff's complaint asserted the following 16 causes of action, all under state law: (1) New Jersey's Civil Racketeering Statute, N.J.S.A. 2C:41-1, et seq.; (2) Tortious Interference with Prospective Economic Advantage; (3) Tortious Interference with Contractual Relations; (4) Malicious Prosecution; (5) Abuse of Process; (6) Trade Libel; (7) Intentional Infliction of Emotional Distress; (8) Unjust Enrichment; (9) Quantum Meruit; (10) Unfair Competition — Idea Misappropriation; (11) Breach of Contract; (12) Civil Conspiracy; (13) Aiding & Abetting; (14) Negligent Supervision; (15) Negligent Retention; and (16) Respondeat Superior.

While the aforementioned sports memorabilia investigation was ongoing, Inselberg was also trying to convince the Giants to use his wireless technology. Ultimately, he

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Rice Saga: Not Just About Punishment Fitting the Crime

By Howard M. Bloom, of Jackson Lewis P.C.

The disturbing domestic violence incident involving former Baltimore Ravens running back Ray Rice and his wife may raise issues for professional football's labor relations as well as Rice's future career as a player.

Rice was seen in a hotel video dragging his wife out of an elevator. National Football League Commissioner Roger Goodell investigated and suspended Rice for two games. Public outrage continued to mount, especially after a newly released hotel video showing Rice punching Janay inside the elevator was released. Commissioner Goodell changed Rice's punishment and increased the length of the punishment to an indefinite suspension.

Rice is covered by a collective bargaining agreement between the league and the National Football League Players Association (NFLPA) and, despite the seriousness of the incident, the question arises whether the "rules" bar Commissioner Goodell from having increased the initial sanction against Rice for reasons of "double jeopardy." That argument, among other theories, almost certainly will be raised by the NFL Players Association (NFLPA) at the hearing that will take place in connection with the appeal the NFLPA filed challenging Rice's indefinite suspension

The NFLPA represents NFL players under a collective bargaining agreement (CBA) with the League. Like most CBAs, the NFL CBA contains a provision under which employees (players) and/or the union may file a "grievance" involving a dispute about how a specific provision of the CBA has been interpreted or applied by the NFL. Unresolved grievances are referred to arbitration in front of a neutral arbitrator.

Unlike almost all other grievance processes contained in CBAs, however, the NFL CBA grievance procedure does not apply to fines or suspensions (including Ray Rice's) levied against players. Instead, a "hearing officer," appointed by the Commissioner after "consultation" with the Executive Director of the NFLPA, hears the case and renders a written decision which is "full, final and complete disposition of the dispute" and binding.

Enter the potential concept of "double jeopardy." In criminal cases, it prevents an individual from being tried twice for the same crime after a conviction or acquittal has occurred. The same concept also can be applied in the workplace. Double jeopardy

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Rice Saga: Not Just About Punishment

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as a workplace concept has more than one meaning or application. First, once an employee has been disciplined for wrongdoing, he or she may not be subject to discipline a second time for the same infraction. Second, and most relevant to the Rice situation, the notion also disallows increasing the penalty for a violation after the discipline has been imposed. In fact, double jeopardy can apply where a penalty is enlarged, even if the greater penalty is based on facts about which the employer was unaware when the original discipline was imposed.

In its press release announcing the filing of the appeal on Rice's behalf, the NFLPA said "[u]nder governing labor law, an employee cannot be punished twice for the same action when all of the relevant facts were available to the employer at the time of the first punishment.")

Although the concept of double jeopardy is well-established in grievance arbitration, it is not a given that it will be recognized by the hearing officer under the procedure contained in the NFL CBA. And, even if it is, the double jeopardy rules are not without exception. For example, assuming double jeopardy is raised by the NFLPA at the hearing, the hearing officer may be sympathetic to a counter-argument by the NFL that it was unaware of what actually occurred in the elevator until after the two-game suspension had been imposed, and therefore, it was appropriate to reconsider the earlier suspension decision.

Memorabilia Case Stays in Federal Court

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claimed the defendants wrongly "misappropriated" and "used" his "wireless patented marketing concepts and 'integrated' them into the Giants' wireless platforms."

Given the patent claims, the defendants successfully had the claim removed to federal court.

On appeal, the plaintiff argued that the patent claims should be covered under New Jersey state law. But the court was unpersuaded.

"The plaintiff's purported state law 'patented concepts' claims are really patent claims, no matter what they are called," wrote the court. "Patent claims are quintessentially federal, creating model federal jurisdiction. But not only are patent claims federal, they are exclusively federal, and can only be brought in federal court. In patent matters, Congress has so completely preempted the field that any attempt to disguise them as state law claims cannot defeat federal jurisdiction. Thus, the motion to remand should be denied."

Pom Poms and Picket Lines: Might Professional Cheerleaders Unionize?

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NLRB; the agency has been combatting declining union rolls for many years. However, about three or four years ago the agency underwent a philosophical re-evaluation of its role in the unionization process and its role in workforce management, in general, with the hopes of reinvigorating unionization in the United States. The reinvigoration efforts have led to some interesting developments.

We've Got the Players.... Why Not the Cheerleaders?

One way the NLRB is trying to reinvigorate the union rolls is by crafting rules and administrative decisions that make it easier for employees to unionize. A by-product of that effort has been that categories of employees who have traditionally not been unionized are initiating organizing attempts. Let's get crazy for a moment; what are the chances NFL cheerleaders would ever organize?

Well, first-things-first…is a cheerleaders union even legally possible? The short answer is, yes. The NLRA allows "employees" (both full and part-time) to engage in protected concerted activity for their mutual aid and protection. So, as long as the cheerleaders were actually employees of some organization (and not independent contractors) and there were two or more cheerleaders on the squad (because one employee cannot form a union), then cheerleaders would be no different than any other "employees" who were working in, say, a manufacturing plant.

The next question to answer then is who is considered the employer? Taking NFL cheerleaders as an example, are the cheerleaders employees of the NFL team for which they cheer or even the NFL? In most, if not all instances, NFL teams employ their own cheerleaders (usually at low wages… but more on that later) and would clearly be a statutory employer under the NLRA. Teams who subcontract with cheerleading companies to provide cheerleaders may or may not be considered "employers" under the NLRA, depending on the amount of control and direction they exercise over the cheerleading squad (as was seen in the Buffalo Jills-Mighty Taco matter discussed below). But the more interesting question is, what about the NFL? Might the cheerleaders be considered employees of the NFL?

For those at all familiar with the NLRA, it will come as no surprise that the basic definition of "employer" is extraordinarily broad – literally, anyone "acting as an agent of an employer…", with limited exceptions, will qualify as an employer under the NLRA. But in order to be considered

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an employer of NFL cheerleaders (who are ostensibly paid by their respective teams) the NFL would have to be viewed as a "joint employer." In order to be a joint employer, an entity must exert a significant and direct degree of control over employees and the employees' essential terms and conditions of employment – which include such things as hiring, firing, discipline, and supervision of work. In short, in order for the NFL to be a joint employer, it would have to have some significant say over the day-to-day roles of a team's cheerleaders. Whether that would be the true for any particular team's cheerleaders would have to be determined on a case by case basis; and it is *probably* not something that could be demonstrated by cheerleaders on a "league wide" basis. In other words, it is unlikely that the NFL would be deemed a joint employer of every NFL teams' cheerleaders. However, the easier path to unionization for cheerleaders is likely concentrating on the "employer" that strokes their meager paychecks, and in most instances that is their team.[1]

So even if cheerleaders can unionize, why would they? Or should they? Ironically, cheerleaders today represent a fair example of why the NLRA was passed in the first place. Professional cheerleaders are, by and large, paid poorly for a fairly involved job that requires not only practice, but public relations appearances, uses of their likenesses for marketing purposes, autograph sessions, and photo shoots—all with little or no compensation. For their efforts, cheerleaders are often paid less than minimum wage (which is unlawful, if they are employees) or even if they earn minimum wage, the pay is still low. Thus, the conditions are ripe for discontent among the ranks of the cheerleaders; and discontent is traditionally the fuel for the fire of unionization. How discontented can an NFL cheerleader possibly be, you ask? Quite a bit, apparently….at least according to some NFL cheerleaders who have recently filed individual lawsuits against their employer teams for wage theft, stemming from the alleged failure of the teams to pay them at least minimum wage. But has this apparent discontent actually lead to any attempts at unionization by cheerleaders? The answer may surprise you.

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1 It is worth noting that NFL players are unionized, collectively, and not on a team-by-team basis. However, the NFL has significant control over the players' day-to-day jobs, including such things as pay, discipline, suspension, uniforms, off the field conduct, etc. This type of governance does not exist at the NFL level for teams' cheerleaders.

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Cheerleaders Strike Back

As of the writing of this article, the Oakland Raiders (twice), Cincinatti Bengals, Tampa Bay Buccaneers, New York Jets and Buffalo Bills have all been sued by current and former cheerleaders.[2] In the second Raiders case filed on June 4, 2014, the National Football League is also a named defendant. The cases are a mix of claims under federal law (e.g., the Fair Labor Standards Act) and state law, and generally claim that they were (i) not paid minimum wage for practices, appearances, modeling, etc., (ii) not paid in a timely manner, (iii) not paid overtime, (iv) subjected to unlawful terms and conditions of employment (e.g., auctioned off at golf outings and forced to sit in winners' laps in golf carts, and "jiggle tests"), (v) not reimbursed for expenses, and (vi) not provided breaks. Unjust enrichment claims were also asserted against the teams.

The Oakland Raiders reached a settlement in the *Lacy T. v. The Oakland Raiders* case on September 4, 2014, with the court granting preliminary approval on October 2, 2014. The settlement will pay an average of $6,000 to each Raiderette for each season worked between 2010 and 2012, and $2,500 for the 2013-2014 season.[3] The settlement resolved all disputed claims regarding payment for hours worked, including practices and appearances, unreimbursed expenses, interest on past wages, and penalties under the California Labor Code.

Déjà Vu All Over Again: NFL Cheerleaders Association

For the Buffalo Jills cheerleading squad, their current foray into labor unrest is déjà vu all over again. It is a little-known fact that the Buffalo Jills *successfully* formed a union in 1995. Formed in 1967, the Jills were leased to local fast food chain Mighty Taco by the Buffalo Bills organization in the mid-1980's. Mighty Taco selected and managed the Jills, while using the squad to promote its business and provide cheerleading at 8 Buffalo Bills home games a season.

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2 See Brenneman v. Cincinnati Bengals, Inc., No. 1:14-CV-136 (S.D. Ohio 2014); Jaclyn S. v. Buffalo Jills, Inc., No. 804088-2014 (N.Y. Jul. 1, 2014); Krystal C. v. New York Jets, LLC., No. L00428214 (Super. Ct. N.J. May. 6, 2014); Manouchar Pierre-Val v. Buccaneers Limited Partnership, No. 8:14-CV-1182-T-33EAJ (M.D. FLA. May. 19, 2014); Caitlyn Y. v. The National Football League, No. GG14727746 (Super. Ct. Cal. July. 4, 2014); and Lacy T. v. The Oakland Raiders, No. RG14710815 (Super. Ct. Cal. Jan. 22, 2014).

3 The amount for the 2013 season is reduced as the Raiders began paying minimum wage in 2013 before the lawsuit was filed.

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After years of receiving little to no pay for their services, the Buffalo Jills filed a petition with the National Labor Relations Board to form a union. Despite claims of Mighty Taco that the cheerleaders were merely independent contractors, the NLRB Regional Director ruled that the Jills were employees of Mighty Taco as the company controlled the Jills' rehearsal schedules, costumes, routines, time and places of performances and other factors (e.g., weight restrictions). In February 1995, the Jills voted 29-2 to join the *National Football League Cheerleaders Association*- the first, and to date only, professional cheerleaders union. Unfortunately, the Jills' success was short-lived as Mighty Taco dropped its 'sponsorship' of the Jills after unionization. Despite finding short-term sponsors for the 1995 season, the Jills were forced to disband their union in order to secure sponsorship for the 1996 season and beyond.

Conclusion

Only time will tell if NFL cheerleaders will ultimately form one or more unions at the local or national level(s), but years of poor wages and difficult working conditions seem to have created a climate that is ripe for cheerleading squads across the National Football League (and across the other professional leagues) to form unions in an attempt to improve their current terms and conditions of employment. With the combined record of 9-22-1 shared by the Oakland Raiders, Cincinatti Bengals, Tampa Bay Buccaneers, New York Jets and Buffalo Bills[4], cheerleader picket lines outside of the teams' respective stadiums might be far more interesting than the games being played inside.

4 As of October 20, 2014

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Reinsdorf Secures Legal Victory in Retaliation Case

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directors, including the chairman, James R Thompson. The board is selected by the Mayor of Chicago and the Governor of Illinois. Although Irmer alleged that the Governor alone selects the chairman, the Illinois statute provides that the chairman "shall be appointed by the Governor subject to the approval of the Mayor of the City of Chicago…." 70 ILCS § 3205/4. Thompson was the Governor of Illinois when ISFA was created and served as the chairman of the board from 2006 through 2011.

"After becoming executive director, Irmer recognized that the ISFA was in a difficult financial condition, due in substantial part because it was putting the interests of the White Sox ahead of the interests of Illinois taxpayers," wrote the court, citing the complaint. "As a result, Irmer sought to reform the relationship between the White Sox and the ISFA established in the management agreement, which she viewed as abusive to taxpayers. To that end, Irmer developed and implemented a facilities management plan, resulting in millions of dollars of savings for ISFA. Irmer also sought to develop new sources of revenue from non-baseball events, such as music concerts. She advocated that the White Sox pay rent to the ISFA and also sought to develop the publically owned lands around Cellular Field to generate additional revenue. The White Sox and Reinsdorf opposed these proposals because of the economic detriment to them. Reinsdorf also opposed the music concerts on the basis that they could detract from revenue generated by concerts held at the United Center," which he had an ownership interest in. "Reinsdorf increasingly viewed Irmer as an opponent based on her reforms," added the court, citing the complaint.

After being terminated, Irmer sued, alleging the following claims: (1) Count I, asserted against Thompson, for infringement of Irmer's First Amendment right to free speech and retaliation; (2) Count II, asserted against Reinsdorf and Thompson, for conspiracy to violate Irmer's civil rights under 42 U.S.C. § 1983; and (3) Count III, asserted against Reinsdorf, for a state law claim of tortious interference with prospective economic advantage.

Addressing Count I, the court wrote that an employee must show: "(1) his speech was constitutionally protected; (2) the protected speech was a 'but-for' cause of the employer's action; and (3) he suffered a deprivation because of the employer's action." Wackett v. City of Beaver Dam, Wis., 642 F.3d 578, 581 (7th Cir. 2011). However, a public employee's speech is not protected if it is made pursuant to her official duties. Garcetti v. Ceballos, 547 U.S. 410, 426, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

The defendants honed in on the latter condition, noting that Irmer's First Amendment claim "should be dismissed because she was acting within the scope of her duties as Executive Director of the ISFA when she instituted reforms and protested against ISFA actions." Irmer countered that she was whistleblowing and acting outside of her official duties because she spoke out beyond the ISFA. She pointed to her meetings with politicians and public officials, as well as her attempts to meet with the governor and mayor.

The court sided with the defendants, noting "a mere speculative possibility" that she spoke as a citizen is insufficient.

"Moreover, Irmer has failed to make any plausible allegations that Thompson knew about her allegedly protected speech," wrote the court. "To state a First Amendment retaliation claim, Irmer must connect her protected speech with her termination. See Caldwell v. City of Elwood, Ind., 959 F.2d 670, 672 (7th Cir. 1992) (dismissing claim where plaintiff failed to plead any defendant actually knew of the allegedly protected speech). Irmer has not done so."

The court found Count II similarly lacking.

"As discussed above, Irmer has failed to sufficiently allege that she was deprived of her First Amendment right to free speech. This is sufficient by itself to dismiss her conspiracy claim. See Smith v. Gomez, 550 F.3d 613, 617 (7th Cir. 2008).

"Moreover, Irmer's Complaint is devoid of any facts that would establish an agreement between Thompson and Reinsdorf to deprive Irmer of her constitutional rights. The existence of such an agreement is essential to a conspiracy claim. See Redwood v. Dobson, 476 F.3d 462, 466 (7th Cir.2007)."

Further, Irmer's conspiracy claim against Reinsdorf "is barred by the Noerr-Pennington doctrine, which provides private citizens with immunity from civil liability for petitioning the government for official action in their favor, even if the results might harm others. See Tarpley v. Keistler, 188 F.3d 788, 794 (7th Cir. 1999). Here, Irmer alleges only that Reinsdorf petitioned government officials to remove her, in order to achieve economic benefits for the White Sox and himself. This alleged conduct is protected by the Noerr-Pennington doctrine."

According to the court, Count III, or the state law claims, was also lacking factual support, since the plaintiff "has not alleged sufficient facts to establish that Reinsdorf intentionally interfered with her employment so as to cause her termination. Although she alleges that Reinsdorf lobbied to remove her in 2008, she states that her contract was renewed at that time through 2010. Irmer has not alleged that Reinsdorf had any communications with any ISFA Board members or otherwise caused her termination in 2011. Because Irmer has failed to state a claim, Count III is dismissed." ●

Perri L. Irmer v. Jerry M. Reinsdorf et al.; N.D. Ill.; Case No. 13-cv-2834, 2014 U.S. Dist. LEXIS 83762; 6/19/14