

# SPORTS LITIGATION ALERT

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## Cases

### Philadelphia Eagles Lose Workers' Compensation Appeal in Pivotal Case

By Jeff Birren, Senior Writer

Emmanuel Acho was injured practicing with the Philadelphia Eagles in 2015. He had surgery, but never returned to his pre-injury level of performance. Thereafter, Acho successfully sought workers' compensation benefits from the Eagles, despite consistent

opposition. Pennsylvania's intermediate appeals court brushed aside every argument and affirmed the award in Acho's favor (*Philadelphia Eagles v. Emmanuel Acho* (Workers' Compensation Board), Unreported Opinion, Commonwealth Court of Pennsylvania (2-3-23)). This case is almost a text-book example of a misguided appeal.

#### Background

Acho was born in Nigeria and played college football at the University of Texas. He won several awards

## Table of Contents

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#### Cases

- Philadelphia Eagles Lose Workers' Compensation Appeal in Pivotal Case . . . . . 1
- Florida Institute of Technology Ordered to Reinstate Men's Rowing After Title IX Complaint . . . . . 5
- Appellate Court Strikes Arbitration Decision Secured as a Result of Sports Agent's Fraud . . . . . 8
- Judge Dismisses Upstart Company's Antitrust Claim against World Wrestling Entertainment. . . . . 9
- Former Coaches Get Mixed Ruling from Court in Lawsuit Against Highland Community College . . . . . 11

#### Articles

- MLB's Apple TV+ Arrangement Highlights Subscription Legal Compliance Obligations . . . . . 12
- Stormy Times at St. John's University as it Terminates its Head Men's Basketball Coach for Cause 14
- Labor Relations in Sports Has Become Boring; That's a Good Thing. . . . . 15
- Assessing Minor Leaguer's Union Status and What It Means for America's Pastime . . . . . 17
- Education Department Proposes New Title IX Regulations for Transgender Student-Athletes . . . . . 19

- The NFL, the Raiders, and A Law Firm: A Tale of Two Colors . . . . . 20
- Activision Blizzard: Once Again in Hot Water . . . . . 21
- The Cultural Intersection of Sports and Fashion . . . . . 22
- Study Could Change Assumptions About Helmet Safety . . . . . 23
- As Legal Action Brews, AFL Releases Updated Concussion Guidelines and Strategic Plan. . . . . 24
- CORRECTED - Does Recent Decision Portend the End of 'Clean Zones' in Event Host Cities? . . . . . 28

#### News Briefs

- Sunkin, Anderson Chosen to Lead Sheppard Mullin's Sports Industry Group . . . . . 30
- Free Webinar on Teaching Fitness Law Offered on May 4 . . . . . 30
- Sports Law Podcast Features Lawyer Todd Shumaker of Church Church Hittle + Antrim; Firm Recognized as Leader in Sports Industry. . . . . 31

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there and graduated in 2011. Later, Acho was drafted in the sixth round by the Cleveland Browns in the 2012 draft, but he missed the entire season due to a leg injury. Next, he was traded to the Philadelphia Eagles in 2013. Acho was released prior to the 2013 season and subsequently joined the New York Giants' practice squad. The Eagles then signed Acho to their active squad in October of 2013. He played sparingly in several games before being demoted to their practice squad. The 2014 season was similar. Acho was signed, released, put on the practice squad, and then elevated to the regular squad during the regular season.

By 2015, Acho was back with the Eagles. On August 11 "while practicing" he "injured his thumb," but "nevertheless, continued to play football, including a preseason game" on August 22 of that year. The next day, however, Acho "fractured the same thumb during practice." He "completed practice," but had surgery on the thumb afterwards. Acho "could not participate in any physical activity for approximately three weeks after the surgery." He was released immediately after the surgery and signed a three-week injury settlement with the Eagles. The pins were later removed from his thumb and although the surgeon cleared him to play, he "continued to have pain and weakness in the thumb."

In November 2015, the Eagles re-signed him, but his "thumb remained symptomatic." Acho did not play in any games and was released from the team. He "attempted to try out for other teams but found he could not play at his pre-injury level." Acho "was not offered any positions" and never "played professional football again."

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Acho returned to Texas where he continued "to do exercises and therapy." In 2017, he received a master's degree in sports psychology from the University of Texas. Two years later, on February 20, 2019, Acho saw Dr. Greg Vagner, who reviewed his medical records including an MRI and ordered a CT scan of Acho's thumb. The results "indicated some displacement within the joint and mild to moderate post-traumatic osteoarthritis." Dr. Vagner testified that the displacement and arthritis were related to the August 2015 injury; that the post-traumatic arthritis "more than likely resulted in pain and decreased function in his thumb"; that "ongoing treatment, potentially to include surgery, would be required"; and these injuries "interfere with an NFL player's ability to use his hand."

After his final release, Acho began working as a part-time football analyst for the University of Texas network. He joined ESPN fulltime in 2018 and in 2020, he began working for Fox. Later that same year, Acho published his first book and received the first of two Emmy Awards. In 2022, he gave the University of Texas commencement address.

#### Workers' Compensation Filings

In the relevant matter, Acho filed two claims. The first one related to the August 23, 2015, injury. He also filed a "Petition to Reinstate and Review Benefits related to the August 11, 2015, injury." The Eagles responded by filing "Petitions to Terminate Benefits with regard to both injuries." The cases were ultimately heard together before the Workers Compensation Judge ("WCJ"), who ruled for Acho.

The WCJ "credited" both Acho's and "Dr. Vagner's testimony" that the thumb injury "rendered him unable to perform his pre-injury linebacker job until he was found by the Eagles' expert, Dr. Leatherwood, to be fully recovered as of September 12, 2019." The WCJ awarded Acho complete disability benefits until November 10, 2015. The WCJ also "granted Claimant partial disability benefits until September 12, 2019" and gave the Eagles a three-week credit for the prior injury settlement. The WCJ granted the Eagles' petition to terminate benefits as of September 12, 2019. Meanwhile, Acho "withdrew his petition related to the August 11, 2015, injury."

Not satisfied, the Eagles appealed both awards to the Workers Compensation Board. The Board, like the WCJ, consolidated the cases. The Eagles insisted that

the decision was “not based on substantial, competent evidence, was not reasoned, and was arbitrary and capricious.” They also asserted that the WCJ did not acknowledge that Acho was “capable of playing football within three weeks of his injury and accepted incompetent medical testimony from Dr Vagner in awarding benefits.” This may have caused the Board to yawn, since it ultimately affirmed the WCJ ruling. Nevertheless, the Eagles were not yet done and appealed to the Commonwealth Court.

### **Pennsylvania Workers’ Compensation**

The Commonwealth Court is one of the state’s two intermediate courts of appeal. It is primarily concerned with appeals involving state and local governments, state regulatory agencies, including workers’ compensation appeals, and serves as the trial court in cases filed by or brought against the state.

Pennsylvania, like all other states, enacted a workers compensation statute to provide limited protection to injured workers. Employees gave up the right to sue their employers in tort for most then-existing job-related injuries, and in return, got a system that was designed to provide benefits to injured employees.

Pennsylvania’s Workers’ Compensation Act was enacted on “June 2, 1915, P.L. 736 as amended, 77 P.S. § 1 et seq” (*Dumas v. W.C.A.B. et al*, 423 A. 2d. 476, (12-18-80)). *Dumas* recognized that the provisions of the Act “are remedial in nature and are to be liberally construed, with borderline interpretations resolved in favor of the injured employee.” Similar language can be found in workers’ compensation statutes across the country. Thus, from the start, the Eagles attempts to deny benefits here were likely doomed.

### **The Eagles’ Appeal**

Initially, the Eagles only presented a “single question for review, namely, whether the Board erred in affirming the WCJ’s decision, as such [d]ecision was not based on substantial, competent evidence, was not reasoned, and was arbitrary and capricious.” However, their brief “then goes on to include” “three subsidiary issues in the argument section of its brief.” The Court considered the subsidiary issues, though it did not have to do so. The Eagles were not penalized for this gaffe, but it was certainly not a good way to begin convincing an appellate court that others made errors.

### **The Court’s Analysis**

The Court noted that all the issues in the Eagles’ appeal “relate in some form to the WCJ’s consideration of the evidence and fact findings.” It reminded the Eagles that the WCJ is “the ultimate fact-finder in workers’ compensation cases” including “questions of credibility and evidentiary weight.” This “is unquestioned. The WCJ may accept or reject the testimony of any witness, including a medical witness, in whole or in part.” Therefore, the Court determined it is “bound by the WCJ’s credibility determinations.”

Consequently, “it is irrelevant whether the record contains evidence to support findings other than those

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#### **Expert Witness**



**Lauren McCoy, J.D.**

**Expertise: Assistant Professor, Sport Management Program Director, Sport and Fitness Administration, Winthrop University  
Race and Gender Discrimination, Title IX,  
Sexual Orientation and Gender Identity  
Discrimination, and Title VII.**

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made by the WCJ; the critical inquiry is whether there is evidence to support the findings actually made.” The Court’s role is to examine the record to determine if there was “sufficient evidence to support” those findings. If so, “the findings must be upheld.” Finally, it “must review the evidence in the light most favorable to the prevailing party and give it the benefit of all inferences reasonably deduced from the evidence.”

The Court cited case authority that stated neither “the Board nor the Court may reweigh the evidence or the WCJ’s credibility determinations.” The relevant statute “does not permit a party to challenge or second-guess the WCJ’s reasons for credibility determinations.” Thus, unless such determinations were “arbitrary or capricious,” an appeal will be rejected. As a result, Acho had virtually an insurmountable lead at that point.

### **The Eagles’ Specific Evidentiary Challenges**

The first argument made by the Eagles was that award of benefits from August 23 to November 10, 2015 “was not based on substantial, competent evidence.” The Court’s response was succinct, stating simply “We disagree.” Acho initially stopped playing after the August injury and subsequent surgery. When he re-signed with the Eagles in November, he “still experienced a constant aching in his thumb, and then practiced with a heavily bandaged hand.” Acho “did not play in any games during this period” and was released sixteen days later.

The Eagles insisted that this pattern was also true in the prior two years, but the Court reminded the Eagles “that Claimant played in regular season games in both of those seasons.” The 2015 season “release was thus clearly not routine or based on any past practice but rather was due to Claimant’s injury and perceived inability to play.” There was consequently “substantial evidence” to support the findings according to the Court, and “the WCJ did not err in awarding payment of total disability benefits for the period between August 23, 2015, and November 10, 2015.”

November 10, 2015 through September 12, 2019

The Eagles next attempt to score on appeal was an assertion that the award for this period was “arbitrary and capricious.” They argued that they had cleared Acho to play, that he unsuccessfully sought to sign

with other teams, and that Acho “failed to support his disability claims with any competent evidence.” This argument, however, also failed. The Court very matter-of-factly stated, “Again, we disagree.

The Eagles had cleared him to play in August 2015, but argued that Acho had “ongoing pain, tenderness, and related limitations in his ability to play.” Furthermore, no other teams signed him then, or after his November release. Thus, the Eagles maintained that “it cannot merely be ‘assumed’” that the failure to sign with other teams was due to his injury. The Court instructed the Eagles that “no ‘assumption’ is necessary.” This argument “largely discounts or ignores entirely” Acho’s “pre-injury and prospects in the NFL” and the WCJ was free to find that he played at a “high level prior to the injury.” The Eagles’ “suggestion to the contrary is simply not accurate.

But, the Eagles were not done restating the evidence. Their “characterization of Claimant’s complaints of pain and related disability as ‘not borne out by any evidence’” required the Court to remind the Eagles of how much evidence was in the record that supported the WCJ’s findings. The Eagles’ “alternative explanations” did not create error. The Court found “this issue to be without merit.” Moreover, during this period, the WCJ had not awarded Acho total disability benefits, but merely partial disability benefits based on his interim employment as a broadcaster.

### **The Final Desperation Play**

Looking for a miracle, the Eagles then assaulted the credibility of Dr. Vagner. The Court thought that these attacks “mischaracterize the evidence and the WCJ’s findings.” Dr. Vagner first examined Acho in 2019, but he testified that he reviewed and relied upon the prior medical records while coming to his conclusions. He did not give “an exact date” of the current condition, but “he nevertheless corroborated Claimant’s claims”.

The WCJ found him to be “uniquely qualified to comment on” these issues. Dr. Vagner is an orthopedic surgeon “with added credentials as a hand specialist and the hand surgeon for the University of Texas and Baylor University athletic departments.” Consequently, the Court determined that the WCJ did not err in finding his testimony to be more credible than Dr. Leatherwood. The Court was unimpressed with



the argument that Dr. Vagner only examined Acho once, especially since the Eagles “expert” examined Acho “on only a single occasion approximately seven months after Dr. Vagner’s examination.”

Grasping at crumbs, the Eagles maintained that Dr. Vagner’s opinions were not unequivocal. “We again disagree,” concluded the Court. This argument also challenged findings that were solely in the purview of the WCJ, who found that Dr. Vagner “unequivocally supports the award of benefits in this matter.” This is a long way from finding that Dr. Vagner was “equivocal.” The Court noted that “this finding is consistent with both Dr. Vagner’s and Claimant’s testimony.” Dr. Vagner testified that he “formulated” his opinions “within a reasonable medical certainty.” The WCJ also noted that the Eagles’ expert disagreed with Dr. Vagner, but found Dr. Vagner to be more credible. This did not mean that he “arbitrarily or capriciously” disregarded that doctor’s testimony.

The Court ended by stating that the WCJ’s decision was “free of errors of law and violations of constitutional rights.” It was “supported by substantial evidence” and “did not arbitrarily or capriciously disregard any competent evidence.” With that the Court affirmed the Board’s decision.

## Conclusion

The Eagles’ appeal was not worth the paper it was printed on, but rather it cost far more. Under the best of circumstances challenging a finding of compensable benefits is a tough row to hoe, yet at times there is a legitimate basis for it. Challenging findings that are left by statute to the WCJ have little chance of prevailing. Here, most of the benefits at issue were partial, temporary benefits so perhaps there was a hidden agenda. One can only wonder if Eagles’ ownership was informed of the dubious nature of the appeal, and how it would make the team look to knowing eyes. Consequently, other teams should take note when similar instances arise with their players.

## Florida Institute of Technology Ordered to Reinstate Men’s Rowing After Title IX Complaint

By Emily J. Houghton and Erica J. Zonder

In February 2023, the U.S. District Court in Florida issued a preliminary injunction in favor of six male student-athletes from Florida Institute of Technology who alleged that the university violated Title IX. The male student-athletes filed the lawsuit against Florida Institute of Technology (FIT) in 2022. The student-athletes claimed FIT violated Title IX when the university eliminated rowing and other programs.

### Background

In June 2022, the university informed student athletes that they would eliminate several athletic programs including men’s rowing. The university told the student-athletes that they could still participate in rowing by creating a club team. The university president then announced these cuts via a public statement in July 2022. Prior to eliminating those five teams, FIT had cut several other athletic programs in recent years. For example, in 2019, the university terminated the football team (120 student-athletes and 8 coaches) due to issues related to COVID -19 and the rising costs of fielding a competitive football team (Gleeson, 2020). In 2019, FIT also terminated the men’s and women’s tennis programs along with women’s golf (Gleeson, 2020).

On October 24, 2022 the six male student-athletes (“the plaintiffs”) filed a complaint against FIT alleging 1) violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 equal participation; 2) equal treatment; 3) equal scholarship opportunities; and 4) preliminary injunction.

### Count I: Violation of Title IX- Equal Participation

The plaintiffs alleged that at the time FIT eliminated the men’s rowing team, the university was out of compliance with Title IX. They pointed to the university reports based on the Equity in Athletics Disclosure Act of 1994. According to the data disclosed by FIT in 2020-2021, of the 3,010 undergraduate students, 69% were male and 31% were female (Complaint, \*33). In terms of student-athletes, men comprised 58.7% of student-athletes in 2020-2021 and women 41.3% which created a “participation gap of 123 athletes”

[Return to Table of Contents](#)

(\*14). The plaintiffs also alleged that the university had been out of compliance with participation opportunities for men resulting in 100 fewer opportunities for male student-athletes based on the overall population of the university for each year from 2014-2015 to 2020-2021 (\*35). When FIT cut football in 2019, they did not add a men's team that provided a similar amount of participation opportunities, which further perpetuated the equal participation gap for male student-athletes (\*40). The complaint further claimed that after cutting men's rowing and the other men's teams in 2022, FIT would be short 126 participation opportunities for male students (\*41). The plaintiffs argued that since FIT has already been out of compliance with the proportionality prong of the Title IX analysis by cutting football and men's rowing, FIT also has not accommodated the interests of male student-athletes on campus who were interested and able to participate in sports as they were already varsity athletes (\*42). In addition, FIT has repeatedly cut men's sports and subsequently has not demonstrated a history and continuing practice of adding participation opportunities for male student-athletes (\*42). The plaintiffs further argued that FIT counting esports athletes would not satisfy Title IX requirements (\*44).

### **Count II: Title IX-Equal Treatment**

By downgrading the men's rowing program to club status, the plaintiffs alleged that they are not being treated equally with other women's varsity sports. In addition, the plaintiffs argued that club teams at FIT self-fund coaches, equipment and operations costs based on student fees and donations and therefore, it would prevent students from joining the team which in turn is unequal treatment under Title IX (\*7).

### **Count III: Title IX-Equal Scholarship Opportunities**

In terms of scholarship opportunities, the plaintiffs alleged that from 2004-2005 to 2020-2021, male student-athletes lost out on \$10,500,000 in financial aid (\*45). The plaintiffs claimed that in 2020-2021, male student-athletes should have received \$458,000 more dollars in financial aid than they received. In the 2020-2021 academic year there was a purported 12% differential in the amount of financial aid with male student-athletes

getting less financial aid than they should have based on enrollment and proportionality (\*55).

### **Count IV: Title IX-Injunction**

Lastly, the plaintiffs sought an injunction against FIT because they wanted the university to reinstate the rowing program. They claimed that FIT would not be harmed, but the rowers have been harmed by the university cutting their program. The plaintiffs stated that the university has harmed students financially by eliminating scholarships and emotionally due to shock of the program getting terminated, loss of relationships due to students transferring, and coaches leaving for opportunities at other universities (\*47).

### **District Court Ruling**

As the plaintiffs were seeking a preliminary injunction, the Court assessed the four required elements (per 11th Circuit case *Forsythe Cnty. v. U.S. Army Corp of Engineers*, 2011), finding that all four were satisfied in this case (Order, p. 20):

### **Substantial likelihood of success on the merits**

As noted above in Count 1, the plaintiffs contend that FIT is out of compliance with the participation piece of Title IX. FIT argues that there was only a three student participation gap, assuming, noted the Court, two conditions: 1) esports offers genuine participation opportunities for intercollegiate athletes and 2) online-only students should count in the overall enrollment numbers. The Court addressed both conditions in the following:

Firstly, the Court here relied on the OCR's "flexible," case-by-case approach to determine whether esports counts for Title IX purposes, and further compared it to the competitive cheerleading issue in *Biediger*, calling that case an example of a "close-call" application of OCR's factors (p. 13) (No favorable presumption applied since cheerleading was not sanctioned by the NCAA, yet the program was structured and administered consistent with the school's other varsity sports, including practice time, regimen, and venue, and further the length of the season and the "purpose of the team" were also consistent with other varsity sports.). However, the *Biediger* Court found shortcomings, including lack of off-campus recruitment, uniform rules, intercollegiate competition, and a progressive playoff system. Esports, according to the District Court, was

not a close call since it “does not require athletic ability” (p. 13 - and this is perhaps a harsh, inaccurate assessment). More compellingly, the plethora of different video games lacking uniform rules enforced by a national governing organization, games are owned by commercial vendors and leased to players, so sport governance associations have no control over those rules. And, as in *Biediger*, there is no evidence that FIT recruits off campus or has a progressive playoff system. Even if the esports participants practice and compete, it is not done so in a manner that is consistent with the school’s other varsity teams. Therefore, the Court here found the FIT’s esports program failed to provide genuine participation opportunities under Title IX.

Secondly, given that FIT is out of compliance when esports is not considered for Title IX purposes, the Court did not see the need to determine whether the online-only students should be counted. The Court did, however, note that the definition of full-time students that FIT used to support its argument was found in the Federal Student Aid Handbook, which was derived from Title IV and therefore it is “likely that policy considerations for student financial aid would differ from policy considerations regarding discrimination under Title IX” (p. 14 - footnote 4).

### **Irreparable harm will be suffered**

Courts have consistently held that due to the fleeting nature of college athletics, student-athletes will suffer irreparable harm by losing the opportunity to compete in their sport (per *Biediger*), and further that the elimination of a team creates irreparable harm when the plaintiffs have demonstrated a likelihood of success on the merits of their Title IX claim (per *Mayerova*). Here, FIT argues that the plaintiff’s delay in filing a motion for injunctive relief (“about six months”) shows the harm is not imminent, but the Court disagreed, attributing that delay, partially, to FIT’s own untimely response to an information request (p. 17). FIT further cited both *Equity in Athletics* and *Miller v. Cincinnati* cases to argue that the plaintiffs faced no irreparable harm because they did not lose their scholarships and they were free to transfer. Nevertheless, the Court here distinguished both cases, as the school in *Equity* cut sports to bring itself into compliance, therefore there was not a likelihood of success on the merits for the

plaintiffs in that case, and in *Miller*, the plaintiffs failed to demonstrate any difficulty in transferring (no testimony in this regard), whereas the plaintiffs here testified to transfer difficulties due to the timing of the announcement. Thus, the District Court in the instant case found the evidence of irreparable harm to be substantial for these student-athletes.

### **Threatened injury to the movant outweighs damage the proposed injunction may cause**

When considering the balance of harms, the Court, citing *Haffer v. Temple* and *Daniels v. Brevard Cnty*, found that the harm associated with a Title IX violation is “serious” and financial concerns cannot alone justify gender discrimination. Therefore, the Court was “unsympathetic” to the school’s claim that undue harm will result from the financial expenditure necessary to reinstate rowing (p. 20)

### **The injunction would not be adverse to the public interest**

Once more, according to the Court, the public has a compelling interest in eradicating gender discrimination and promoting Title IX compliance. For this reason and because the plaintiffs established a likelihood of success on the merits, the public’s interest weighed in favor of the Court granting the preliminary injunction (p. 20).

### **FIT Compliance**

Subsequently, FIT notified the Court that it took the following steps in compliance with the Court’s Order: apportioned necessary funding for the men’s rowing team for the “remainder of the academic year;” hired an interim coach at full-time compensation level; is “willing” to hire an assistant coach if necessitated by number of athletes; and all other benefits that are provided to other varsity, intercollegiate teams are available to men’s rowing (*Notice of Compliance*, p. 2). The team was officially reinstated on March 12th (*Keenan, 2023*), took first place in two events at the *Hatter Invitational Regatta* on March 25th, and also took first place in three events at the *FIRA Championship Regatta* on April 1st.

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[Return to Table of Contents](#)

## Appellate Court Strikes Arbitration Decision Secured as a Result of Sports Agent's Fraud

By Scott White<sup>1</sup>

There are limits to the arbitration processes frequently used in sports, and these limits were put on display in the Third Circuit's recent decision in *France v. Bernstein*.<sup>2</sup> Arbitration offers advantages for both parties – it reduces the cost of potential litigation, it shields documents from the presumption of public access, and, most importantly, it provides stability in conflict resolution through decisions that are binding on both parties. In other words, the biggest advantage of arbitration proceedings is that they keep the parties out of the courtroom. The implications of the *Bernstein* decision are noteworthy for any organization or individual who participates in arbitration, and the facts of this case show the competitive, cut-throat nature of the sports agent business.

*France v. Bernstein* was heard on appeal from the U.S. District Court and involved a set of circumstances that were “like something out of the

film *Jerry Maguire*.”<sup>3</sup> The two parties, Todd France and Jason Bernstein, were both NFLPA-certified athlete-agents competing over the same client: Lions wide receiver, Kenny Golladay. Bernstein was Golladay's agent from his rookie season until January 2019. During this time, Golladay emerged as a primary threat in Detroit's high-flying offense, and according to the Third Circuit Court's opinion, another agent, Todd France of CAA, made overtures to represent Golladay at the end of the 2018 season. Golladay abruptly terminated his relationship with Bernstein at the end of January 2019. Bernstein alleged that France organized an paid autograph signing appearance for Golladay while Golladay was still under a representation contract with Bernstein. Bernstein had only learned about the autograph appearance after seeing two promoters post about it on social media. If the allegations that France helped organize the signing were true, then he likely violated two provisions of NFLPA regulations, which prohibit agents from communicating with or providing benefits to players who are under contract with other agents.<sup>4</sup>

Bernstein filed a written grievance with the NFLPA, alleging that he suffered \$2.1 million in pecuniary losses.<sup>5</sup> NFLPA regulations require grievances to be handled in arbitration, and both parties produced discovery requests in advance of the arbitration hearing. In his discovery request, Bernstein specifically requested information on the January 21, 2019 event, and France responded that he possessed no documents that were responsive to these requests.<sup>6</sup> The court noted that France interpreted his obligations under the discovery request narrowly, claiming that he was not responsible for producing documents that were “not physically in his possession,” even if he had control over them. Bernstein took issue with France's narrow interpretation of his discovery obligations and issued subpoenas to France, Golladay,

3 Id. at 2. For more on the District Court Opinion, see Gary Chester's coverage for Sports Litigation Alert: <https://sportslitigationalert.com/france-v-bernstein-illustrates-the-competitive-nature-of-sports-agency-and-the-limits-of-arbitration-2/>

4 Id. at 5. Unless otherwise noted, all direct quotations in this article are attributed to the Third Circuit Opinion identified in footnote 2.

5 Id. at 6.

6 Id. at 7.

1 J.D., University of Tennessee College of Law 2017. Scott is currently a PhD student in Sport Management at Florida State University.

2 *France v. Bernstein*, No. 20-3425, (3rd Cir. Aug. 9, 2022). Full text available at: <https://www2.ca3.uscourts.gov/opinarch/203425p.pdf>



and other parties. Bernstein did not seek judicial enforcement of the subpoena in federal court prior to the arbitration date, and, as a result, entered arbitration with only the evidence that was voluntarily produced by France.

In arbitration, France argued that the timing of the autograph signing event was purely coincidental and, absent evidence to the contrary, the arbitrator ruled in favor of France and denied Bernstein's grievance. However, more evidence emerged after the conclusion of the arbitration proceeding. The Third Circuit stated that, in light of this additional evidence, "it became perfectly clear that France was involved in arranging the signing event."<sup>7</sup> Unfortunately for Bernstein, the arbitration decision was finalized prior to discovery of the new evidence.

Bernstein filed an action seeking to vacate the arbitration award in U.S. District Court after the new evidence emerged. The district court upheld the award, noting that Bernstein did not seek judicial enforcement of the subpoenas and would not be given a "second bite of the apple"<sup>8</sup> when he could have potentially gained access to evidence prior to the arbitration hearing. Bernstein appealed to the Third Circuit, which overturned the district court's ruling.

In its analysis, the Third Circuit noted that "It's a steep climb to vacate an arbitration award."<sup>9</sup> However, Section 10 of the Federal Arbitration Act permits a court to vacate an award "procured by corruption, fraud, or undue means[.]"<sup>10</sup> The appellate court held that "it is plain that France both lied under oath and withheld important documents demanded in discovery," and that these actions constituted fraud. The court also explained that the district court's holding that the fraud was discoverable through due diligence was a legal error. The court explained "[r]easonable diligence does not require parties to assume the other side is lying," and Bernstein took "substantial measures towards uncovering France's perjury." Accordingly, Bernstein's actions

were reasonable under the circumstances, even if they were not perfect.

The Third Circuit remanded the case for entry of an order vacating the arbitration award, and France's request for a rehearing en banc was denied.<sup>11</sup> The Third Circuit's decision shows that arbitration awards may still lead to future litigation, and lawyers, agents, and clients should take notice of the circumstances that may lead a court to invalidate an award secured through the arbitration process.

[Return to Table of Contents](#)

## Judge Dismisses Upstart Company's Antitrust Claim against World Wrestling Entertainment

A federal judge from the Northern District of California dismissed a lawsuit brought by a "professional wrestling company," which alleged that World Wrestling Entertainment, Inc. ("WWE") violated antitrust laws.

Specifically, the court found that MLW Media LLC's ("MLW") allegations were "insufficient to plausibly allege a relevant product market."

By way of background, MLW claimed it is in "the business of promoting sporting events, particularly live events, programming, and digital content related to professional wrestling." The plaintiff also alleged that it competes with WWE and non-parties All Elite Wrestling ("AEW") and Impact Wrestling ("Impact") for distribution channels—e.g., television networks, cable, and streaming services—for professional wrestling content.

WWE is the dominant player in the wrestling content industry. According to MLW, WWE has used its media rights contracts with major networks and distribution channels to lock in those networks so that they only offer WWE content, which gives WWE content more favorable time slots and marketing opportunities.

<sup>7</sup> Id. at 13.

<sup>8</sup> France v. Bernstein, No. 1:20-cv-01443 (M.D. Pa. Oct. 30, 2020), at 6. See also Chester, 2022, fn. 2.

<sup>9</sup> Bernstein, No. 20-3425, (3rd Cir. Aug. 9, 2022), at 17.

<sup>10</sup> 9 U.S.C. § 10(a)(1).

<sup>11</sup> See <https://www.sportsbusinessjournal.com/Daily/Issues/2022/09/13/Labor-and-Agents/Todd-France-denied-appeal-NFLPA-arbitration-award.aspx>

“MLW alleges that WWE used its stature to harm MLW’s business prospects on at least two occasions,” wrote the court. Thus, it alleges “intentional interference with contractual relations; intentional interference with prospective economic relations; violation of Section 2 of the Sherman Antitrust Act; and violation of California’s Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, et seq. Compl. ¶¶ 53-81.”

In response to MLW’s lawsuit, the defendant moved to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6).

The court noted that the only claim over which it has original subject matter jurisdiction is the alleged violation of Section 2 of the Sherman Act. Compl. ¶ 15; 28 U.S.C. § 1337.

“WWE argues that MLW’s Sherman Act claim should be dismissed because MLW does not plausibly allege (1) a relevant market; (2) monopoly power; or (3) antitrust injury,” wrote the court.

“Antitrust law requires [an] allegation of both a product market and a geographic market.” *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 n.4 (9th Cir. 2008). “[T]he plaintiff must allege both that a ‘relevant market’ exists, and that the defendant has power within that market.” *Id.* at 1044; see also *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (“Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.”).

Moreover, the court noted that “although the definition of a relevant market for antitrust purposes is typically a factual inquiry, an antitrust claim may be dismissed under Rule 12(b)(6) if the plaintiff’s relevant market definition is ‘facially unsustainable.’” *Newcal*, 513 F.3d at 1045 (citing *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir.1997)); see also *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190 (N.D. Cal. 2008).”

“A relevant product market must ‘encompass the product at issue as well as all economic substitutes for the product.’” *Newcal*, 513 F.3d at 1045. “Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff’s favor, the

relevant market is legally insufficient and a motion to dismiss may be granted.’” *Queen City Pizza*, 124 F.3d at 436; see also *Reilly v. Apple Inc.*, 578 F. Supp. 3d 1098, 1109 (N.D. Cal. 2022) (“[W]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, . . . the relevant market is legally insufficient.”)

“MLW alleges that the relevant antitrust market is the ‘the national market for the sale of broadcasting rights for professional wrestling programs to networks, cable and streaming services.’” WWE does not dispute the geographic market of the United States. WWE does, however, argue that MLW has not plausibly alleged facts supporting its proposed product market, particularly due to the lack of allegations about the structure of the television and streaming industries, the production of professional wrestling programming, and the unavailability of reasonably interchangeable alternatives to professional wrestling content. In response, MLW asserts that it is not required to include express allegations regarding the cross-elasticity of demand or the absence of reasonably interchangeable products, that products with potentially interchangeable substitutes can nonetheless constitute a relevant antitrust submarket, and that WWE’s arguments ‘at most raise factual issues that cannot be decided on a motion to dismiss.’”

The court found that MLW’s argument need not allege cross-elasticity of demand and the absence of “reasonably interchangeable alternatives” to professional wrestling programming is “unavailing.”

The court elaborated, noting that MLW “has not included sufficient facts to plausibly allege a relevant antitrust product market. Regarding the proposed market, the complaint alleges only that there are four competitors in the ‘United States professional wrestling market,’ that the ‘business of promoting professional wrestling as sports entertainment is fundamentally a media industry, with revenues and business valuations driven largely by fees obtained from broadcasting rights deals,’ and that corporations such as NBCUniversal and Fox Sports ‘purchase broadcasting rights in the (proposed market) for their various distribution channels such as broadcast networks, cable and satellite services, streaming networks, and film production companies.’”

“These facts, as pled,” according to the court, “are not sufficient to provide an understanding of the characteristics of the relevant market, including the existence or lack of substitutes.”

The Attorneys of Record are as follows: For MLW Media LLC, Plaintiff: Jason Takenouchi, LEAD ATTORNEY, Kasowitz Benson Torres LLP, Ste 3000, San Francisco, CA; Nicholas Rendino, PRO HAC VICE, Christine Montenegro, Kasowitz Benson Torres LLP, New York, NY; Marc Elliot Kasowitz, PRO HAC VICE, Kasowitz Benson Torres and Friedman LLP, New York, NY.

For World Wrestling Entertainment, Inc. Defendant: Daniel William Fox, LEAD ATTORNEY, K&L Gates LLP, San Francisco, CA; Jerry S McDevitt, LEAD ATTORNEY, PRO HAC VICE, K&L Gates LLP, Pittsburgh, PA; Christopher S. Finnerty, PRO HAC VICE, KL Gates LLP, State Street Financial Center, Boston, MA; Derek Kelley, PRO HAC VICE, K&L Gates LLP, Washington, DC; Morgan T. Nickerson, PRO HAC VICE, K&L Gates LLP, State Street Financial Center, Ste 17, Boston, MA.

MLW Media LLC v. World Wrestling Ent., Inc.; N.D. Cal.; Case No. 22-cv-00179-EJD; 2/13/23

[Return to Table of Contents](#)

## Former Coaches Get Mixed Ruling from Court in Lawsuit Against Highland Community College

By Alexis Sokach

The plaintiffs in this case are the former coaches of Highland Community College’s women’s basketball team – BJ Smith, Bradford Zinn, and Jered Ross. The coaches asserted multiple claims against Highland Community College (HCC), the HCC board of trustees, Russel Karn (a board member), Deborah Fox (the President of HCC) and Athletic Director Bryan Dorrel.

The coaches had been very successful at HCC, managing to maintain the highest win-loss record in HCC history, sending a multitude of players Division I, and graduating 100% of their student-athletes. However, in late 2019, head coach BJ Smith was called into a meeting with the athletic director. In this meeting Dorrel allegedly informed Smith that his players were an embarrassment to the school community and directed him to start recruiting more players that were of the culture that the community could relate to. It is important to understand this conversation considering the demographics of Highland, Kansas, where HCC is located. The 2010 census of Highland showed that almost 85% of the residents were white, 10% of the residents were African American, and the rest of the

population was made up of other minorities or joint races. Soon after this meeting, Smith secured commitments from two stand-out African American players in the Kansas City area. Learning of their commitments, Dorrel asked Smith if “these are really the kind of players we want at Highland.” Dorrel continuously pressured the athletic coaches to stop recruiting players with “dreadlocks and wicks” in favor of recruiting white student-athletes.

Toward the end of 2019 Smith, Zinn, and Ross were all accused of NJCAA violations and academic misconduct. HCC suspended all three coaches without notice or hearing and prohibited them from entering campus or contacting the team. The players and their parents were told by Fox and Dorrel that the coaches had been doing players homework and even recommended to one player’s father that she transfer schools. Fox and Dorrel informed the team that the allegations were both severe and solid against the coaches. Dorrel openly stated that HCC had ample evidence of obvious, flagrant, and intentional violations, calling them the “worst” he had seen in his 25-year tenure in collegiate sports.

A board meeting was held, but the coaches were not provided any advance notice and when they requested to have their lawyers present, they were denied. The board members admitted that HCC’s purported investigation did not reveal any academic misconduct or other violations of NJCAA bylaws. Smith was reinstated, but Ross and Zinn were continued on suspension. In March 2020, HCC gave Zinn and Ross the option to resign and informed them that their contracts would not be renewed for another season. In June 2020, Fox demanded that Smith resign from his position and informed him that his contract also would not be renewed. All three coaches ended up blacklisted in the collegiate coaching market.

The case ended up in the US District Court for the District of Kansas. The court evaluated four main topics, revolving around several charges: a procedural due process claim, liberty interests of the coaches, race discrimination and retaliation claims, and individual and official separation within the discrimination claim.

The coaches claimed that they were suspended by HCC without due process in December 2019 and had neither notice of the purported allegations against them

nor a hearing before being suspended. In response, HCC contended that the plaintiffs did not possess any protectable property or a liberty interest. Smith, Zinn, and Ross all claimed that they had a protectable property interest in their continued government employment. Smith and Zinn's claims were treated separately from Ross' claim because Ross was an at-will employee, while Smith and Zinn had 10-month contracts. The court found that Smith and Zinn, even though their contracts were for a specific period without promise for renewal, had a property interest in their contracts being renewed. The court stated that the contract did not just rely on the past contract renewals, but rather it relied on the history of producing a high-quality athletic program and students with academic achievement. The district court decided that Smith and Zinn's claims should not be foreclosed as a matter of law, as HCC had previously asked. Ross also sufficiently pled a protectable property interest in his continued employment. The court's decision as it pertained to Ross relied on the parties' past actions, mutual understandings, and underlying circumstances, specifically the previous practice of contract renewal.

The coaches also alleged deprivation of their protected liberty interests in their good name and reputation when HCC made statements falsely accusing them of misconduct. HCC did not contest that there were defamatory statements made, but instead contended that loss of future employment does not constitute a significant change in legal status under the "stigma-plus" framework. A public employee has a liberty interest in his good name and reputation as

they relate to his continued employment. The Tenth Circuit recently explained that the classic stigma-plus claim in the context of public employment involves a governmental supervisor who defames the employee during termination, foreclosing other employment opportunities. Accordingly, the defamation alleged by the plaintiffs here was decided by the court to rise to a constitutional level and was therefore sufficient to state a protectable liberty interest.

Finally, HCC asked that the race discrimination and retaliation claims be dismissed due to improper pleading. The court found, however, that the original claim was brought under 42 USC §1983 and that the 42 USC §1981 claim was an underlying violation claim. The court stated that the coaches correctly used §1983 as a vehicle for their §1981 claim. Therefore, the court dismissed the race discrimination and retaliation claims against Fox and Dorrel in their official capacity because they were already pled against the two as agents of the larger entity of HCC.

Based on the above findings of fact and law, the US District Court for the District of Kansas granted the HCC's partial motion for judgment in part and denied it in part. Other than the official capacity claims in the race discrimination and retaliation counts, HCC's other motions were denied.

Smith v. Highland Cmty. Coll., No. 22-CV-02048-JAR-ADM, 2023 WL 372016 (D. Kan. Jan. 24, 2023)

[Return to Table of Contents](#)

## Articles

### MLB's Apple TV+ Arrangement Highlights Subscription Legal Compliance Obligations

By Andrew Lustigman, Esq. and Morgan Spina, Esq.

Major League Baseball's recent announcement that it will air its "Friday Night Baseball" weekly

doubleheader on Apple TV+ indicates the streaming service's growing role in sports broadcasting. Aside from the potential fan reactions, the requirement that a viewer will now need to subscribe to Apple TV+ to watch games reflects a growing trend towards continuity subscription programs. Regulators have taken note of this trend, and have enacted and proposed enhanced compliance obligations triggered at all phases of the subscription, renewal, and cancellation journey.



Subscription-based business models continue to be very popular among marketers, particularly given the high cost of customer acquisition. On the one hand, automatically renewing contracts conveniently facilitates the continued delivery of goods or services to consumers without consumers needing to submit a request or a separate order each time they wish to receive such goods or services. On the other hand, regulators have been concerned that businesses' reliance on consumers taking affirmative acts to cancel automatically renewing contracts, as opposed to consumers affirmatively renewing such contracts, can and has resulted in consumers paying for goods or services that they no longer use or desire.

As a result of this concern, states began enacting and enforcing highly specific laws regarding subscriptions. California has undoubtedly led the charge when it comes to enacting these particular laws and remains to have one of the most comprehensive state laws on the books. Many states have followed in California's footsteps and enacted similar laws, in whole or in part. The obligations contained within these state laws encompass all aspects of a subscription journey – enrollment, order acknowledgment, reminders, and cancellation pathway. As more states continue to enact their own automatic renewal laws, businesses face various compliance obligations. With new state law bills being introduced monthly, compliance obligations constantly evolve and change over time.

The state laws are enforced by regulators, such as attorneys general. In California, the automatic renewal law is enforced by the California Automatic Renewal Taskforce (“CART”) – a task force of county district attorneys seeking to enforce the state's complex law. In addition, enterprising plaintiffs' attorneys have brought class actions against businesses that allegedly failed to provide proper enrollment or cancellation processes.

As the leading federal regulator for national advertising, one would expect, particularly in the context of borderless e-commerce, that the Federal Trade Commission (FTC) would establish uniform laws. Unfortunately, the FTC's existing negative option rule (Negative Option Rule) was drafted and finalized in the context of an outdated subscription model, namely, the “book of the month” club model.

That model is when a member receives advance notice of an upcoming publication and then has ten days to reject the offer. If the member failed to reject the offer, the publication would be sent to the member, and that individual would be responsible for paying for it.

Looking to update its Negative Option Rule, on March 23, 2023, the FTC published an Advance Notice of Proposed Rulemaking (ANPR) to establish a federal rule addressing the contemporary use of negative option plans. While the Proposed Rule is not currently in effect, businesses offering continuity service subscriptions are well advised to pay close attention as the Proposed Rule includes some of the most specific compliance obligations that are already addressed by existing state law.

The Proposed Rule would apply to all forms of negative option marketing, including pre-notification and continuity plans, automatic renewals, and free trial offers, in addition to covering offers made in all mediums, including internet, telephone, in-person, and printed materials. It would require sellers to provide specific information to consumers before obtaining their billing information, including the costs a consumer may incur, the date the charge will be submitted for payment, and cancellation information. Moreover, businesses would need to obtain express informed consent to the negative option feature. Such consent must relate only to the subscription and not any other part of the transaction. The Proposed Rule would require online cancellation where the consumer signed up online and would require businesses to ask the consumer if they wish to receive “save” pitches before making such offers during the cancellation process. Finally, the Proposed Rule would require sellers to send at least annual reminders to consumers in the event that the subscription does not involve physical goods. The Proposed Rule is now set for public comments before being finalized.

Unfortunately, the Proposed Rule would not supersede state laws as currently drafted. Thus, while the law sets the minimum standards for continuity programs, businesses offering continuous service programs must continue to look to the existing state laws and ensure enhanced compliance where necessary.



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## Stormy Times at St. John's University as it Terminates its Head Men's Basketball Coach for Cause

**By Dr. Robert J. Romano, St. John's University, Senior Writer**

In May 2021, St. John's University decided to extend Big East Coach of the Year Mike Anderson's employment contract an additional six years which meant that he would be leading the Red Storm men's basketball team through the 2026-27 season. At that time, newly appointed University President, Father Brian Shanley, openly commented, "In my time at St. John's, Coach Anderson and the men's basketball program have represented our University in a first class manner on the court, in the classroom and in the community."

With that being said, however, with two subsequent subpar seasons (2021-2022: 17-15 and 2022-2023: 18-15) that ended with the men's basketball team riding the bench during the NCAA's perennial March Madness Tournament, St. John's decided to end its relationship with the once award-winning coach. In a statement by the University's athletic director, Mike Cragg, he expressed that "After fully evaluating the men's basketball program, our University has decided a change is needed in both the leadership and direction of St. John's basketball. We wish Coach Mike Anderson and his family the best in their future."<sup>12</sup>

What is interesting about the University's decision is that per a letter to Coach Anderson dated March 10, 2023, the day after St. John's was eliminated from the Big East Tournament after losing to Marquette in overtime, it stated that St. John's was terminating the Coach, not because it wanted to part ways with him based on the team's overall win-loss record, its poor showing in the Big East Tournament, or because the team never reach the NCAA's Men's Basketball Tournament during the Coach's tenure, but instead, that it was terminating him from his position as head coach for cause.

As outlined in the letter, St. John's decision to terminate for cause was based on what it believes Coach Anderson failed to do in the two years since his contract was extended:

[Return to Table of Contents](#)

<sup>12</sup> <https://apnews.com/article/st-johns-mike-anderson-fired-7b44ee86b03c943c955337ec1403d3e1>

a. “failure to create and support an environment that strongly encourages student-athletes who are in the men’s basketball program to meet all university academic requirements,”

b. “failure to perform duties and responsibilities in a manner that reflected positively on St. John’s University . . . in actions that brought serious discredit” to the school, and

c. “failure to appropriately supervise and communicate with assistant coaches.”<sup>13</sup>

Coach Mike Anderson, however, disputes these ‘reasons’ as to why he was terminated and in response stated, “I vehemently disagree with the university’s decision to terminate my contract for cause. The ‘for cause’ accusation is wholly without merit and I will be aggressively defending my contractual rights through an arbitration process.”<sup>14</sup> Coach Anderson’s aggressive posture may be based in part on the fact that at the time of his termination, he had approximately \$11 million due to him per his contract. In most situations, if an employer decides to terminate an employee for cause, then it relieves itself of the obligation to pay any future amounts due under the contract. Therefore, based upon both the University’s and the Coach’s positions as to whether being terminated for cause was warranted, the question becomes, when is cause – cause enough?

Per contract law, an employee can be terminated for cause when that employee by act or omission provides a ‘reason’ for the termination. The termination, however, may be challenged and deemed wrongful when the so called ‘cause’ is decided to be ‘unreasonable’.<sup>15</sup> And this is exactly what occurred at another Big East University, the University of Connecticut, when it terminated its former men’s basketball coach, Kevin Ollie, for cause in March 2018. At that time, Coach Ollie, who led the Huskies to a 127-79 record and the 2014 NCAA National Championship during his six seasons as head coach, was found by the University to have violated NCAA rules when he allegedly held improper

training sessions and allowed former UConn player, Ray Allen, to speak with a potential recruit. In the end, though, an outside arbitrator concluded that the cause associated with Coach Ollie’s termination was unreasonable and ordered the University to pay its former Coach an amount in excess of \$11 million.

Therefore, for St. John’s University to prevail at an arbitration hearing, it will have to convince the arbitrator that terminating Coach Anderson for cause was reasonable because of the Coach’s above-referenced ‘failures’ while he was at the helm of the Red Storm’s men’s team. This may be a tough hurdle since only two years prior, it extended his contract and openly stated that Coach Anderson and the men’s basketball program represented ‘the University in a first-class manner on the court, in the classroom and in the community.’”

[Return to Table of Contents](#)

## Labor Relations in Sports Has Become Boring; That’s a Good Thing

By Christopher R. Deubert, Senior Writer

On April 1, the National Basketball Association (NBA) and National Basketball Players Association (NBPA) announced they had reached an agreement on a new collective bargaining agreement (CBA). The new deal, which runs through the 2029-30 season, is relatively unremarkable as there do not appear to be any major changes to the league’s operations. Instead, what is remarkable is that the NBA-NBPA CBA caps a fairly remarkable run of successful CBA negotiations in sports over the past two years.

In those two years, six CBAs have been executed in professional sports: (1) the October 25, 2021 CBA between the United Soccer League (USL) and the USL Players Association (USLPA) concerning USL Championship; (2) the February 1, 2022 CBA between the National Women’s Soccer League (NWSL) and the NWSL Players Association (NWSLPA); (3) the March 2022 CBA between Major League Baseball (MLB) and the MLB Players Association (MLBPA); (4) the November 1, 2022 CBA between USL and the USLPA concerning League One; (5) the recently announced CBA between MLB and the MLBPA concerning minor league baseball; and, (6) the new NBA-NBPA CBA.

<sup>13</sup> <https://www.rumbleinthegarden.com/2023/3/20/23648672/mike-anderson-st-johns-lawsuit-over-firing-from-st-johns>

<sup>14</sup> <https://www.si.com/college/arkansas/hogs-mens-basketball/looking-at-end-of-mike-anderson-st-johns-firing>

<sup>15</sup> The existence and reasonableness of cause is established by the context of the surrounding facts, circumstances of the dismissal, or as defined per state statute or the terms of the contract itself.



These CBAs come on the back of new CBAs executed in the National Hockey League (NHL) and Major League Soccer (MLS) in 2020 and 2021 respectively during the pandemic and CBAs in the National Football League (NFL) and Women's National Basketball Association (WNBA) in 2020 just before the pandemic.

### The New CBAs

Notably, four of the aforementioned CBAs are the first ever CBAs in those leagues, helping to provide uniformity and stability to those leagues' operations.

Start with the USL. The USL operates two men's professional soccer leagues. The USL Championship is a Division II league according to the standards of the United States Soccer Federation, just below MLS as the country's only Division I league. USL League One is a Division III league, below USL Championship. In common parlance, both USL Championship and League One are minor leagues, in a sport which is already of second tier status in the United States. Consequently, these CBAs were largely focused on core employment matters, such as the terms of the Standard Player Agreement, the length of player contracts (February 1 to November 30), club termination rights (broad), clubs' rights to transfer players (also broad), a salary cap called a "Benefit Spend" (\$1.97M in the Championship and \$1.3M in League One for 2023), minimum monthly salaries (\$2,250 in the Championship and \$2,000 in League One for 2023), workers' compensation, and grievance procedures. The CBAs do not require health insurance or retirement plans and there is no player draft.

The NWSL CBA is similarly brief and focused on core economic items. The CBA set minimum salaries of \$36,400 for 2023, established free agency for players after five years, and includes the concept of a salary cap but leaves the amount of the cap generally within the NWSL's discretion. Unlike the USL, the NWSL agreed to provide its players with a variety of benefits, including full salary protection in the event of pregnancy. The CBA was perhaps most remarkable for its level of cooperation with the union, including an agreement to provide confidential league financial information and the creation of a joint council to address and evaluate ongoing league matters. Indeed, NWSLPA Executive Director Meghann Burke was a

part of the committee that selected Jessica Berman as the NWSL's new Commissioner.

Finally, there is the CBA in minor league baseball. This CBA's quick execution is surprising given that it was only in September 2022 that MLB even recognized the MLBPA as the bargaining representative for minor league players. Nevertheless, a deal was reached that should provide stability to the players and clubs. After the settlement of a lawsuit in which MLB agreed to pay \$185 million to minor leaguers for alleged violations of the Fair Labor Standards Act, the parties agreed to minimum annual salaries ranging from \$19,800 in rookie ball to \$35,800 in Triple A, a substantial increase from prior minimums. The CBA also improves offseason pay, housing, meals, and travel for players. Lastly, control over player name, image, and likeness reverted back to the players.

### The Experienced Leagues

The seemingly peaceful negotiation of the minor league baseball CBA was also surprising given that MLB and the MLBPA had a contentious labor negotiation in early 2022. The league locked the players out in December 2021 and the start of the 2022 season was delayed until the parties finally reached a deal in March 2022. That lockout is a blemish on this recent run of labor peace but is also notable for preserving the status quo. Despite some thought that the MLBPA would seek to change the standards of free agency or salary arbitration for the first time in decades, no such changes were made. Instead, the league agreed to a \$50 million performance-based bonus pool to be paid to players not yet eligible for arbitration. Moreover, the parties incentivized teams to call up young players in time to earn a full year of service by providing the teams the chance to earn additional Draft picks depending on player performance. The Draft itself is now also a lottery. Nevertheless, the recent rule changes, such as the pitch clock and elimination of defensive shifts, were unilaterally implemented by MLB.

As mentioned above, the new NBA-NBPA CBA is similarly benign. The parties added a second salary cap level over which teams can no longer take advantage of certain roster construction methods, including the mid-level exception. The limit on salaries in contract extensions was raised from 120% of a player's prior year salary to 140%. To address concerns over



player rest, players must now play at least 65 games to earn postseason awards such as MVP. Finally, the most interesting change is the possibility of a mid-season tournament.

### Lessons Learned

The recent run of labor peace is in stark contrast to the era from the 1970s through mid-2000s when most CBA negotiations in the NFL, MLB, NBA, and NHL involved work stoppages and litigation. For better and worse, that litigation largely resolved major legal issues concerning labor relations in sports. Specifically, the significance and scope of the non-statutory labor exemption was clarified, even if its exact end point is still not clear. See *Brown v. Pro Football Inc.*, 518 U.S. 231 (1996). Additionally, many of the attorneys who fought those battles have since left the scene, including Paul Tagliabue and David Stern on the league side and Don Fehr and Jim Quinn on the players' side.

Perhaps the biggest driver of labor peace has been the gradual change in ownership. Owners that years ago claimed that free agency and out of control player salaries would lead to their financial ruin were proven wrong and are generally no longer in control of clubs. Instead, newer owners have grown up with the financial realities of labor relations in sports, including players' rights to free agency and a share of league revenues. Acceptance of these realities have helped the parties in each league to work together to grow their respective pies while avoiding the calamity of missed games.

### Next on the Docket

The next CBA up for negotiation is that between the NHL and NHLPA, which expires after the 2025-26 season. That negotiation will be interesting in that it pits Gary Bettman, NHL Commissioner since 1992 and league-side attorney before that, against Marty Walsh, the new head of the NHLPA and former Secretary of the U.S. Department of Labor and Mayor of Boston. Bettman has overseen three lockouts that resulted in a considerable loss of games and may see the upcoming negotiation as an opportunity to crown his career with wins for the owners. A major issue in those negotiations will be player participation in the Olympics.

The current NFL-NFLPA CBA runs through March 2031. The NFLPA has reportedly begun its search for a replacement for Executive Director De Smith,

expected to leave the post he has held since 2009. NFL Commissioner Roger Goodell is reportedly set to sign an extension that will keep him at the league through the 2027 season, when he will be 68 years of age and may retire. As the league with the most litigious labor relations history, the possible introduction of new chief executives on both sides may eventually spell the end of a sustained era of labor peace.

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[Return to Table of Contents](#)

## Assessing Minor Leaguer's Union Status and What It Means for America's Pastime

By Josh Nadreau, of Fisher Phillips

To the surprise of many observers, minor league baseball players presented owners with more than 5,400 union authorization cards last August, and perhaps even more surprisingly, Major League Baseball promptly agreed to voluntarily recognize the union—avoiding a drawn-out proceeding before the National Labor Relations Board—just a few days later. As spring beckons across the country and ballparks emerge from their winter slumber, how will the minor leaguers' union status impact America's Pastime?

### How Did We Get Here?

An MiLB players' union was historically seen as unlikely as an undrafted free agent making it to Cooperstown. Despite what the players perceived as poor working conditions and substandard wages, for years the players seemed reluctant to “rock the boat” with major league owners given the players' goals of making it to the big leagues. The late Marvin Miller, who led the Major League Baseball Players Association (MLBPA) for 17 years, conceded as much in a 2012 interview with Slate: “The notion that these very young, inexperienced people were going to defy the owners, when they had stars in their eyes about making it to the major leagues—it's just not going to happen.”

So what changed? Likely a confluence of events. In 2014, former Marlins' prospect Aaron Senne filed a class action lawsuit in California alleging violation of the state and federal minimum wage and overtime

laws. In response, MLB lobbied-for, and ultimately secured the passage of the “Save America’s Pastime Act,” which exempted minor league baseball players from the overtime provisions of the federal Fair Labor Standards Act. According to reports, this was strike three for the players. Not only were the major leagues not willing to make changes to player working conditions, but they were also willing to leverage allies in Congress to preserve the status quo.

Following this 2018 change, players began having conversations about improving working conditions. Over the next few years, players formed advocacy groups to help guide fellow players through the economic and other challenges associated with the lost 2020 season. Soon after, the major leagues announced the elimination of 40 minor league teams and a geographical realignment. These issues, along with a general resurgence of organized labor nationwide, proved to be the perfect storm for the minor leaguers—who announced their intent to unionize with the MLBPA in August 2022.

### **What Happened Next?**

Under federal labor law, an employer presented with union authorization cards sufficient to constitute a majority of the proposed bargaining unit has two choices—to agree to a “card check” election where a neutral party counts the cards and certifies the result, or to require a secret ballot election conducted by the National Labor Relations Board. For most employers, requiring a secret ballot election is preferred. It allows employees to make an informed choice free of union coercion, instead of the common scenario of the union pressuring employees to sign authorization cards, often at home or during off hours.

The major leagues presumably assessed the likelihood of whether a secret ballot election would have made any material difference and declined to prolong the process. It is also possible that the current NLRB General Counsel’s intention of reviving a long-dormant doctrine known as Joy Silk played a role. Under Joy Silk, an employer presented with a union’s demand for recognition must show a good faith basis for rejecting the demand or face a bargaining order — without a secret ballot election.

### **What does this mean for my local AAA club?**

With the major leagues voluntarily recognizing the MLBPA as the minor leaguers’ exclusive bargaining representative, the parties’ interactions are now governed by federal labor law. Most importantly, the law requires that the parties to bargain over the players’ wages, hours, or other terms and conditions of employment. Put simply—the owners cannot make unilateral changes to player pay, work rules, or even playing rules. All of these items need to be negotiated with the union first. According to reports, the players’ representatives have been meeting with the owners and had hoped to have a finalized collective bargaining agreement in place before the minor league season begins on March 31. What this agreement may include is still unknown, but we discuss a few likely items of note below:

**Increased Wages:** One of the primary issues raised by minor leaguers over the past several years is what they viewed as substandard salaries, especially for those players who may not have signed large signing bonuses when drafted. One would expect any new collective bargaining agreement to address perceived inequities and increase wages across the board. This may include higher minimum salaries, contractual overtime, or other financial inducements. How any agreement would apply to players across the different levels within minor league baseball and in several different jurisdictions remains unclear.

**Housing:** Minor league housing is also likely to be addressed, either through dedicated team facilities or through housing stipends. The players were able to court public opinion throughout their organizing efforts with reports of 5 or 6 players sharing apartments and even some players reporting sleeping in their cars.

**Playing Rules:** Perhaps most notable to fans—the owners will have to bargain with the players over future changes to playing rules. For several years, the minor leagues have been used to experiment with rule changes before they are implemented in the big leagues. These included rules making their major league debut this year—pitch clocks, larger bases, and bans on player shifts.

Other notable negotiation subjects will likely include health insurance, retirement, and full-time employment (minor leaguers currently get paid during the

regular season only). On the other side of the table, it will be interesting to see how MLB intends to pay for any increases to player wages or benefits. Will MLB require the minor league owners to contribute? How will that impact ticket prices at minor league parks—one of the last places an average American family can watch professional sports at an affordable price? As we await word of a finalized collective bargaining agreement, one thing is certain—with more than 5,400 members, the minor league players represent one of the largest bargaining units in the United States, and it would be foolish to think that they will not leverage their numbers to effectuate significant changes throughout the minor leagues.



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## Education Department Proposes New Title IX Regulations for Transgender Student-Athletes

**By Susan D. Friedfel, Monica H. Khetarpal, Carol R. Ashley, and Mallory H. Gantt, of Jackson Lewis**

The U.S. Department of Education Office for Civil Rights (OCR) has proposed a standard that would clarify participation and equal opportunity of transgender students in school athletics.

The proposed regulation published in the “U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams” fact sheet seeks to build upon existing Title IX rules, the Department said, by upholding the long-standing requirement that women and girls be afforded equal athletic opportunity and affirming that schools can still offer separate men’s and women’s sports teams in certain circumstances while providing equal opportunity to transgender students to participate in athletic programs.

The proposed regulation would apply to K-12 schools, as well as colleges, universities, and other institutions that receive federal funding.

According to U.S. Secretary of Education Miguel Cardona, “Every student should be able to have the full experience of attending school in America, including participating in athletics, free from discrimination.” The proposed regulation seeks to provide schools a framework to develop eligibility criteria that protects students from being denied equal athletic opportunity, while providing schools the flexibility to develop their own policies.

The proposed regulation provides, “if a recipient adopts or applies sex-related criteria that would limit or deny a student’s eligibility to participate” on a sports team consistent with their gender identity, “such criteria must, for each sport, level of competition, and grade or education level ... be substantially related to the achievement of an important educational objective” and “minimize harms to students whose opportunity to participate” on a team “consistent with their gender identity would be limited or denied.”

Under the proposed regulation, schools would be prohibited from implementing a one-size-fits-all”

[Return to Table of Contents](#)



categorical ban on transgender students participating in athletics consistent with their gender identity.

Instead, the proposed regulation would allow schools to adopt policies that provide flexible eligibility criteria that serve important educational objectives, such as ensuring fairness and preventing sports-related injury.

When creating a policy, the proposed regulation would allow schools to:

- Recognize differences in grade and education level;
- Recognize that athletic teams vary in competition levels, such as “no cut teams” versus competitive success teams; and
- Recognize the types of sports offered by schools vary widely.

For example, under its proposed regulations, OCR expects elementary students would generally be able to participate on school sports teams consistent with their gender identity, where the considerations may be different for high school and college teams with a higher competitive outlook. Likewise, OCR expects that, where schools offer lower levels of competition, such as intramural or junior varsity teams, sex-related eligibility criteria that restricts students from participating would need to reflect such differences in competition.

OCR also recognizes that sports vary widely and schools wishing to restrict students from participating consistent with their gender identity must consider the nature of the sport to which the restrictions would apply. OCR notes that many sports governing bodies have already created participation criteria for their sports. For example, the National Collegiate Athletic Association has adopted a sport-specific approach for eligibility criteria for college-level competitive leagues.

Lastly, OCR iterates that when evaluating the use of sex-related criteria where there are multiple methods of achieving an important educational objective, OCR may determine that the school does not satisfy the requirements of the proposed regulation if the school did not choose the method that minimizes the harm to students whose opportunity to participate on a team based on their gender identity may be limited or denied.

OCR’s release of the fact sheet comes as some states seek to or have enacted laws to limit or restrict transgender students from participating on sports teams consistent with their gender identity.

The public may submit comments for 30 days from the date of publication in the Federal Register.

[Return to Table of Contents](#)

## The NFL, the Raiders, and A Law Firm: A Tale of Two Colors

By Josh H. Escovedo, of Weintraub Tobin

A dispute has emerged between the NFL, the Las Vegas Raiders, and the Dimopoulos Law Firm over the NFL and the Raiders threatening to sue the firm for trademark infringement. The law firm claims it has been using a black and silver color scheme to promote its services since its inception in 2012. However, after hiring three professional athletes, including Maxx Crosby of the Las Vegas Raiders, to appear in a new advertisement, the NFL sent a cease-and-desist letter to Dimopoulos accusing the firm of unauthorized use of the Raiders’ marks. The complaint states that the advertisement did not feature any logos or trademarks of the NFL, the Raiders, or any other sports teams, and the disclaimer on the Dimopoulos Law Firm website and YouTube page make it clear that the firm is not affiliated with the NFL. Below we analyze the grounds of the dispute and the legal implications of the case.

The Dimopoulos Law Firm alleges that the NFL’s cease-and-desist letter is unfounded. According to the letter, the NFL claims that Dimopoulos used hashtags, including the Raiders’ marks, and engaged in other unauthorized use of their marks. However, the complaint alleges that the advertisement did not feature any NFL logos or names, and the disclaimer on the Dimopoulos Law Firm website and YouTube page clearly states that the firm is not affiliated with the NFL. The limited information available suggests that it is unlikely that a reasonable consumer could be confused into thinking that the firm is affiliated with the NFL or the Raiders.

The Dimopoulos Law Firm argues that multiple professional sports teams, including the Los Angeles Kings, the San Antonio Spurs, and the Chicago



White Sox, use a silver and black color scheme. However, the NFL could have protectable IP in its color scheme, but that remains to be seen.

As for the hashtag claim and the argument that using the marks as hashtags creates a false designation of association or affiliation with the Raiders or the NFL, that seems plausible. If a consumer were to see the silver and black uniforms in the advertisement that was returned in response to a search for #raiders or #raidernation, they could potentially assume that there must be a relationship between the firm and the NFL or the team. However, the disclaimer on the firm's website and YouTube page makes it more complicated.

In conclusion, the dispute between the NFL and the Dimopoulos Law Firm over trademark infringement is complex and will require further examination of the facts. While the Dimopoulos Law Firm may have used a silver and black color scheme, it is unclear if the NFL has protectable IP in its color scheme, and even if it does, whether that would preclude use by a personal injury law firm. The hashtag claim is also complicated, given the disclaimer on the Dimopoulos Law Firm's website and YouTube page. Ultimately, the case will come down to whether the NFL and the Raiders have protectable IP in the color scheme and other marks and whether the

use is likely to create consumer confusion or create a false designation of association. We will have to see how it plays out.

[Return to Table of Contents](#)

## Activision Blizzard: Once Again in Hot Water

By Jared Good, Esq.

Activision Blizzard has had a rather up-and-down past several years. Reports of a toxic workplace that led to a federal investigation, was followed by the massive purchase price from Microsoft to acquire the company and its subsequent antitrust investigation and complaint. Lost amongst these massive changes, another issue was warranting a federal intervention that likely was only aware to those who follow esports. Activision Blizzard is a major player within the esports world, as it owns and operates two separate leagues: one for Overwatch and one for Call of Duty.

Within these leagues, Activision Blizzard had attempted to enact salary limits on the participants in their esports leagues. When filing their lawsuit in the District Court of Washington, the Justice Department alleged that Activision Blizzard and the independently owned teams imposed a tax that "effectively operated as a salary cap, penalized teams for playing esports players above a certain threshold and limited player compensation in these leagues."

The exact phrasing of the tax was:

*teams were fined if their total player compensation exceeded a threshold set by Activision each year. For every dollar a team spent over the threshold, Activision would fine the team one dollar and distribute the collected sum pro rata to all non-offending teams in the league.*

At first glance, most sports fans, especially in North America, would be confused on why Activision would be subject to penalties because of this conduct. So called "luxury taxes" and salary caps are prominent in all of the major sports leagues. The tax being levied under the terms of the Activision rules, would most closely follow that of the NBA where teams that spend more than the permitted salary cap,

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enter the luxury tax where the money is then pooled into a league-wide pot to help supplement income for smaller-market teams to help maintain competitive parity and opportunities for success.

The difference here, however, is that the esports leagues at issue do not have a collective bargaining agreement and representation of the players. So in attempting to legislate this change, the players were having a pay limit unilaterally imposed without opportunity to content or negotiate the terms and benefits.

This tax was never actually implemented within the league. Activision dropped the plans in October of 2021. Although this never occurred, Activision has maintained that the tax would have been a lawful action that would not have adversely impacted the salaries of players.

As per the agreed terms of the settlement, Activision is required to refrain from capping and/or limiting the salaries of esports players or their teams. The settlement must still be approved by the federal district judge.

[Return to Table of Contents](#)

## The Cultural Intersection of Sports and Fashion

**By Claire Gregory, J.D. Candidate at the University of Miami School of Law**

On March 30th and 31st, the University of Miami School of Law hosted its annual Global Entertainment & Sports Law + Industry Conference. The conference featured a number of panelists – lawyers, creatives, athletes, business owners, industry leaders, and more – who discussed current issues and developments in the sports and entertainment industries.

One of the more unique panels addressed the cultural intersection between sports and fashion. The discussion focused on the increasing infusion of culture and fashion in the sports industry and, in particular, how the NBA has been at the forefront of this trend.

As culture and fashion have become more and more intertwined with sports, many NBA teams have found substantial value in having a creative mastermind behind the brand of the team. Accordingly, the panel began with a discussion from Don C, the

Creative Strategy and Design Advisor for the Chicago Bulls. C explained that the Bulls are more than just a basketball team; they are a brand rooted in people and community. To reflect this, he works to infuse the Bulls' brand with aspects of culture and community engagement to create an authentic and recognizable brand both on and off the court. By doing so, the Bulls hope to build a strong connection with their community and establish themselves as a brand that goes beyond basketball.

This commitment to infusing culture and community into the Bulls' brand was exemplified by the launch of BullsFest, a two-day music festival in Chicago that brought together young basketball fans with shared interests in basketball, music, and art. C described the festival as an opportunity for people to connect, enjoy themselves, and feel a sense of unity with the Bulls' brand. Going forward, the Bulls plan to continue using their brand to unite various aspects of culture, including fashion, music, and art, to be an aggregator of the community.

While work such as C's once seemed unusual, Matthew Growney, the Senior Advisor of Fashion, Creative, and Partnerships at PUMA, explained that embracing creative designers and advisors is the reason the NBA is the leader of the intersection of sports and fashion. Unlike the NBA, many other sports leagues have been slow to recognize how the overlap of fashion and sports can be used as a vessel to build a stronger community.

To illustrate this, Growney pointed out that leagues like MLS have fans who love fashion, but those leagues have struggled to acknowledge the importance of this interest to the community. It wasn't until February 2023, that Inter Miami MLS talked the team into painting a wall for the iconic "tunnel fit pics." Because the MLS has been slow to keep up with developments like these, there aren't many MLS players that have even had the exposure or visibility to be icons of fashion like players in the NBA. Without that exposure it becomes nearly impossible to create a connection with the community through cultural aspects like fashion. Thus, as leagues like the NBA continue to pave the way, other leagues will soon realize that failing to follow suit means falling behind.

Additionally, as teams in the NBA have embraced the infusion of creativity and culture into their brands, it has opened the door for a new era of endorsement deals in the sports world. Through her work with creative directors, brands, and influencers, Danielle Garno, a Partner at Holland & Knight and Fashion Law Professor at Miami Law, has had a front row seat in watching the landscape change. Previously, athletes were limited to sneaker endorsements; but now, as Garno explained, athletes are able to align themselves with not only sneaker brands, but other fashion brands that they love and are loyal to.

This alignment with brands allows athletes to generate additional revenue streams through fashion-related endorsement deals, while also allowing fashion brands to use players to market their products. Smaller brands are able to gain exposure through mediums such as the iconic tunnel fit pictures that are widely shared across the internet. Luxury brands like LVMH have also recognized this new opportunity and have been quick to utilize sports-related brand deals and brand ambassador opportunities with NBA athletes. For example, Louis Vuitton created a travel case for the Larry O'Brien trophy and designed outfits for esports players. Garno explained that the overarching theme between sports and fashion is branding, whether it be from the team or an athlete, and this emerging market between fashion brands and athletes will lead to many big brand ambassador deals.

Subsequently, as more of these revenue-related developments emerge between players and fashion, the NBA has nevertheless continued to own the space. Don C credited this to the emphasis on individualism that occurred when David Stern's took over as commissioner of the NBA. Instead of focusing on the teams, Stern promoted the league through the players' perspectives and allowed players to embrace their individuality, which birthed creative superstars such as Magic Johnson, Kobe, Shaq, and now LeBron. These players became the "poster boys" and generated new interest in the league by connecting fashion and culture with the sport. Now, the NBA's acceptance of individualism has become a hallmark of the league's culture. In fact, C explained that many younger fans don't watch full

NBA games anymore, instead they consume the culture by watching game highlights and checking social media to see what the players wore.

Because the NBA has been at the forefront of this movement by embracing culture to create community, proactively creating roles and opportunities to infuse fashion and creativity, and by embracing players' individualism in the league, it continues to propel the cultural intersection between sports and fashion. The NBA's innovation and creativity has not only allowed the potential for new partnerships with the league and brand deals for players, but it has also allowed for fans to connect with players through a shared interest in fashion and for communities to connect with the teams through a shared culture. With such creative individuals joining teams and unique opportunities emerging with brands, who knows what exciting developments are to come in the world of sports and fashion, the only thing that is certain is that the NBA will continue to pave the way.

[Return to Table of Contents](#)

## Study Could Change Assumptions About Helmet Safety

A new study led by researchers at New York Institute of Technology College of Osteopathic Medicine (NYITCOM) could change public perceptions about helmet safety.

Helmets, which are proven to prevent skull fractures and head wounds, are no doubt critical for safety. However, there is much debate about the extent to which they are capable of mitigating the effects of concussions. The hard-shelled, heavily padded helmets used by many of today's athletes, military personnel, and industrial workers have been much adapted since early helmet models, which lacked inner padding. But do these design enhancements provide additional protection?

That's the question that NYITCOM researchers, led by biomedical engineer and Assistant Professor Milan Toma, Ph.D., address in a new study published in Applied Sciences.

During a concussion, forces from the initial hit cause the brain to move rapidly back and forth (oscillate)



within the skull and make contact with skull bones. This brain-skull interaction can damage brain chemicals and tissues, especially if multiple interactions occur. Cerebrospinal fluid (CSF), which is found in the central brain cavities and space surrounding the brain and spinal cord, cushions the brain and protects it from hitting the skull. However, as one of Toma's previous studies indicated, if subsequent hits occur in quick succession, the fluid loses its protective abilities and the brain incurs more stress with each successive skull oscillation.

While no helmet can fully prevent a concussion, some researchers, including Toma, hypothesize that helmet design can play a role in limiting concussion severity. The latest advancements in helmet design have shifted away from the conventional hard-shell and extensively padded helmets. Instead, they employ inventive materials and construction methods, with an emphasis on minimizing forces caused by head rotations during and after impacts. Experts believe that these forces are primarily responsible for concussions, as also demonstrated by Toma's earlier studies. Nevertheless, conventional helmets continue to be widely used across various sports disciplines, especially recreational ones like cycling and skateboarding, due to the exorbitant cost of the newer designs.

"Our new study may have implications for future helmet design and calls into question current assumptions regarding the best way to protect soldiers and athletes from concussions," says Toma, whose research largely focuses on how fluids in the human body respond to forces.

Using 3-D models, Toma and his fellow researchers, including NYITCOM students Faiz Syed and Elisabeth Frankini, as well as Research Technician Kelsi Hurdle, simulated brain-skull interactions under conditions resembling a low-speed, head-on collision. This force of impact is similar to the collisions experienced by athletes in contact sports and bicycle accidents. The simulation's conditions also accounted for CSF presence and the features found in many of today's helmets: a hard exterior with soft inner padding.

The simulations projected multiple direct brain-skull interactions following the initial hit. In other words, the current helmet design did little to limit concussion severity. The CSF's ability to provide natural protection diminished with each successive skull

oscillation, an outcome consistent with Toma's earlier research.

"These smaller back-and-forth motions may seem insignificant compared to the first one, however, we showed that they can still cause serious damage," the researchers write. "As these subsequent head movements occur, they compromise the ability of CSF inside the skull to prevent contact between the brain and skull bones."

Their findings also support a 2020 experimental study by another institution, which compared modern military helmets with the unpadded helmets used during World War I. Surprisingly, that study found that the historical helmets may have had an advantage in protecting from concussions when relying solely on cerebrospinal fluid.

The NYITCOM authors conclude their new research by calling for additional studies aimed at developing advanced helmet designs for better protection against concussions.

However, they make it known that using a helmet—even one with some limitations—is still better than not wearing any head protection at all.

Other co-authors include Jodan Garcia, D.P.T., of Byrdine F. Lewis College of Nursing and Health Professions at Georgia State University, and Rosalyn Chan-Akeley, M.D., of the Lang Research Center at New York-Presbyterian Hospital Queens. This research project received external funding from the New York Thoroughbred Horsemen's Association.

[Return to Table of Contents](#)

## As Legal Action Brews, AFL Releases Updated Concussion Guidelines and Strategic Plan

The Australian Football League (AFL) has been in the news for all the wrong reasons in 2023.

Among the concussion lawsuits leveled against the league are:

Liam Picken's lawsuit against his Western Bulldogs club, the AFL, and doctors. Picken alleged the defendants were negligent in that they concealed his true condition from him and breached their duty of care. He is represented by lawyer Michael Tanner, who claimed Picken "was never made aware of his failings of any

cognitive assessment he ever underwent. Further to that, he did not necessarily understand the full extent of his injuries or his symptoms.” In the complaint, the attorney alleged that the plaintiff, “prior to his last game of football for the purpose of his post-football career, had obtained undergraduate and a masters degree in international business and finance. The plaintiff, as a consequence of his injuries, has been totally incapacitated from undertaking placements consistent with his academic, vocational and commercial training.”

Emma Grant’s lawsuit against Collingwood and the league. Grant alleged that she suffered eight to 10 significant concussions throughout her playing career. “The conduct of the defendant was negligent and fell below a reasonable standard of care,” according to her complaint. Her attorney Michel Margalit noted that players like Grant, “often enter into AFL careers as teenagers, without the life experience or perspective to understand the life-long debilitating impacts of concussion. These players need to be protected and adequately cared for if injured.”

And there are others, such as a class action involving Former Melbourne star Shaun Smith, Adelaide Crows premiership player Darren Jarman and the family of the late Shane Tuck. Attorney Greg Griffin suggested as many as 200 to 300 players could join.

Meanwhile, the Australian Football League has released its “updated guidelines for the elite game and strategic plan for sport-related concussion in Australian football.

The Guidelines for the Management of Sport-Related Concussion – AFL & AFLW, which are continually modified and enhanced in line with evolving scientific evidence, provide best-practice information for the diagnosis and management of concussion in the AFL, to protect the short and long-term welfare of all AFL/AFLW players. Revised community guidelines for all other levels of Australian football will be released soon.

In following the elite game guidelines, the earliest that a player can return to play after a concussion is on the 12th day after the day on which the



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concussion was sustained and provided that the player has safely progressed through each phase of the 11-step return-to-play program.

The 11-step return-to-play program consists of three distinct stages – rest, recovery and graded return to training and play. The updated guidelines insist on a minimum period of 24 hours (or longer) for each Step of the progression and, if any symptoms recur during the graded return to training and play stage, the player athlete must go back to the previous symptom-free Step.

The guidelines also insist on a more conservative approach in cases with “modifying” factors, including young players, where there is a history of learning disorders or mood disturbance, or a history of multiple concussions, particularly those with prolonged recovery, and previous concussion/s in the same season and where there is a high symptom burden in the first few days after injury. In these cases, the graduated loading program should be conducted over a longer period of time (e.g. by extending the number of days between progressions, or increasing the number of days held at each Stage/Step of the graded return-to-play).

The player must have medical assessment prior to being cleared to return to full contact training with the group and then a further medical assessment before being cleared to return to play.

The updated 17-page guidelines also make clear that there are computerised screening cognitive tests (e.g. Cognigram, ImPACT) that have been validated for use following sport-related concussion, which are readily available and are a practical method to assist with the assessment of cognitive recovery. The guidelines also insist that neuropsychological testing is only one component of assessment and does not replace the need for a full history and clinical/neurological examination.

The AFL has also released its Strategic Plan for Sport-Related Concussion in Australian Football, covering the current period to 2026, which formalises a guiding framework for the football industry’s approach to sport-related concussion and affirms the AFL’s commitment to the prioritisation of the health and safety of players at all levels while maintaining the fabric of our game.

The plan sets out the AFL’s ambition and its pathway in continuing to make our game safer and outlines the AFL’s planned integrated framework for managing the potential impacts of sport-related concussion.

At its core, the plan aims to pursue excellence in each strategic objective: Education, Prevention, Detection, Recovery, Support and Innovation. The AFL convenes a steering group which has five separate Working Groups to guide the work and ensure the successful implementation of the five-year plan and each of the strategic objectives.

The strategic plan was formulated and finalised last year and is now able to be publicly released after the conclusion of the independent review led by senior barrister Bernard Quinn KC, Professor of Neuroscience at the University of Queensland and Royal Brisbane and Women’s Hospital Michael O’Sullivan and Jane Lindgren of Counsel into the work undertaken by former AFL concussion consultant, Associate Professor Paul McCrory. The independent panel’s 260-page detailed report reviewed the Strategic Plan as part of its investigation. The AFL will shortly release its action items in response to the findings and recommendations of the report.

The plan includes key priorities within each of the strategic objectives to guide how the AFL will evolve its concussion management and research activities over the next five years including to:

- Educate – Enhance sport-related concussion expertise across the industry, including healthcare practitioners, players, umpires, coaches, teachers, parents, media and fans
- Prevent – Promote a culture of safety which encourages behaviours to protect the brain health of teammates and opponents
- Detect – Diagnose sport-related concussion quickly and accurately using best practice clinical standards, supported by detection technologies
- Recover – Facilitate recovery through holistic, evidence based and individualised approach to care
- Support – Enable access to support across the entire lifespan of players recovering from sport-related concussion



- Innovate – Collaborate widely to identify, integrate and deploy world-leading solutions in sport-related concussion”

Meanwhile, A range of concussion-related initiatives are in development for 2023, including:

- Recruitment of initial participants in the AFL Brain Health Initiative (Longitudinal Research Program)
- A model for an expanded financial assistance scheme for former elite players suffering serious injury and experiencing financial need
- Review into the elite player disability and/or trauma insurance policy
- Re-launch of a concussion information portal on afl.com.au - a central repository of information and resources for stakeholders involved at all levels of the game
- Trial of a telephone support service for community football, to be conducted in conjunction with the Victorian Amateur Football Association and Monash University
- Continuation of education opportunities and briefings nationally for AFL and AFLW players, as well as community football representatives and key stakeholders, including media

AFL Executive General Manager Football and General Counsel, Andrew Dillon, added:

‘Overall, this past year represents significant progress in the area of concussion management with the adoption of a new governance structure, the development and release of the strategic plan and the release of updated concussion guidelines.

‘These actions demonstrate the AFL’s ongoing commitment to continuous improvement, increased transparency and diverse consultation, in the prioritisation of health and safety of all Australian football participants across all levels of the game.

‘There have been significant enhancements in both the resources devoted to the area of concussion management within the AFL and the lines of accountability since the period of 2014-19, which was the focus of the internally-commissioned independent review.

‘The AFL acknowledged and accepted criticism of it in the recently released independent review and

is taking steps to address recommendations in the report, including that the AFL improves clinical care aspects for past players. The AFL apologised to past players who were let down by the manner in which some of the research and clinical programs were at times conducted in the past.

‘The AFL has made more than 30 changes to concussion protocols, tribunal guidelines and on-field rules over the past two decades to further protect the head and improve the response to head knocks in our game in accordance with current and evolving science and we will continue to work to strengthen protocols and increase the education to clubs and players.

‘The AFL thanks those who have been involved in development of the strategic plan and other important work around concussion, including the AFL Players Association and members of the AFL Concussion Steering Group.

‘The AFL will continue to review its elite and community football concussion guidelines with the benefit of the research insights that will be presented in 2023 as an output from the recent Concussion in Sport Group’s conference in Amsterdam in October.’

AFL Chief Medical Officer, Dr Michael Makdisi, said: ‘Concussion and repeated head trauma continue to be an extremely important issue across our industry. The updated guidelines and strategy reinforce our commitment to continuing to improve healthcare education, recognition and management of head injuries, and prevention of concussion and head trauma at all levels of competition.

‘The guidelines reinforce the importance of players passing through each of the steps safely (i.e. rest, recovery and a graded return), without a recurrence of symptoms, rather than simply progressing through a schedule.

‘The health and wellbeing of all players who choose to play our game, at all levels from grassroots through to the elite game, remains a priority.’”

[Return to Table of Contents](#)

## **CORRECTED - Does Recent Decision Portend the End of ‘Clean Zones’ in Event Host Cities?**

**Steve McKelvey, University of Massachusetts Amherst, John Grady, University of South Carolina**

*(Editor’s Note: Hackney Publications regrets that the endnotes for this article were accidentally excluded when it appeared in the last issue. As a courtesy, we are including the entire article with the endnotes here.)*

For over two decades, it’s been a staple in the anti-ambush marketing arsenal of sport properties that put their marquee events out to bid: the Clean Zone Ordinance. From the FIFA World Cup and NCAA March Madness, to Super Bowls and Olympic Games, the promised passage of event-specific ambush marketing legislation (ESAML) has been a necessary condition for a winning bid.<sup>i</sup> While the NFL’s “demands” for ambush marketing protections are not nearly as sweeping as those included in the bid documents for mega events like the World Cup or Olympic Games (which includes extra-ordinary trademark protections), requiring host cities to pass “clean zone” ordinances has become part of the costs of doing business for a city seeking to host the Big Game.

Given both the economic and pragmatic consequences of clean zone restrictions on host city’s local citizenry, it is frankly surprising that there has been so little public outcry or legal action against clean zone ordinances over the past few decades. Prior to this year’s Super Bowl, we could uncover just two instances of legal challenges to Super Bowl clean zones ordinances -- in New Orleans in 2013<sup>ii</sup> and in Arlington, Texas in 2011<sup>iii</sup> – with neither gaining any precedent-setting legal traction.

However, a recent Superior Court of Arizona decision has cast a bright light (might we say a “bright line”) on the legality of clean zone ordinances. It also suggests that the not-so-little dirty secret of “clean zones” has been revealed for what they really are (or were?): a governmentally enforced means for a private sport organization to protect its multi-million-dollar sponsorship largess.

First, for the uninitiated, a typical bid package for the NFL Super Bowl (running over 100 pages) includes a provision requiring the host committee to work with

local government to enact “clean zones.” More specifically, clean zones include restrictions on the following: Temporary Structures, Temporary Sales Permits, Temporary signage (including signage or banners, video screens, electronic message boards, or nighttime projections of commercial messages), Inflatables and Building Wraps. The typical bid document also included a “Preventive Fund” whereby, if such prohibitions could not be obtained, the Host Committee would need to provide a fund of \$1,000,000 for the NFL to use to prevent ambush marketing.<sup>iv</sup>

Which brings us to the case at hand: *Paulin v. Kate Gallego, et al.*<sup>v</sup>

In preparation for the Super Bowl, scheduled to be played in nearby Glendale, Arizona on February 12, 2023, the city of Phoenix designated a nearly two-square-mile area (encompassing virtually all downtown Phoenix) as a “Special Promotional and Civic Event Area.” Resolution 22073, titled the Super Bowl Censorship Ordinance, provided that through February 19, 2023, no resident or business in this city-imposed “clean zone” would be allowed to display temporary signage without the approval of the city and two private organizations, the NFL and the Arizona Super Bowl Host Committee.

Local business owner Bramley Paulin owned two pieces of property in downtown Phoenix and sought to erect temporary signage on his property to take advantage of the high public visibility such signage would garner during the Super Bowl. He had even communicated with Coca-Cola, a competitor of official NFL sponsor Pepsi, who was unwilling to enter into an agreement with Paulin because his property fell within the clean zone area and Coke assumedly knew such signage would never be approved by the NFL.

Paulin decided to sue the city, asking the judge to declare the ordinance unconstitutional, and was represented by the Goldwater Institute, a public policy research and litigation organization dedicated to advancing the principles of economic freedom and individual liberty. More specifically, the plaintiffs alleged that the ordinance was an unconstitutional prior restraint on speech and an unconstitutional delegation of power. When the city assured him that they would change the law, Paulin agreed to briefly postpone the lawsuit thinking the city would repeal the ordinance. But the city instead made only a modest revision, leading the

Goldwater Institute and Paulin to charge headlong back into court ... and left with a decision that appears to have jeopardized the future of clean zones everywhere (or at least, pun intended, “muddied” it).

As to the first claim (unconstitutional prior restraint on speech), Judge Bradley Astrowsky first laid out the law, stating that “[p]rior restraints on speech and publication are the most serious and the least tolerable infringement” on free speech and expression.<sup>vi</sup> Such restrictions can survive, the judge continued, only if it survives strict scrutiny. In other words, the restriction would need to 1) serve a compelling governmental interest, 2) be necessary to serve the asserted compelling interest, 3) be precisely tailored to serve that interest, and 4) be the least restrictive means readily available for that purpose.<sup>vii</sup>

Historically, sport properties have asserted that the purpose of clean zones revolve around aesthetics (the notion that too many signs and inflatables would be unsightly) and public safety. However, legal commentators have long questioned whether these “purposes” serve a compelling governmental interest, let alone whether the clean zone ordinances enacted are narrowly tailored and are the least restrictive means to achieve these professed purposes by the municipality. After all, everyone involved knows the real purpose, and local governments would not get far, legally speaking, if it stated its compelling governmental interest was to protect the financial investment of the property’s official sponsors.<sup>viii</sup>

“The City ... set up a circumstance in which a private entity is given the authority to make content-based decisions on speech,” wrote the judge. “There is no legitimate government interest in content-based regulation of signs, let alone regulation of signs based on the content preferences of private businesses that are given special privileges by the government. Courts have recognized two substantial government interests that can sometimes justify regulations on commercial signage: public safety and aesthetic. ... The government, not the plaintiff, bears the burden of proving that the restriction serves these ends with a proper narrow tailoring, (citation omitted), and it has not done this.”<sup>ix</sup>

The ordinance was also deemed by the court to be unconstitutional because the city delegated decision-making power to an unaccountable private actor (here, two actors: the Host Committee and the NFL). [I]t is

well-established theory,” wrote the judge, “that a legislature may not delegate its authority to private persons over whom the legislature has no supervision or control.”<sup>x</sup> “Handing over power to an unaccountable third party [to decide what signs could be posted] is totally antithetical to the principles of limited government enshrined in Arizona’s Constitution,” the judge added.<sup>xi</sup>

Does this decision portend the demise of the clean zone, not only for future cities hosting the Super Bowl but also for other global mega-events? First, it is important to acknowledge that the constitutional analysis of commercial speech restrictions as applied in the instant case would only apply in the United States. Similar clean zone ordinances in host cities abroad would be subject to the free speech provisions of the respective venues and the host nation’s laws.

In terms of clean zone ordinances enacted in the U.S. as “required” in bid documents for Super Bowls, league All-Star Games, March Madness, and the like, it is difficult to see how such an ordinance could pass legal muster if challenged. The threshold issue would be proving that the clean zone is necessary to achieve a compelling governmental interest; it is tough to see how temporary signage (including inflatables, building wraps, etc.) displayed by official sponsors would not trigger concerns over aesthetics and public safety ... but that of non-sponsors would? It would thus seem that if a sport property wants a clean zone ordinance to pass legal muster, it would at the very least need to restrict all temporary signage. Alternatively, it would be a non-starter for sport properties to come “clean” and posit that protection of its official sponsors from ambush marketing serves a compelling government interest.

Turning to the constitutional issue of delegation, it’s highly likely that any ordinance that turns over authority to the sport property and/or host committee to decide what temporary signage gets approved and what gets rejected will be fatally flawed. The sport property could perhaps overcome this hurdle by leaving the decision-making to the legislature who enacted the ordinance (with a wink-wink and a handy list of official sponsors!) but even this legal maneuver would still be subject to the constitutional hurdles with respect to prior restraints on speech.



It will be intriguing to watch what transpires with clean zone ordinances at future marquee sport events now that some legal precedent has been established by the Arizona court, and the Goldwater Institute is “on the case,” likely to pursue similar legal challenges in future Super Bowl host cities. Lawyers in the space around sponsorship and major sports events should take note of this intriguing legal development.

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i McKelvey, S. & Longley, N. (2015) Event-specific ambush marketing legislation for mega-sporting events: An economics perspective. *International Journal of Sport Marketing & Sponsorship*, 16(5), 349-364.

ii In the New Orleans lawsuit (*Ciccarone v. City of New Orleans*, 2013 U.S. Dist. LEXIS 32270, (United States District Court for the Eastern District of Louisiana March 8, 2013, Filed), the American Civil Liberties Union sued the city on behalf of a preacher and a political activist. The city removed the restrictions as part of settlement of the lawsuit and agreed not to restrict most forms of commercial and non-commercial speech, such as local businesses having a sign advertising their wares, but the city could still prohibit off-site and mobile advertising near the French Quarter, such as signs attached to a vehicle or worn by a person, according to the court filing.

iii *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. Oct. 11, 2011). Despite filing the lawsuit, the Super Bowl that year went by without any issues or challenges as it related to the clean-zone ordinances, except for some confusion about how the ordinance would be enforced, according to Sliffman, *infra* note endnote iv, discussing fn 15.

iv Ari J. Sliffman, *Unconstitutional Hosting of the Super Bowl: Anti-Ambush Marketing Clean Zones’ Violation of the First Amendment*, 22 Marq. Sports L. Rev. 257 (2011), at 277.

v *Paulin v. Gallego et al.*, CV 2023-000409 (Superior Court of Arizona, Maricopa County. Feb 2, 2023).

vi *Id.* at page 2, citing to *Phoenix Newspapers, Inc. v. Otis*, 243 Ariz. 491, 495 (App. 2018).

vii See *Nash v. Nash*, 232 Ariz. 473, 481-82 (App. 2013)

viii For excellent legal analysis of the application of the commercial speech doctrine to clean zone ordinances, see Sliffman, *infra* endnote iv.

ix *Paulin v. Gallego et al.*, p 5.

x *Paulin v. Gallego et al.*, p. 3 citing *Emmett McLoughlin Realty, Inc. v. Puma City*, 203 Ariz. 557, 559 (App. 2002).

xi *Id.*

## News Briefs

### Sunkin, Anderson Chosen to Lead Sheppard Mullin’s Sports Industry Group

Sheppard Mullin has announced that partners David Sunkin and Brian Anderson have been named co-leaders of the firm’s Sports Industry Team. The Team includes more than 50 attorneys worldwide providing full-service legal counsel to owners, investors, teams, athletes, leagues, governing bodies, facility operators, rights holders, advertising companies, sponsors, sports technology businesses and others involved in sports-related transactions and disputes. Anderson, a technology and commercial transactions partner based in San Francisco who also leads the firm’s advertising practice, recently represented investors in their successful \$53 million bid for an expansion franchise for the National

Women’s Soccer League in the San Francisco Bay Area. Sunkin, a corporate partner based in Los Angeles, has represented a myriad of sports clients including owners of major league sports franchises in sales of majority and minority interests, and clients and venues involved in major media and sports-related events including, college football, The Rose Bowl Game and College Football Playoff Games, the 2028 Olympic Games to be held in Los Angeles and the Los Angeles Marathon.

### Free Webinar on Teaching Fitness Law Offered on May 4

The Fitness Law Academy, LLC is again offering a Faculty Training Course this summer. Faculty members who have participated in this course the past

two summers have benefited from the course. Many of them are now including legal/risk management content in an existing academic course or have developed an entire legal/risk management course which they are now teaching. In advance of the course, which starts May 23, Dr. JoAnn Eickhoff-Shemek will be hosting a “free” webinar on May 4 at 2:00 pm (Eastern). To register for the webinar, send your name and email address to JoAnn at: [drjes2014@gmail.com](mailto:drjes2014@gmail.com). Type “free webinar” in the subject line. Your name and email will only be used to send you the link to the webinar. It will not be shared with anyone. If unable to attend, a recording of the webinar will be sent to all registrants. For more information and to register for the 2023 Faculty Training Course, go to: Educational Courses ([fitnesslawacademy.com](http://fitnesslawacademy.com)).

### **Sports Law Podcast Features Lawyer Todd Shumaker of Church Church Hittle + Antrim; Firm Recognized as Leader in Sports Industry**

**H**ackney Publications announced today that Todd S. Shumaker, a sports lawyer and partner at Church Church Hittle + Antrim, is the featured guest on the Sports Law Expert Podcast. The podcast segment can be [heard here](#). The firm was also honored recently by Hackney Publications as one of the “100 best firms with sports law practices you need to know about” on [www.100lawfirms.com](http://www.100lawfirms.com). Church Church Hittle + Antrim

was recognized for several specialty areas in which the firm’s practice excels. CCHA’s college sports practice was in its seventh year when Shumaker joined, from the NCAA. He was quick to credit the work of his current colleagues Kelleigh Fagan and Jane McGill in building the practice during those years, along with newer practice group members Matt Banker, Kara Carlson, Connor Glass and James Nussbaum for their collective work in continuing to expand its reach in the college sports space. Working for the association, he investigated and processed violations of NCAA rules across all three divisions as an associate director and, more recently, helped develop processes and procedures related to the Independent Accountability Resolution Process. During his time with the NCAA, Shumaker also sat as an appeals panelist for USA Basketball, served as a liaison to the Board of Governors Student-Athlete Engagement Committee and the Division II Enforcement and Infractions Task Force and helped lead diversity, equity, and inclusion efforts as chair of the Enforcement Inclusion Guiding Team and as a member of the LGBTQ-A+ Employee Engagement Group leadership team. Shumaker received his undergraduate degree in political science from Taylor University before earning his juris doctor from the Indiana University Robert H. McKinney School of Law in Indianapolis. During his time with the NCAA, he also completed a master’s degree with the Butler University College of Education.