PROFESSIONAL SPORTS and the LAW

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Drones and Sports: A Brief Overview

By Bob Wallace, Thompson Coburn LLP

The use of unmanned aircraft systems (UAS or drones) is not just reserved for covert military operations anymore. Indeed, today, there is an abundance of small, nimble, drones taking to the sky for a variety of recreational and commercial purposes. Internet giant Amazon has plans to use drones for deliveries, and sports organizations and media outlets are using them to enhance their filming operations.

Indeed, UAS technology can be useful to sports organizations by providing them with unique aerial perspectives and footage to review. It can give coaches a different view when analyzing player spacing, hand placement, footwork or formation play, not to mention the low altitude view from behind a quarterback, for example, or a defensive player. Sports teams have also used drone footage as part of promotional material on their websites and for analytical data that cannot be gathered from traditional use of video equipment.

Many believe that the next major development in aviation is the safe integration of UAS into the national airspace system (NAS). Here are five things that you might wish to consider about the use of drones in the United States before you decide whether to take to the skies.

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'I Got 5 On It': UFC Fighter's Suspension for a Positive Marijuana Test Reeks of Controversy

By Benjamin Mulcahy and Calvin Berman, of Sheppard, Mullin, Richter & Hampton LLP

At the Nevada State Athletic Commission (NSAC) hearing on September 14, 2015, UFC star Nick Diaz sat in silence as he heard state commissioners Francisco V. Aguilar, Skip Avansino, Pat Lundvall, and Anthony A. Marnell III deliberate on the future of his career. Commissioner Lundvall suggested a lifetime ban from professional fighting. Commissioner Avansino balked; a lifetime ban seemed excessive. After all, although this was his third offense, Diaz had *only* tested positive for marijuana during his post-fight drug test, whereas his opponent, former middleweight champion Anderson Silva, had reportedly tested positive for steroids that same night, provoking a one-year ban and a $380,000 fine from NSAC.

NSAC ultimately settled on a five-year ban for Diaz, coupled with a $165,000 fine, 33% of his $500,000 purse from the Silva match. Commissioner Lundvall noted that this punishment would effectively be a lifetime ban for the 32-year-old fighter, while Commissioner Avansino seemed visibly

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'I Got 5 On It': UFC Fighter's Suspension for a Positive Marijuana Test Reeks of Controversy

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uncomfortable with the magnitude of the decision. This discipline exceeded NSAC's own guidelines, which call for a three-year ban for a third positive test for marijuana.

Diaz, a former champion of the venerable Strikeforce mixed martial arts organization (acquired by UFC parent Zuffa, LLC in 2011), and World Extreme Cage Fighting (acquired by Zuffa, LLC in 2006), was livid. His means of earning a living were taken away by what he called a "dork court," referring to NSAC, just minutes after the hearing.

The NSAC, however, is widely considered one of the premier athletic commissions in the United States. An NSAC suspension would make it extremely difficult, if not impossible, for any professional boxer or mixed martial artist to obtain a license to fight in any other jurisdiction during the suspension period.

Some observers of the sport, the commissioners included, believe that Diaz had this coming. The fighter, known as much for his anti-hero aura as his superior conditioning and striking skill, frequently makes headlines for what could be characterized as the wrong reasons, including a pair of DUI arrests and a string of brawls since his professional career began in 2001.

But others in the fight world did not agree with NSAC on this issue. Although the UFC has not publicly taken a particular side, fighters, commentators, and journalists have clamored to come out in support of Diaz. One of the sport's most recognizable superstars, undefeated bantamweight champion Ronda Rousey, expressed her dismay at athletic commissions even testing for marijuana given that, in her view, marijuana is not a performance enhancing drug. Fight announcer and former Fear Factor host Joe Rogan reportedly called the decision "an irresponsible abuse of power."

During the hearing, Diaz's attorney Lucas Middlebrook argued the factual and medical unlikelihood of the positive test's results. In fact, Diaz took three drug tests the night of the Silva fight. He was tested once before the fight at 7:12 pm, and then twice afterward, at 10:38 pm and 11:55 pm. The second test came back positive for marijuana, while the first and third tests yielded consistent, passing results for Diaz.

Nevada deputy attorney general Christopher Eccles argued that the disparity between the second and third tests was a result of Diaz's rehydrating, therefore diluting the traces of marijuana in his system. Middlebrook argued that the second test was incorrect and that Eccles' argument was factually implausible, citing that Diaz's hydration levels at the time of the third test were below his hydration levels at the time of his first test. Further, Middlebrook called Dr. Hani Khella to offer expert testimony that in order for the second and third tests to be accurate, Diaz would have had to consume so much water that he would have been incoherent and in danger of water intoxication, yet Diaz was coherent at the post-fight press conference. Interestingly, a lab accredited by the World Anti-Doping Agency (WADA), considered the "gold standard" in boxing and MMA drug testing, conducted the first and third passing tests. A second lab, not accredited by WADA, tested the second, failing sample.

Throughout the hearing, Middlebrook argued repeatedly for his client's due process rights. Diaz attempted to invoke a blanket Fifth Amendment protection to prevent his client from testifying, but Commissioner Lundvall informed Middlebrook and Diaz that any invocation of the Fifth Amendment would need to occur on a question-by-question basis. Commissioner Lundvall, in an admitted effort to create a record on which adverse inferences could be made,

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A Professional Athlete's Charitable Liability Coverages — Is Your Client Exposed?

By Jani Memorich, CLCS, Associate Director of Britton Gallagher/PAE

While many professional athletes have great intentions and look to give back when establishing a Foundation, having a charity event or simply throwing a birthday party at a club, there are also liability exposures often overlooked by the advisor and professional athlete.

Unfortunately, many athletes only think about securing insurance coverages for their homes, condos, automobiles and jewelry. While these coverages can provide proper protection for their personal liability exposures, they do not provide coverage for activities associated with the athlete for their commercial exposures.

Many advisors and athletes make the assumption their Foundations and charity events would be covered under the athlete's personal liability coverage, which may include an umbrella policy. There have been many cases where we have provided an insurance review for an advisor and their clients where they were unaware there were additional exposures associated outside of their personal insurance coverages.

Many Foundations may have little or no insurance coverage at all. It's imperative to provide this protection for a client since he or she has that exposure when providing any events under the Foundation name. Every Foundation should have an insurance program in place as part of their business model. Coverages such as General Liability, Errors & Omissions, Directors and Officers, business property and Workers Compensation coverage may all be necessary to provide the proper protection for the athlete's exposures. There are a number of questions to be answered when considering what the appropriate coverage is for a Foundation or special charity event:

- Does the Foundation have employees and office space?
- Do the employees directly handle the funds received?
- What types of events are held during the year?
- Is alcohol served?
- How many events take place during the year?
- Are the Board members provided protection under the Foundation's coverages?
- Do employees drive for any Foundation activities?
- Is anything associated with the Foundation sold on the internet or in other ways?

Many advisors and agents do not make an insurance review an integral part of the Foundation's business plan. Insurance is seen as a commodity and overlooked. These Foundations and charity events come with significant exposures. Many of them have family members running them who may not have the knowledge and expertise in placing the proper insurance as part of the Foundation's financial portfolio.

What types of insurance should a Foundation have? While the cost of insurance may at times feel like a financial burden to a Foundation, not having it in place if a claim arises could be the real financial challenge. The following types of coverage should be considered depending on the type of Foundation and the mission.

GENERAL LIABILITY INSURANCE: General liability coverage insures your organization against classic slip-and-fall scenarios. Your Foundation will be covered for damages to someone (such as a visitor, supplier, or associate) who is injured on the organization's property. These policies don't apply to the nonprofit's employees, who are covered separately by workers' compensation insurance. If the Foundation is run out of someone's home, an accident that occurs while there on Foundation business would expose the Foundation to a claim and may not be covered under a homeowner's policy.

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A Professional Athlete's Charitable Liability Coverages

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PROPERTY INSURANCE: Whether owned or rented space is occupied by the nonprofit, consider what your organization might lose in the event of a fire, earthquake, vandalism, storm, flood, or similar event.

- fixtures (such as lighting systems or carpeting)
- equipment and machinery
- office furniture
- computers and accessories (monitors, CD-ROM drives, modems, printers, and so forth)
- inventory and supplies

If you are running a nonprofit out of your home, you may need to adjust your homeowners' or renters' insurance policy. Many exclude coverage of business-related claims, while others forbid business use of your home — meaning that if you run a nonprofit there, your coverage could be limited or excluded.

HIRED NON-OWNED AUTO INSURANCE: If your staff or volunteers use rented vehicles or their own for your nonprofit's activities, this coverage is recommended. The insurance will pay for injuries a driver causes to other people or property while carrying out your organization's business.

DIRECTORS AND OFFICERS INSURANCE: Your nonprofit's Board of Directors and Officers (many of whom are volunteers) could be personally named (individually or collectively) in a lawsuit against your nonprofit. For example, if the board members invests the nonprofit's assets unwisely and lose everything, a creditor might sue the nonprofit as well as its directors and officers. In such a case, you'd want directors and officers (D&O) insurance to cover the cost of defending the directors and officers and pay any resulting money damages. The organization can choose to indemnify the board members which means that the Directors and Officers coverage will be used to pay for the legal costs associated with the lawsuit. The board members could not be indemnified for criminal acts.

PROFESSIONAL LIABILITY INSURANCE: Similar to D&O coverage, professional liability coverage (sometimes called "Errors and Omissions" or "Malpractice" insurance) protect against liabilities resulting from mismanagement of the organization, as well as workplace-related claims such as discrimination or sexual harassment. It covers not only directors and officers but also staff, volunteers, and the nonprofit organization itself.

WORKERS COMPENSATION INSURANCE: If your organization has employees, you should have additional coverage. Both state and federal insurance requirements will apply, typically mandating that you pay for workers' compensation and unemployment insurance, and possibly for disability insurance as well.

Here are a few examples of claims:

DONORS: Claims resulting from those who make donations to the organizations

The Board of Directors of a nonprofit were sued by a number of their donors, alleging misrepresentation of the financial status of the organization. Three members brought separate suits for repayment of the money lent to the organization. The first case settled for $240,000 of which $117,000 accounted for expenses including legal. The second case settled for $75,000 and incurred $86,000 in defense costs. The last case paid nothing to the claimant but incurred $13,000 in defense costs. The total loss including defense costs exceeded $530,000. A $1,000,000 limit including legal costs on a Directors and Officers policy would have covered this loss.

THIRD PARTIES: Third party lawsuits can be filed for various reasons

An organization filed a suit against a Foundation and its Board of Directors for improperly infringing upon the claimants intellectual property rights (the claimant was actually being used as a vendor to promote the event). The claimant filed suit seeking injunctive and monetary relief for the Foundation's alleged improper use of trademarked property while promoting their fundraiser. The claim settled and the total loss, including defense, was over $400,000.

EMPLOYEES AND VOLUNTEERS: Often suits will be brought regarding discrimination, harassment, wrongful termination, retaliation and hostile work environment.

After 10 years of employment, an employee was fired for poor work performance, the employee brought a discrimination suit against the employer under the Americans with Disabilities Act. The individual alleged lack of work place accommodation and constructive discharge. The claim was closed for a total loss of over $80,000, including more than $20,000 in defense costs.

BENEFICIARIES/CLIENTS: A claim by the recipient of the organization's services/gifts or on behalf of the intended recipients. A suit was brought against a Foundation for not providing support both financial and services that the Foundation had solicited donations from donors to pay for.

Consequently, if every donation isn't used in the way your organization says it will be, the organization is exposed to lawsuits. These lawsuits may be determined false but they still have to be defended. Defense costs should play an important role in determining the limits of your policy.

Understandably, many attorneys, advisors and agents may not have confidence in an insurance broker who does not fully understand and appreciate the exposures a professional athlete has, both personally and professionally. Insurance is seen as a commodity.

With the proper insurance advisor to assist in providing these coverages, your clients will receive the appropriate insurance program as part of your overall service model.

Younger than Many of his Employer's Players, Arizona Coyotes General Counsel Talks about His Fast Rise

Just five years out of the Arizona State University College of Law, Ahron Cohen was named general counsel of the Arizona Coyotes this summer. And while it may seem like a fantastic fluke deposited him in what many a sports lawyer would consider a coveted job, Cohen's road was both dynamic and calculated, including time spent interning with the Minnesota Vikings and gaining real-world experience at Snell & Wilmer.

To learn more, we interviewed Cohen:

Question: *When did you first know sports law was something you were interested in?*

Answer: Sports has been a huge part of my life since I was very young. I grew up closely following and playing several sports, and then went on to play running back at Bowdoin College. While at Bowdoin, I took several law, policy and government courses, and realized that I also had a strong passion for law. I contemplated going into coaching, but I thought that pursuing a legal career gave me more of an opportunity to pursue my various passions. While in law school, I learned about the various sports law career paths, but I did not have a particular path pre-determined. I was incredibly fortunate to obtain an internship during law school—and shortly after law school—with the Minnesota Vikings. During my internship, I realized that eventually serving as a team General Counsel would be an exciting job; however, I also knew that I needed to learn how to become a good lawyer in order to effectively deal with the complex and challenging legal and business issues facing professional sports teams. After law school, I decided to join the Snell & Wilmer law firm in its Phoenix office. I had no idea what would be in store for my future in law, but I knew that joining a large, premiere business law firm with dynamic clients, exceptional attorneys and sophisticated legal work, would create great opportunities down the road.

Q: *Tell me about your experience with Kevin Warren and the Minnesota Vikings?*

A: Working for Kevin Warren and the Vikings was an unbelievable experience. Kevin remains a great friend and mentor, and we talk on a regular basis to this day. He is not only a great lawyer and business leader, but he is also a wonderful person. Kevin gave me the opportunity to see the big picture of all the legal issues affecting an NFL team. He allowed me to participate in several important meetings and phone calls with NFL executives, business leaders, coaches, players and staff members, and he always made sure that I was learning and gaining new experiences in sports law. On top of the general business law matters, I had exposure to many unique issues, including work stoppage preparation, new stadium development, player discipline issues, and coaching staff changes. Kevin also provided me with a lot of substantive work, and he consistently pushed me to expand beyond my comfort zone and get better every single day. Kevin's thoughtful and engaging approach to analyzing legal and business issues, collaborating with others in the organization to solve problems, and developing close relationships within the sports industry sets an outstanding example, and I hope to emulate these qualities in my career.

Q: *Describe your practice at Snell and Wilmer?*

A: I began my practice at Snell & Wilmer in the Business Litigation group. After my first year, however, I switched into Snell's Corporate Group. Although I really enjoyed the intellectual rigors of litigation, I wanted to work with clients to help grow their businesses and achieve positive outcomes for all involved parties. For the last 3 years, my practice in the Corporate group primarily consisted of M&A, general corporate, securities, and corporate governance work. Snell & Wilmer did not have a devoted sports law practice group, but I did serve as the lead associate in representing the ownership group that purchased the Coyotes from the NHL in 2013. I also represented the Arizona Super Bowl Host Committee in outside legal counsel in its preparation for the Super Bowl in 2015.

Q: *A lot of people might note that you are fairly young for the position. Does the age thing really matter?*

A: What is fun and exciting about sports—both for athletes and the front-office—is that you never know where or when an opportunity is going to come along. The only thing you can control is that you are ready to perform when given the opportunity. I have been incredibly privileged in my legal career thus far to learn from some outstanding lawyers. In addition, my great exposure to complex and high-profile legal work with the Vikings, Snell & Wilmer, and the Super Bowl Host Committee has given me the confidence to step into this role and achieve success from day one. The fact that I previously represented the ownership group helps as well, as I had some familiarity with the team, and the ownership group had a level of comfort with my work product and ability to effectively address legal issues. I am very thankful for this outstanding opportunity to serve as General Counsel of the Coyotes.

Q: *Finally, what advice would you give college students that want to build a career is sports law?*

A: First and foremost, my advice

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is to become a good lawyer. In-house positions—especially General Counsel positions—are challenging in that there is very little legal guidance. It is certainly fun working for a professional sports team, but it is also difficult and complex work. I would encourage students to find a way to constantly get better. This includes learning and becoming familiar with a wide range of legal topics affecting sports teams. I would also encourage students to find ways to constantly improve their writing skills. On top of the substantive skills, it is important for students to develop relationships within the sports industry. It is also important to find ways to build up their resumes to make themselves valuable assets. For instance, as teams continue to look for new ways to activate corporate partnerships, promotional law and privacy law are becoming hot-button topics within the sports law community. These are cutting-edge legal fields, which presents great opportunities for students to conduct research, write articles, and become legal experts.

San Francisco 49ers Settle Age Discrimination Suit

The San Francisco 49ers have settled an age discrimination lawsuit brought by two former managers, who claimed that they were forced out to make room for younger replacements.

Plaintiffs Anthony Lozano and Keith Yanagi, who were represented by Brown Poore LLP, alleged in federal court that the team sought to replace them with younger, "hip" employees from technology companies in Silicon Valley because they "made a lot of money, they did a lot of cool things before they were 40 years old, and they don't want to go play golf six days a week."

Lozano, 56, worked for the 49ers for more than 20 years as its facilities manager, while Yanagi, 59, had been the team's director of video operations since 2004.

The plaintiffs claimed the 49ers decided to fire them after the team hired Gideon Yu, a former Facebook, YouTube and Yahoo executive, as chief strategy officer.

Lozano and Yanagi were seeking punitive damages for age discrimination, wrongful firing, fraud and concealment, and intentional infliction of emotional distress. Terms were not released.

Seventh Circuit: Federal Hockey League Made Its Own Bed, Must Suffer Consequences

The 7th U.S. Circuit Court of Appeals affirmed the ruling of a district judge, who refused to reconsider his decision to grant a default judgment against the Federal Hockey League in a case in which the league was sued by one of its players. The court was unsympathetic to the league, which had delegated the litigation brought by a professional hockey player, who was injured in a game, to an attorney, who failed to adequately pay attention to the case.

Kyler Moje, while playing for the league's Danville Dashers lost an eye in a high-sticking incident during a game against the Akwesasne Warriors. He sued Oakley, Inc., which made the visor for "offering inadequate protection," and the League.

"Instead of notifying its liability insurer and letting it defend the tort suit, the League hired John A. LoFaro, of Syracuse, New York," wrote the court. "LoFaro promised to represent the League's interests but did not do so.

"The League learned about potential trouble a month after the suit began, when Oakley's attorney called Dan Kirnan, the League's President, to ask why it had not filed an answer to the complaint. Kirnan asked LoFaro what was up, and LoFaro said that an answer had been filed. He sent the League a purported copy. The court's docket did not reflect any filing, however, and Moje asked the judge to enter a default. LoFaro did not respond—nor did he do anything after the district court entered the default and permitted Moje to prove up his damages. On June 11, 2014, four months after the suit began, the district court entered a final judgment of $800,000 against the League."

Kirnan maintained that he first learned about the problem in October 2014, after Moje commenced collection proceedings. It was at that point that Kirnan notified the League's insurer, which undertook to defend under a reservation of rights (the League's delay in notification, and the entry of a final judgment, had an obvious potential to prejudice the insurer), according to the court. In December 2014, a lawyer hired by the insurer entered an appearance for the League and filed a motion under Fed. R. Civ. P. 60(b)(1) to set aside the judgment. The district court's denial of that motion led to this appeal.

On appeal, the league argued that "excusable neglect" led to the default judgment. The district court saw "neglect" but did not think it "excusable." The appeals court added that LoFaro "has never offered an explanation for the combination of inaction and deceit."

It continued:

The League wants us to bypass the question whether LoFaro's conduct is excusable and concentrate on its own knowledge and conduct. Relying on Pioneer Investment Services Co. v. Brunswick Associates L.P., 507 U.S. 380, 396-97, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), the court noted that a litigant in such situations "must show that both its own conduct and its lawyer's fit the category of 'excusable' neglect.

"Usually this concentrates attention on counsel, for most errors will be chalked up to counsel alone. There is one potentially important exception to this norm, however. As the Supreme Court discussed in Maples v. Thomas, 132 S. Ct. 912, 922-23, 181 L. Ed. 2d 807 (2012), and we repeated in Choice Hotels, a lawyer's abandonment of the client ends the agency relation. Abandonment leaves the client responsible for its own conduct, but not for the lawyer's—and then the question becomes whether the litigant's conduct constituted excusable neglect."

The appeals court noted that "the thin record that the League built in the district court does not compel a ruling in its favor. Two things dominate: first, the league failed to tender the defense of Moje's suit to its insurer when it received the complaint; second, the league failed to act prudently after being alerted by Oakley that there was a problem.

"Instead of turning to its insurer, which any sensible business should have done, it hired LoFaro. Why? The only reason the League has given is that he had provided satisfactory legal services to Kirnan (and perhaps the League) in earlier years." But the court questioned whether he had sufficient experience in the instant litigation.

"Even if he were a wizard of tort defense, why keep the insurer in the dark? The league has never offered a reason. After a co-defendant told the league that no answer had been filed on its behalf, it did not take precautions such as notifying the insurer, engaging counsel in Chicago, or checking the district court's docket (which can be done from any desktop computer). A check of the docket would have revealed that LoFaro did not file an appearance as the league's attorney and did nothing to protect its interests. Because LoFaro had not filed an appearance, Moje's lawyer would have sent all filings, such as the request for a default judgment and his proof of damages, directly to the League, which sat on its hands. The league cannot escape a substantial share of the responsibility for the outcome." ●

Kyler Moje v. Federal Hockey League, LLC,; 7th Cir.; No. 15-1097, 2015 U.S. App. LEXIS 11647; 7/7/15

Attorneys of Record: (for plaintiff) Dean Caras, Attorney, Chicago, IL. (for defendant) James R. Branit, Attorney, Litchfield Cavo LLP, Chicago, IL.

Ex-Dolphins Offensive Line Coach Sues Attorney for Defamation In Relation to Jonathan Martin Investigation

By Shawn Schatzle, of Havkins Rosenfeld, Ritzert & Varriale

Jim Turner, former offensive line coach for the Miami Dolphins, recently commenced a defamation action against attorney Ted Wells in the United States District Court, Southern District of Florida. The suit also names prominent law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP, where Mr. Wells is a partner, as a defendant. Mr. Turner's claims stem from Mr. Wells' investigation of the Dolphins on behalf of the National Football League ("NFL") regarding bullying and harassment claims by former offensive tackle Jonathan Martin. Mr. Wells has been the subject of substantial media attention as of late based on another investigation that he performed on behalf of the NFL relating to the New England Patriots football deflation scandal, commonly referred to as "Deflategate."

Mr. Martin's claims made national headlines initially in October 2013 when he promptly left the Dolphins' team facilities, despite his position as a starting member of the offensive line. The Stanford graduate, who was then twenty-four years old and in his second year in the NFL, briefly checked himself into a hospital for emotional distress before flying to his parents' home in California. It was later reported that Mr. Martin had allegedly been the victim of prolonged bullying and harassment from other players, notably Richie Incognito. The veteran offensive guard had a track record of aggressive behavioral issues, which included numerous fights during his college years as a member of the Nebraska Cornhuskers.

Thereafter, Mr. Wells, a prominent trial attorney, was hired by the NFL in order to conduct an investigation into the matter and prepare a report as to his findings.

The "Wells report," as it was commonly referred to in the media, was ultimately released to the public in February 2014. Mr. Wells, who oversaw an investigation that involved over 100 interviews with Dolphins' personnel, ultimately concluded that multiple Dolphins players, led by Mr. Incognito, engaged in a persistent campaign of harassment directed towards Mr. Martin, another unnamed offensive linemen and an unnamed assistant trainer.

Notably, the Wells report determined that the assistant trainer, an Asian-American, was repeatedly the target of racial

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slurs and other derogatory language. The unnamed offensive lineman — referred to as Player "A" in the report — was found to have been the victim of frequent homophobic name-calling. Mr. Martin, an African-American, was said to have been ridiculed with racial insults, as well as sexually explicit remarks about his mother and sister.

Mr. Turner was depicted in the report as enabling the harassment. The Dolphins' offensive line coach, Mr. Wells concluded, had to have been aware of the harassment, especially in light of his participation in it on at least one occasion. Mr. Turner, for his part, denied any knowledge that would implicate him.

During the 2012 holiday season, Mr. Turner gave the offensive linemen Christmas stockings, all of which were stuffed with inflatable dolls. All of the players received female dolls, except Player "A," who received a male doll. Up to that point, the young offensive lineman was often referred to as a homosexual by the other players, although he was a heterosexual. During his interview for the investigation, Mr. Turner stated that he "could not remember" whether he purchased a male doll for Player "A," according to the report, despite corroboration from multiple players.

Additionally, the Wells report included statements from numerous players regarding the concept of "Judas fines" amongst the Dolphins offensive linemen. The concept involved a player imposing a monetary fine on another player who "snitched" on him, such as by accusing the player of being at fault for a botched play in order to avoid the repercussions of his own mistake. Multiple players who were interviewed during the investigation stated that Mr. Turner was aware of the concept and had discussed it with them, even explaining the Biblical betrayal of Jesus Christ by Judas and its relevance to the idea of "snitching." This seemingly created an environment that would discourage victimized players from speaking out. Mr. Turner denied ever hearing the term "Judas" or "Judas fine" in the offensive line locker room.

After the harassment allegations against Mr. Incognito became public, Mr. Turner advised Mr. Martin by way of text message to "[d]o the right thing" and make a public statement to "take the heat off [Mr. Incognito] and the locker room."

Within days of the release of the Wells report, Mr. Turner was terminated by the Miami Dolphins, along with a head trainer. Mr. Turner has not held nor been offered a position on an NFL team since his termination.

Mr. Turner has now brought suit against Mr. Wells, seeking damages for defamation. In his complaint, Mr. Turner, through attorney Peter R. Ginsberg, asserts that Mr. Wells either negligently or intentionally left out key witness statements from his final report, which has directly caused damage to Mr. Turner's reputation and resulted in his inability to obtain further coaching opportunities in the NFL. The complaint repeatedly asserts that Mr. Wells was not an "independent" investigator and instead crafted a report that would satisfy the NFL's public relations needs in exchange for hefty legal fees.

Furthermore, Mr. Turner alleges that Mr. Wells "falsely accused [him] of helping to create [an] atmosphere that allowed bullying and harassment to happen." Mr. Turner contends that he would be gainfully employed as an NFL coach had Mr. Wells actually "present[ed] a complete and accurate picture of the situation in the Dolphins' locker room."

Mr. Turner's complaint contains numerous attempts to explain or clarify his uncontroverted actions. For instance, the complaint asserts that the inflatable doll was given to Player "A" not because he was a homosexual but, "[r]ather, ... [because] he did not always have success dating women." Therefore, Mr. Turner contends, the gift was merely a joke, albeit a "slightly juvenile" one, as opposed to a "cruel or homophobic" act. Notably, in attempting to provide a rationale for his behavior, Mr. Turner admits his involvement in the situation, as opposed to his prior statement that he "did not remember" it.

Mr. Turner asserts causes of action for defamation and defamation per se. He also claims that he is neither a public figure nor a limited purpose public figure, most certainly in an attempt to avoid the heightened standard applicable to such persons. He argues that Florida law applies, as it is the state with the most significant relationship to the events at issue.

"To successfully assert a claim for defamation under Florida law, a plaintiff must establish five elements: (1) the defendant published the statement; (2) the statement was false; (3) the statement was defamatory; (4) the defendant acted negligently; and (5) the plaintiff suffered damages as a result of defendant's publication." See Suarez v. Sch. Bd., 2014 U.S. Dist. LEXIS 66342 (M.D. Fla. 2014). "When a statement facially degrades a plaintiff, brings her into ill repute, or causes similar injury with innuendo, the statement is defamatory per se." Carroll v. TheStreet.com, Inc., 2014 U.S. Dist. LEXIS 156499 (S.D. Fla. 2014).

When a claim of defamation is asserted by a public figure, it must be shown that the statement was made with "actual malice"; that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964). "Reckless disregard" requires that the defen-

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dant "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

"[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246 (1985).

Mr. Turner will therefore be facing an arduous task in proving defamation as against Mr. Wells. He was arguably a limited purpose public figure in light of his involvement in what was a national story at the time. This would impose a requirement that he prove that Mr. Wells had "actual malice," which does not appear to exist. Even if Mr. Turner were to avoid a public figure designation, there are strong indications that the statements and conclusions set forth in the Wells report were not false.

Furthermore, to the extent there were any false statements or conclusions set forth by Mr. Wells that could be deemed defamatory, there appears to be a serious question as to whether such falsehoods would have had any impact on the claimed damages. It is entirely possible that the Dolphins would have terminated Mr. Turner without having reviewed the entire Wells report and based simply on a review of the uncontroverted evidence, such as the inflatable doll situation and his text message exchange with Mr. Martin.

With that said, defamation claims often involve prolonged legal battles, especially when there are an inordinate amount of potential witnesses that could be deposed, as is likely the case here. Mr. Turner may very well be keen to settle in light of the aforementioned legal issues and his alleged inability to obtain employment as a football coach. In the event that Wells and his legal team dig their heels into the ground, however, a motion for summary judgment could be successful.

As a practical matter, this case is an example of the changing environment in professional sports. Players and coaches alike should be mindful that conduct that may have been acceptable as recently as a decade or two ago will no longer be tolerated, whether by sports leagues, fans or the public at large.

Reporting from the Sidelines of the ABA's Annual Sports Law Forum — The Business of Being Team Counsel

By Margaret Kelly

The Pre-Game Basics

For those who missed it, the annual American Bar Association (ABA) Forum on Entertainment and Sports Industries was held this past weekend in our nation's capitol. The Forum's over-arching mission is to highlight and explore the year's vital developments in the overlapping spheres of sports and entertainment law. To that end, the weekend featured a veritable smorgasbord of panels, roundtable discussions and networking events, each centered on different and expertly-identified industry inflection-points–from copyright revision and net neutrality to data breaches and the new wild west of fantasy sports. There was something to satisfy every appetite. For those hungry for a taste of the real life and trials of attorneys in professional sports, "Inside Sports: The Business of Being Team Counsel" had the best seats in the house.

The panel's introductory literature likened the 'business of team counsel' to a game of whac-a-mole. We were hosted by Casey Schwab (Manager, Media Administration & Development, National Football League) and after just ten minutes, the parallels became clear. On any given Monday in the life of team counsel, logistical challenges, contractual wrinkles and often out-and-out legal novelties pop up, with at least the frequency of those irritating electronic gophers; and to hear them tell it, general counsels are often armed with even less than that ridiculous foam and canvas club. Still, they clobber on.

The Highlight Reel

DANNA HAYDAR — Associate General Counsel, Tampa Bay Lightning, Amalie Arena and Tampa Bay Storm (Tampa, FL)

When Danna Haydar, associate counsel for the Tampa Bay Lightning, goes to the office in the morning, she could find herself dealing with anything from working out the nuts and bolts of player endorsement deals, to fielding complaints related to drunken fan slip-n-falls, to negotiating venue terms and conditions for circus elephants and boy-bands. Haydar handles the legal affairs of the Lightning, and also the Tampa Bay Storm and Tampa Bay Times Forum. Representing not just her teams, but also the facility that hosts both, Danna tackles the litigation challenges she encounters daily with a near-herculean tenacity. Her responsibilities run the gamut from negotiating licensing deals and soliciting sponsorship contracts to leaping administrative hurdles involving liquor licensing permits and responding to dubious personal injury complaints.

Another demanding aspect of Haydar's job centers on branding. In addition to working to build the brand locally and nationally, Danna's between the pipes, so to speak, doing her daily best to shield her teams brand value from shots from all angles. Not long into the panel discussion, Danna recounted an incident recently where a former Lightning player had signed an endorsement deal with a local gentlemen's club; he was making appearances in team uniform and even absent that detail, the association between him and the Lightning was transparent.

Danna, then, found herself in the unconventional position of having to call the management of the establishment in question and figure out how to extricate the Lightning from any suggestion that it was endorsing exotic dancers. As if that were not challenging enough in its own right, the former player proceeded to get on talk radio and open the entire matter up for public discussion, complaining that his former team was affirmatively interfering with his livelihood after hockey. As Danna told it, hilarity ensued. And then there was the time she got in a trademark-infringement tussle with Pearl Jam over the rights to a marketing slogan...

In addition to serving up several such colorful vignettes, Danna fielded more direct questions from the moderator as well, describing, for one, her less than conventional career path and some defining moments along the way. Born in Toronto, Danna knew from an early age that she wanted to be involved in professional sports when she grew up, particularly hockey. She joked that a love for the ice is a prerequisite for a Canadian passport. Years later, she became inspired to merge her mutual loves of sports and the law after just her first year of law school, when she took a year off to work full-time at a professional sports agency. When she headed back to law school, this time it was at Southwestern Law School in Los Angeles where she felt she could finish her J.D. from the University of Florida in closer proximity to the beating heart of the sports/entertainment industry in L.A. She didn't know exactly where she was headed, she said, but she knew she wanted a scoreboard in the mix. Her front office gig with the Lightning certainly checks that box.

DAMON JONES — Senior VP & General Counsel, Washington Nationals (Washington, DC)

Seated next to Danna on the panel was Damon Jones, who hailed from a more traditional firm background before getting involved in the professional sports industry. Today, Jones is Vice President & General Counsel of the Washington Nationals Baseball Club. He is responsible

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for all legal affairs of the Club, handling everything from major corporate sponsorship agreements to contracts with merchandisers and stadium concession providers.

Fielding Casey's first, direct question — "how did you get your start?" — Jones explained that the Nats is hardly the first team he's been to bat for. Having graduated from honors from UC Santa Barbra, followed by Harvard Law, Jones surely fit right in as an associate at Williams & Connolly, where his practice included representing high-profile MLB, NBA and WNBA players in and out of the court room; he was involved in a wide array of related transactional work as well as complex litigation. Prior to joining Williams & Connoly, Jones clerked for the Honorable Roger L. Gregory of the U.S. Court of Appeals for the Fourth Circuit; practiced law at the Los Angeles based entertainment firm Greenberg Glusker; and served as in-house counsel to a Los Angeles-based sports agency where he represented dozens of Major League players.

As General Counsel for the Nats, Jones takes the lead on all the Club's legal matters. Canvassing his duties quickly and humbly, Jones discussed his role as lead counsel in the team's salary arbitration cases, and other labor issues arising out of the MLB's collective bargaining agreement. His transactional lineup, like Danna's, is wide-ranging and encapsulates everything from endorsement and broadcasting agreements to facilities management, sky-box licensing deals, and concert bookings. He, too, is responsible for legal matters involving his team's facilities, in addition to those that directly touch and concern the players and the franchise.

As if Jones's plate isn't full enough already, he also referenced with pride his work representing the Washington Nationals Dream Foundation, which has included helping to build, operate and maintain a Youth Baseball Academy promoting academic and athletic excellence among inner city youth.

ERIC SCHAFFER — VP of Football Administration/General Counsel, Washington Redskins (Washington, DC)

Our final introduction was to Eric Schaffer, General Counsel and VP of Football Administration for the Washington Redskins. Entering his 13th season with the Redskins, Schaffer's primary role, predictably, is as the Club's chief contract negotiatior. That's what lawyer's do, he reminded us. They negotiate. More spe-

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Sports Agency Trademark Case Remanded to State Court

By Cynthia Troy

Select Sports Group LLC, previously Select Sports Group, Ltd. and the defendant and counter claimant in this case, owns the mark SELECT SPORTS GROUP for use with sports agent services for professional athletes.

In 2007, a majority of Select's owners formed SSG Baseball, L.P, which later changed its name to SSG Baseball, LLC, the plaintiff and counter defendant in this case. SSG LP was permitted to use the SELECT SPORTS GROUP mark because Select had a partial ownership interest in SSG LP. However, the relationship between Select and SSG LP came to an end in 2012, before SSG LP's name change, and Select informed SSG LLC that they no longer were permitted to use the SELECT SPORTS GROUP mark or Select's logo. Select filed a trademark application with the Patent and Trademark Office (PTO) for the SELECT SPORTS GROUP mark, in addition to their logo, in June 2014. A month later, SSG filed a trademark application with the PTO for SELECT SPORTS GROUP BASEBALL but the PTO examiner indicated that Select's application would pose a potential bar to SSG's registration.

Movant Argues that Declaratory Judgment Action is a State Law Claim that Doesn't Arise under Federal Law

SSG Baseball, LLC brought this suit in Texas state court against Select seeking a declaratory judgment (a) confirming SSG's ownership and/or right to use two common law trademarks, SSG BASEBALL and SELECT SPORTS GROUP BASEBALL, and (b) confirming that SSG has not infringed on any of Select's common law trademark rights in connection with the marks. Select removed the case to federal court, contending that the US District Court for the Northern District of Texas, Dallas Division has federal question jurisdiction. Select claims the case is removable because the claim is completely preempted by federal trademark law and invokes the doctrine of estoppel against SSG. SSG moves to remand the case to state court on the ground that the US District Court lacks federal question jurisdiction because the declaratory judgment action is a state-law claim that doesn't arise under federal law. SSG also seeks an award of attorney's fees and expenses, claiming the removal of the lawsuit was objectively unreasonable.

Select failed to overcome the initial presumption against jurisdiction, ultimately failing to establish that removal was proper. The first burden Select has is to establish that the court has federal question jurisdiction. Federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's pleaded complaint. Select maintains that the case was properly removed under the artful pleading doctrine because SSG's claim is completely preempted. Select claims that registration of trademarks with the PTO and opposition to those trademarks is governed exclusively by federal law, covered by 15 U.S.C. §1051. While Federal Courts do not have exclusive jurisdiction over all Lanham Act claims, federal law completely preempts state law. SSG, despite Select's contention, did not seek in this lawsuit to determine federal trademark registration rights. Ultimately, Select did not demonstrate that Congress had completely preempted the entire area of trademark law such that any claim asserting ownership of, and the right to use, a state common law trademark is necessarily federal in character. Select must be able to point to a federal cause of action that replaces SSG's claim but it was unsuccessful. Therefore, SSG's declaratory judgment action was not completely preempted.

The second claim that Select asserts is that SSG is judicially estopped from arguing that its claim does not arise under federal law based on positions it took before the PTO. Select contends that based on SSG's representations, the Trademark Trial and Appeal Board's suspended their Opposition, concluding the case involves a dispute over the parties' respective rights in the mark. Before the TTAB, SSG asserted that this lawsuit could affect the trademark proceedings pending in the PTO. SSG represented that this lawsuit would likely have a direct bearing on the rights of the parties to register their respective trademarks and did not represent that anything about this lawsuit arose under federal law. The TTAB's conclusion that this case involves a dispute over the parties' respective rights in their marks says nothing about the nature of the dispute and therefore, Select also failed to establish that judicial estoppel applies.

SSG was only asserting a Texas common law trademark right, despite the elements of common law trademark infringement under Texas law are the same as those under federal trademark law. Under Texas common law, trademark infringement actions do not require the trademark be registered. Accordingly, although the outcome of this lawsuit could impact the federal trademark proceedings, it does not transform SSG's state common law trademark declaratory judgment action into a claim that arises under federal law. In addition, finding that Select's removal was objectively unreasonable, SSG was also awarded attorney's fees and expenses.

The court granted SSG's motion to remand, concluding the court lacked subject matter jurisdiction.

SSG Baseball, LLC v. Select Sports Grp., LLC, 2015 U.S. Dist. LEXIS 106475 (N.D. Tex. Aug. 13, 2015)

Troy *is a 3L at the University of Texas School of Law and the current Editor in Chief of the Texas Review of Entertainment and Sports Law and was a summer intern in the legal office of the Texas Stars AHL Team.*

Reporting from the Sidelines of the ABA's Annual Sports Law Forum

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cifically, Schaffer focused on his management responsibilities related to planning, managing and forecasting the Redskin's salary caps and cash allowances. He has an extensive background researching and analyzing NFL player contracts, and his expertise extends beyond just the Redskin's rosters — he has firsthand experience evaluating the roster composition of each and every club in the league.

Asked what a normal week leading up to a contract negotiation might entail, Schaffer described a process that included drafting and compiling pages and pages of player statistics, free agency targets, performance forecasts and of course dollar figures. And then, he told us, the real fun starts–the negotiations begin. Schaffer let on that even after thirteen years, he was not above pulling college-style all-nighters to help get and keep the right guys on the Redskins roster. Winning seasons, Schaffer made clear, are their own reward. His heart is in the game. And he leaves it all on the field.

In addition to player contract negotiations and collective bargaining interactions, Schaffer's duties, like his co-panelists', extend far and wide. Dealing with FBI agents brought into crack down on gear counterfeiters, for instance, is not out of the question. Apparently bootleggers abound, and during seasons when the team is hot, merchandise can be even hotter.

Our Post Game Wrap-up

When a conversation among legal professionals moves organically from discussions of the upsides of managing NFL, NHL and MLB divas, to the downsides of hosting wild turkeys on the sidelines, to golden tricks of the trade re: handling disgruntled rock stars, gentlemen's clubs and overworked federal law enforcement, boiling the interaction down to a nutshell becomes challenging to say the least. One might be tempted to say, you had to be there. If you walk away with just one thought about the business of being team counsel, though, let's make it this one: the game's not boring.

Margaret Kelly *is a first year associate in the Government Division at Venable LLP. She is a recent graduate of Virginia Law, where she developed a strong interest in sports law as well as US regulatory law and policy. She graduated with honors from Princeton University in 2010, with a major in Political Theory.*

Court Mulls Venue in Volunteer Workers Case

By Jeffrey Birren

Plaintiff Matthew Leonard filed a putative class action against the operator of concession stands at Busch Stadium in St. Louis, claiming various violations of both state and federal law for allegedly not paying minimum wage to certain concession stand workers. Leonard filed the complaint in the Circuit Court of Cole County, Missouri. Delaware North removed it to federal court in the Western District of Missouri. Once there, Delaware North moved for a transfer of venue to the Eastern District of Missouri, the location of Busch Stadium. Leonard opposed the motion. District Court Judge Nanette K. Laughrey granted the motion, sending Leonard on to his third courthouse.

By way of background, many major league venues have arrangements whereby "volunteers" operate concession stands. Instead of receiving paychecks, money is donated to various charities. At some sports venues, individual charities operate a specific concession stand and it is the charity that receives compensation, not the individuals. It is often easy to spot the "charity" concession stands because they have smiling and friendly staff compared to the regular concession stand employees.

Leonard alleged that he was one of the "volunteers" who was recruited to work at the concession stands at Busch Stadium for charity and without compensation. His case was filed on behalf of all such workers. He further alleged that Defendant Delaware North is a for-profit entity with its principal place of business in Missouri and that operates the concession stands at Busch Stadium and Kauffman Stadium, in Kansas City, Missouri

The motion to transfer venue based on 28 U.S.C. §§ 1406(a) and 1404(a). Delaware North submitted a declaration from its Vice President of Finance, Stephen Nowaczyk. He declared that Delaware North does not operate the concession stands at Kauffman Stadium, that its principal place of business is New York, and that based upon information and belief, "virtually all" of the concession stand workers at Busch Stadium live in St. Louis or near Busch Stadium.

Leonard did not dispute those factual allegations, but instead stated that Delaware North operated the concession stands at Edward Jones Dome, also in St. Louis, and Hammons Field in Springfield, Missouri.

The Court only addressed the motion to transfer under § 1404(a). The statute requires the court to address (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice. Western District cases hold the court may also consider a host of other issues related to the case, and ultimately, the moving party must show that the balance of interests strongly support the motion to transfer. Eighth Circuit precedent holds that the decision is within the trial court's discretion, (In re Apple, Inc., 602 F.3d 909, 912 (8th Cir. 2010)).

Leonard's allegations made this a fairly easy motion. Leonard, the sole class representative, did not disclose where he lives. However, he works in St. Louis, and but the entire class as pled also works in St. Louis. Moreover, Nowaczyk's declaration stated that virtually all of the class lived in or near St. Louis and Leonard did not dispute this. It is also legally "irrelevant" that one of Leonard's lawyers lives in the Western District of Missouri.

Leonard opposed the motion based on Delaware North's concessions stands at Hammons Field, a minor league facility that is within the Western District of Missouri. However, Leonard did not plead that the concession stands at Hammons Field were operated in the same allegedly "unlawful manner" as at Busch Stadium. Furthermore, Hammons Field is not part of the "Major League Baseball stadiums at issue" in the case as pled by Leonard.

In considering the motion, if the court considered just Leonard, then the Eastern District of Missouri was the proper venue. If it considered the entire class, then the Eastern District "has a much more substantial connection than the Western District."

It would be easier for witnesses to travel to the Eastern District, where they apparently all live, than to the opposite end of the state. Leonard's venue would thus require substantial travel, a decided inconvenience for the witnesses.

The court then applied the "interests of justice" test. The court noted that although courts generally give considerable deference to a plaintiff's choice of forum, they usually do so when the plaintiff lives in that forum, and Leonard, as previously noted, did not allege that he lives in that forum. One of his attorneys does, but Delaware North operates no concession stands at issue in the case in the Western District, and Delaware North's attorneys are located either in St. Louis or out of state. Since most of the witnesses are located in the Eastern District of Missouri, granting the motion to transfer should decrease the costs of litigation.

Consequently, the court "in its discretion concludes Delaware North has made a clear showing that the balance of interests weigh strongly in favor of the proposed transfer."

If "the past is prologue," The Tempest, Act II, Scene 1, (W. Shakespeare), then it would seem likely that similar wage and hour lawsuits will soon be the new rage in lawsuits against major league sports. There will be a host of case-specific facts that will require examination, including who approached the volunteers/employees to participate—concession operator or charity—was this irregular work for those individuals or irregular work over the season, the potential application of the "entertainment" exception to federal wage and hour laws, as well as the specific laws of each jurisdiction.

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Minor Leaguers Granted Conditional Class Certification

By Gregg E. Clifton and Shawn N. Butte, of Jackson Lewis PC

A group of former minor league baseball players alleging they were not paid the minimum wage in violation of the Fair Labor Standards Act has been granted conditional class certification in a suit brought in California federal court against Major League Baseball teams. Now, both current and former minor league players will have the opportunity to participate in the lawsuit and potentially recover minimum wage and overtime.

U.S. Magistrate Judge Joseph Spero, in San Francisco, on October 20 granted the former minor league players' motion to certify a class of all minor league players who worked for the MLB or any MLB franchise since February 7, 2011, but had not spent time in the major leagues at the time. The former players allege the franchises have been paying them less than minimum wage, denying them overtime pay, and requiring them to train during off-season without any pay. They contend the MLB and its clubs violated the FLSA, as well as similar state wage and hour laws in eight states, by paying them a total of only $3,000 to $7,000 over a five-month season despite their working from 50 hours to 70 hours each week.

This is the latest victory for this group of former players. In July, the U.S. District Court for the Northern District of California denied a motion by MLB franchises to dismiss the suit and allowed the case to proceed to pre-trial discovery "to determine whether certification is appropriate and whether the proposed class representatives have standing to represent the various proposed classes." *Senne v. Kansas City Royals Baseball Corp.*, No. 3:14-cv-00608 (N.D. Cal. July 13, 2015). See the Jackson Lewis Collegiate and Professional Sports Blog post on this decision: http://www.collegeandprosportslaw.com/professional-baseball/minor-league-baseball-players-minimum-wage-overtime-claims-proceed-to-class-certification-stage/.

Judge Spero rejected Major League Baseball's argument that the class should not be certified because minor league players are required to perform different tasks during the season versus the off-season:

In particular, all [current minor leaguers] are bound by the [same standard player contract], which requires players to work for a fixed salary regardless of the number of hours worked, resulting in compensation that falls below the minimum wage because of the long hours they are required to work during the championship season. The Court finds that Plaintiffs' allegations that they are subject to a uniform policy that

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Drones and Sports: A Brief Overview

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UAS Background

Since the early 1980s, recreational/hobbyist model airplane enthusiasts have enjoyed virtually unfettered access to the nation's airspace without obtaining specific FAA authorization as long as they adhered to voluntarily guidelines, titled the "Model Aircraft Operating Standards" contained in AC 91-57. These voluntary guidelines encouraged recreational/hobbyist modelers to fly far away from populated or noise-sensitive areas, keep flights to less than 400 feet in altitude, notify an airport operator if flying within three miles of the facility, and give right-of-way to (and avoid flying in proximity of) manned aircraft.

In 2007, the FAA learned that the AC 91-57 guidelines were being used as a basis for commercial UAS flight operations, contrary to the FAA's position that AC 91-57 excluded flying UAS for business or commercial purposes. Federal statutes have defined business or commercial purposes as "the transportation of persons or property for compensation or hire." Consequently, use of drones for business or commercial purposes required operators to obtain a special airworthiness certificate, which is a very lengthy and costly process.

In February 2012, Congress passed the FAA Modernization and Reform Act of 2012 (the 2012 Act), which required the FAA to develop a roadmap and final regulations for integrating UAS into the NAS by September 30, 2015. It is unlikely that the FAA will meet this deadline. In the interim, the FAA is reviewing and granting exemptions to entities wishing to use UAS for commercial purposes, in accordance with Section 333 of the 2012 Act. More than 1,300 entities have received Section 333 exemptions since the first one was granted on September 25, 2014.

More than a third of all Section 333 exemptions granted seek the exemption for aerial photography, videography and filmmaking purposes. Although most of those exemptions indicate that the UAS will be used for photography and videography for television, motion picture, real estate, construction, infrastructure, etc., some applications indicate a specific intent to be used to acquire sports images. To date, major events such as the PGA Tour, Formula One races, and the Winter Olympics in Sochi, Russia, have employed UAS technology. A wide range of U.S. sports organizations, including several college and professional teams, are seeking ways to do so as well…legally.

Seeking Authority to Fly? Obtain a 333 Exemption

Until the FAA issues final regulations governing commercial UAS operations, the fastest way to legally fly a UAS is to apply for a Section 333 exemption. The application

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requires the commercial entity to specify the exact drone(s) that will be used, the purpose, the specific locations of use and proximity to any airports, and how the UAS will be operated. The FAA reviews applications on a case-by-case basis to determine whether the specific drone and proposed operation are appropriate for use in the NAS. Typically, the FAA requires Section 333 exemption grantees to adhere to the following parameters: (a) the drone and payload weigh under 55 pounds; (b) flights are restricted to daylight operations; (c) flight speeds are less than 50 knots; (d) maximum altitude is 400 feet; (e) drones are operated within visual line of sight of the pilot (along with a visual observer to assist the pilot); (f) flights are further than five miles away from any airports; (g) drones are not controlled from a moving vehicle; and (h) UAS documents are kept readily available on the ground.

If the FAA approves the Section 333 application, the exemption holder must also obtain a Certificate of Waiver or Authorization (COA). The COA is essentially an approval to operate a drone at a specific time and place. To facilitate more commercial drone flights, the FAA automatically grants a "blanket COA" for drone flights at or below 200 feet above ground level to a drone operator with a valid Section 333 waiver, provided proper flight conditions exist. The drone operator must also use or hire a pilot with an FAA-issued sport pilot certificate to operate the drone and do so within the confines of applicable flight regulations and the terms of the FAA exemption.

Penalties for Non-compliance

Entities flying drones for commercial use without FAA approval are subject to a variety of FAA warnings and civil penalties, not to mention potential federal criminal charges and the negative publicity associated with a UAS incident or federal charges. Currently, the FAA has focused most of its enforcement efforts on educational initiatives and warning letters, but it has issued fines for what it determines to be a "careless" or "reckless" operation. The FAA retains the authority to punish violators thousands of dollars *per violation*, depending on the circumstances.

State and Local Laws

In addition to FAA rules, many states have proposed and/or passed legislation regarding the use of drones. Cities and counties have passed local ordinances governing drone use as well. A legal review of the state and local laws and regulations affecting drone use where the operator plans to fly should be done as part of any evaluation process.

Despite the apparent advantages that appear to come with authorized UAS usage,

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there are great concerns related to spectator and participant injury that come along with the unpredictably of certain drone operations. These dangers include pilot error, equipment malfunctions, and an unpredictable flight environment. Because of these risks, teams wanting to use drones in their sports operations will want to carefully consider the environment in which they choose to fly and whether UAS use should occur only in a closed setting rather than an area open to the general public. Although such precautions may reduce risk, they would not eliminate the risk to players, coaches, or employees within the drone's vicinity, even if flying UAS indoors (where a Section 333 exemption is not required).

Organizations that have been approved to operate UAS should post warning signs, employ safety netting or officers to protect observers where necessary, and carry appropriate insurance to cover the various risks and liabilities associated with drone use. If using a third-party drone operator, insist that they do so as well. Appropriate insurance coverage, which the FAA may consider when evaluating a Section 333 exemption, should include, among other liabilities, personal injury, invasion of privacy, property damage, and workers' compensation. The main providers in the drone insurance space are currently offering coverage to businesses operating drones for commercial purposes.

Bob Wallace *is the chair of Thompson Coburn's Sports Law group. This article was written with the assistance of the* **Thompson Coburn** *Unmanned Aircraft Systems practice group co-chairs Sean McGowan and Rob Kamensky, along with associate Tyler Black.*

Minor Leaguers Get Conditional Class

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results in failure to meet the minimum wage requirements of the FLSA are substantial . . . . Therefore, conditional certification is warranted as to this claim.

The victory comes weeks after California's U.S. District Judge Haywood S. Gilliam dismissed a separate suit brought by minor league players against MLB and Commissioner Bud Selig alleging that both parties violated federal antitrust law by conspiring to restrict the salaries of minor league players. See the Jackson Lewis Collegiate and Professional Sports Blog post on this case, *Miranda et al. v. Office of the Commissioner of Baseball et al.,* No. 14-cv-05349 (N.D. Cal. Sept. 14, 2015): http://www.collegeandprosportslaw.com/uncategorized/minor-league-players-strike-out-in-effort-to-bring-antitrust-class-action-against-major-league-baseball/.

Suspension Reeks of Controversy

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went on to question Diaz for about five minutes. Over the course of these tense five minutes, Diaz repeatedly answered each question with "Fifth Amendment."

With Diaz backed into a corner and unlikely to throw in the towel, it seems that a petition for judicial review of NSAC's decision is imminent. There is precedent for state courts in Nevada setting aside NSAC decisions. Just this past May, trial court Judge Kerry L. Earley reversed and remanded NSAC's decision to impose a lifetime ban on UFC fighter Wanderlei Silva because the agency's decision was "arbitrary and capricious ... not supported by substantial evidence in the record." Silva v. Bennett. Case No: A-14-710453-J, May 5, 2015.

Only time will tell whether Diaz's suspension will be lifted or abated, but his fight with NSAC is over, for now. If the knockout and submission artist wants to fight in the Octagon again, he will likely have to leave his fate in a judge's hands.

Mulcahy *is a partner in the Entertainment, Technology and Advertising Practice Group in the Century City and New York offices. He is also Co-Team Leader of the firm's Advertising Industry, Sports Industry and Digital Media Industry Teams, and a former member of the firm's Executive Committee.*

Berman *is a recently hired associate at the firm, who received his J.D. from the USC Gould School of Law.*

Concession Volunteers

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If Leonard is to have his day in court, however, it will be in the third courthouse in this fairly recent case, and one must assume that there will be extensive motion practice before that happens. So although his case may serve as a beacon to other plaintiffs and class action counsel, it should also serve as a warning to subsequent lawyers to plead more carefully before filing.

Leonard v. Delaware North Companies, W.D. Mo.; No. 2:15-cv-04139-NKL. 2015 U.S. Dist. LEXIS 108409; 8/18/15

Birren *worked for the LA/Oakland Raiders for 34 seasons and was general counsel for much of that time.*