New York Law Journal

Sports Law

WWW.NYLJ.COM

An ALM Publication

VOLUME 244—NO. 58

MONDAY, OCTOBER 31, 2011

# Losing Games

Player strikes adversely affect sponsorship agreements.


NYLJ/BIGSTOCK

**BY BENJAMIN R. MULCAHY**

THE END of the collective bargaining agreement between a professional sports league and the players association that represents the athletes triggers a series of dominos: The players go on strike, the league implements a lock-out of the players, the parties meet over the course of several weeks to try to negotiate a new deal, both sides posture (with the league cautioning that pre-season and regular season games will be cancelled and the players association threatening to decertify as a union if a new agreement cannot be reached), the league files an unfair labor practice complaint with the National Labor Relations Board coupled with a declaratory judgment action in U.S. district court seeking a ruling that the lock-out is a legitimate negotiation tactic under the labor laws, the union decertifies and files its own lawsuit claiming that the league's lockout constitutes price-fixing and an illegal group boycott in violation of the antitrust laws, and fans brace for lost games.

Many writers, observers and enthusiasts following the most recent professional sports labor disputes in both the National Football League (NFL) and the National Basketball Association (NBA) have focused solely on the players, the owners and the fans. But there is another group of stakeholders that is inevitably affected by a lack of labor peace: sponsorship partners. Sponsors such as banks, beverage companies, electronics manufacturers and athletic apparel companies that spend millions of dollars a season to sponsor the teams and promote their products to fans may be left losing much of the value they bargained for, even if no pre-season or regular season games are actually lost.

This article provides some background on strikes and lockouts in the world of American professional sports, compares the 2011 NBA labor dispute with what happened during the NFL strike and lock-out earlier this year, and offers ways in which the sponsors can protect themselves.

### Strikes and Lockouts in Sports

At one time or another, strikes and lockouts have left their imprint on all major sports in America, including the NFL, MLB and NHL. This has been a banner year for this activity, with strikes and lockouts in both the NFL and the NBA. The NFL labor dispute was resolved in time to avoid majorly disrupting the league's pre-season and regular season schedule. But the NBA has not been as lucky. Indeed, at the time of this publication, the NBA has elected to cancel all of its 2011 preseason games and the first two weeks of the regular season, with a strong likelihood of further cancellations to follow.

As a very generalized overview, a "strike" occurs when a group of employees stop working in order to exert pressure against employers and force them to adhere to the employee demands. To effectively implement a strike today, there must first be a union, which is an organization of workers that bargain collectively with the employer (i.e., team owners in the world of pro sports). In pro sports, such unions take the form of players associations, such as the National Basketball Players Association (NBPA). When the players form a union, they then have enough collective power to negotiate better terms with the owners. The importance of collective bargaining principles have been articulated through decades old precedent:

> Long ago [the Supreme Court] stated the reason for labor organizations. [It] said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer…[and] that union was essential to give laborers opportunity to deal on an equality with their employer.[1]

Considering the large amounts of money at stake in professional sports, it should perhaps not be surprising that there have been many strikes by professional athletes. In some instances, most or entire seasons were lost because the sides were unable to reach a mutually-acceptable deal. In 1987, for example, the National Football League Players Association (NFLPA) called a strike primarily over free agency, resulting in players walking away from the season after two regular season games had already been played. In 1994, the Major League Baseball Players Association (MLBPA) refused to accept the baseball team owners' demand for a salary cap, launching a strike that would ultimately end after 232 days, marking the first time that an American professional sports league lost an entire post season due to a labor dispute.

A "lockout," on the other hand, is a tool employed by owners in an effort to increase bargaining power and to put pressure on players for the purpose of either resisting the player demands or gaining certain concessions from them. During the "lockout" period, owners of teams can stop paying the players and prevent the players from using team facilities to prepare for the season. Such means are allowed so long as the owners are not attempting to discourage union membership altogether or to interfere with the players' organizational rights more generally. The 2004-2005 National Hockey League (NHL) lockout forced the epic cancellation of the entire NHL season, marking the first time since 1919 that the Stanley Cup was not awarded, and the first time a major professional sports league in North America canceled a complete season because of a labor dispute.[2]

Lockouts commonly occur upon the expiration of a collective bargaining agreement without a successful renegotiation. Such means were employed most recently on July 1, 2011 by NBA Commissioner David Stern. During the lockout, players do not receive their salaries and are prevented from utilizing team facilities for any purpose, while team owners are left not being able to negotiate, sign or trade player contracts, or conduct practices, workouts, meetings or other coaching sessions of any kind.

### Lockout in Wake of NFL Ruling

In early August 2011, both the NBA and the NBPA accused each other of not bargaining in good faith as the two sides tried to hammer out a new collective bargaining agreement. The NBA filed a claim with the National Labor Relations Board, arguing that the union's threat to decertify was an impermissible pressure tactic and a sign that the NBPA had not committed to the collective bargaining process fully and in good faith. The NBA also filed a lawsuit in the U.S. District Court for the Southern District of New York, seeking to establish, among other things, that the NBA's lockout did not violate federal antitrust laws and that if the NBPA lawfully decertified, all existing player contracts would become void and unenforceable.[3] Through such legal tactics, the NBA was trying to remove one weapon from the players' arsenal—decertifying as a union and then filing antitrust charges against the NBA á la the NFLPA against the NFL.

BENJAMIN R. MULCAHY *is a partner in the entertainment, media and technology practice group at Sheppard Mullin Richter & Hampton in the New York and Century City offices.* JAY J. FRAGUS, *a law clerk in the entertainment, media and technology practice group in the Century City office, assisted in the preparation of this article.*

The few interim court rulings that came out of the 2011 NFL labor dispute may have encouraged the NBA owners in the strength of their position. In March 2011, after it became clear that the NFL and the NFLPA would not be able to reach a new collective bargaining agreement prior to the expiration of the then-existing agreement, the NFLPA decertified.[4] Almost immediately after that, 10 active professional football players, led by Tom Brady, and one "rookie" (i.e., prospective) professional football player, filed an antitrust lawsuit against the NFL in the U.S. District Court for the District of Minnesota. In April, the District Court granted the NFLPA's motion to enjoin the lockout.[5]

The NFL appealed, and on July 8, 2011, the U.S. Court of Appeals for the Eighth Circuit ruled that the injunction could not stand.[6] In a narrow and nuanced opinion, the Eighth Circuit held that §4(a) of the Norris-LaGuardia Act, which restricts the power of federal courts to issue injunctions in cases "involving or growing out of a labor dispute," deprived the federal court of power to issue the injunction over players under contract, and with respect to rookies and free agents, the issued injunction failed to conform to statutory requirements.[7]

Under this ruling upholding the NFL lockout, decertification is less of a magic bullet than might have previously been thought, which might mean the parties are more willing shift their focus away from confounding litigation strategies and focus more on negotiating a new collective bargaining agreement. But that has proven to be easier said than done. The NFL is reputed to be the most profitable sport in the world, which presumably allowed the NFL owners to be more generous in sharing revenue with the players and ending the labor dispute that afflicted football earlier this year.

In contrast, one of the fundamental contentions of the NBA is that 22 of the 30 NBA franchises are actually losing money—collectively, a total of $370 million each season.[8] Driven by such claims of poverty, some of the bigger issues in the NBA lockout involve the nature of the salary cap and how the owners and the players will share so-called basketball related income (BRI). Under the present collective bargaining agreement negotiations, the players are most recently reported to be offering a deal that would give them 53 percent of the BRI (down from 57 percent under the previous deal), while the owners would get 47 percent. The owners, during the most recent labor mediation sessions, have responded by offering a 50/50 split as a "take-it or leave-it offer."[9] Based on some public projections that the 2011-2012 BRI is expected to be a total of $4 billion, the sides are still hundreds of million of dollars apart over the duration of any new agreement.

While both sides seem to have taken a hard line on this and some other outstanding issues up to this point, missing games will also lead to lost revenue. Remember, during a lockout, games are not played (with regular roster players, at least) and players are not paid. For as long as the impasse persists, and likely for some amount of time thereafter, both sides will collectively lose millions of dollars for each game that is not played. Player morale and fan support can also be expected to take a hit, even if part of the regular season is salvaged and a post-season is held. Finally, at this point in the schedule, sponsors are, at best, left playing catch-up and will be unable to effectively activate team or league-related advertising, marketing and promotional campaigns until well into the regular season, even if part of the regular season can be salvaged.

### Damage to Sponsors

From marquee national and international brands to lesser known local and regional brands, the cancellation of NBA regular season games means a staggering loss of brand exposure in various markets. Existing sponsors who have already signed agreements have made an investment in the NBA, its teams and the various venues where NBA games are played throughout the country. Such sponsors rely on the timely beginning of the season because they need significant lead-time to create their marketing and packaging materials, plan and place their campaigns, and coordinate with distributors and retail channel partners. Uncertainty surrounding when and if there will be an NBA season puts a stranglehold on these activities. Moreover, if there is an extended lockout in the NBA, fans may come back to the game at a slower rate, or not at all, meaning less exposure for the sponsor's brands than before the lockout.

### Drafting Sponsorship Deals

Force majeure clauses are often included in sponsorship agreements. These provisions generally excuse one party from failing to perform (or timely perform) its obligations under the agreement if the failure to perform is due to an event beyond the non-performing party's reasonable control. Although it is typical for force majeure clauses to cover natural disasters or other "Acts of God," forgiving the team owner's failure to perform due to a player strike or owner lockout does not make a sponsor whole. Indeed, nothing will completely recapture the time and value that was lost due to a strike or lockout. But sponsors can seek to incorporate some flexibility and protection for their interests in the event of a player strike or owner lockout.

One of the contentions of the NBA is that 22 of the 30 NBA franchises are actually **losing money**. Driven by such claims of poverty, one of the **big issues** in the lockout involves how the owners and the players will **share** so-called basketball related **income**.

These protections generally seek to clarify when the force majeure clause is triggered in the event of a strike, lockout or other work stoppage, how long the consequences of the force majeure event last, what happens to the term of the sponsorship agreement during a work stoppage, and what happens to the sponsor's payment obligations. On the issue of when the force majeure clause is triggered and how long it lasts, strictly requiring a strike or lockout to go into effect before the force majeure clause is triggered might not provide sufficient protection to the sponsor. For example, was there a contractually-defined "lockout" in the NFL during the days between the District Court's injunction of the NFL owner's lockout and the Eighth Circuit's decision to vacate that injunction?

Rather than leave the parties to the sponsorship agreement guessing at the answer to that sort of question, sponsors should seek protection during any labor dispute that occurs during the sponsorship term, and broadly define "labor dispute" to include a strike or other work stoppage by essential personnel such as the applicable players association and/or its members, a lock-out by the team owners, the decertification of the applicable players association, and/or a court challenge to an owner lock-out or players association decertification for as long as injunctive or other equitable relief is available to either side of the dispute or actually in effect in any such challenge.

On the issue of the sponsorship agreement term, if the team is prevented from performing by reason of a force majeure event, then the sponsor should ask that the sponsorship agreement and the amounts payable to the team be suspended automatically from the date of such force majeure event. The sponsor may elect to extend the term, and any option period or other time period specified in the sponsorship agreement, for a period of time equal to the period of suspension.

On the issue of payment, it is generally accepted that no sponsorship payments become due to the team during any period of suspension. But implementing that consequence is easier than it sounds. Team owners will generally agree to discount the sponsorship fees that are payable by their sponsors based on some pro rata formula if the work stoppage or other force majeure event causes regular season games to be cancelled.

But due to the significant lead times needed to create materials and plan campaigns, sponsors also suffer cognizable harm if the force majeure event occurs in the off-season, even if no regular season games are actually cancelled. A pro rata reduction of the sponsorship fee based on cancelled games does nothing to compensate a sponsor that is forced to postpone or forego its campaign planning and activation if very few or no games are actually cancelled. Instead of settling on the cancelled-games formula, it is in a sponsor's interest to negotiate a reduction in the sponsorship fee if the force majeure event puts the scheduled start date of the league's regular season in doubt. Without that or similar protection, sponsors may find themselves committed to payments with little recourse and nothing more than their branded logo in an empty arena.

1. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
2. Paul D. Staudohar, "The hockey lockout of 2004-05," Monthly Labor Review, December 2005.
3. For its part, the NBPA also filed a complaint with the NLRB in May 2011, accusing the league of failing to negotiate in good faith, failing to provide the union with critical financial information, and (at the time) threatening to lock out the players.
4. Jim Trotter, "NFLPA files to decertify as a union; labor dispute headed to court," Sports Illustrated, March 11, 2011, http://sportsillustrated.cnn.com/2011/football/nfl/03/11/union-labor/index.html.
5. *Brady v. National Football League*, No. 11-639 (SRN/JJG) (D. Minn. 2011).
6. *Brady v. National Football League*, No. 11-1898 (8th Cir. 2011).
7. Id.
8. Larry Coon, "Is the NBA really losing money?," ESPN, July 12, 2011, http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=NBAFinancials-110630.
9. Jeff Zillgitt, "NBA Talks Break Down With No Meetings Set," USA Today, Oct. 21, 2011, http://www.usatoday.com/sports/basketball/nba/story/2011-10-20/NBA-talks-break-down-no-meetings-set/50846354/1.