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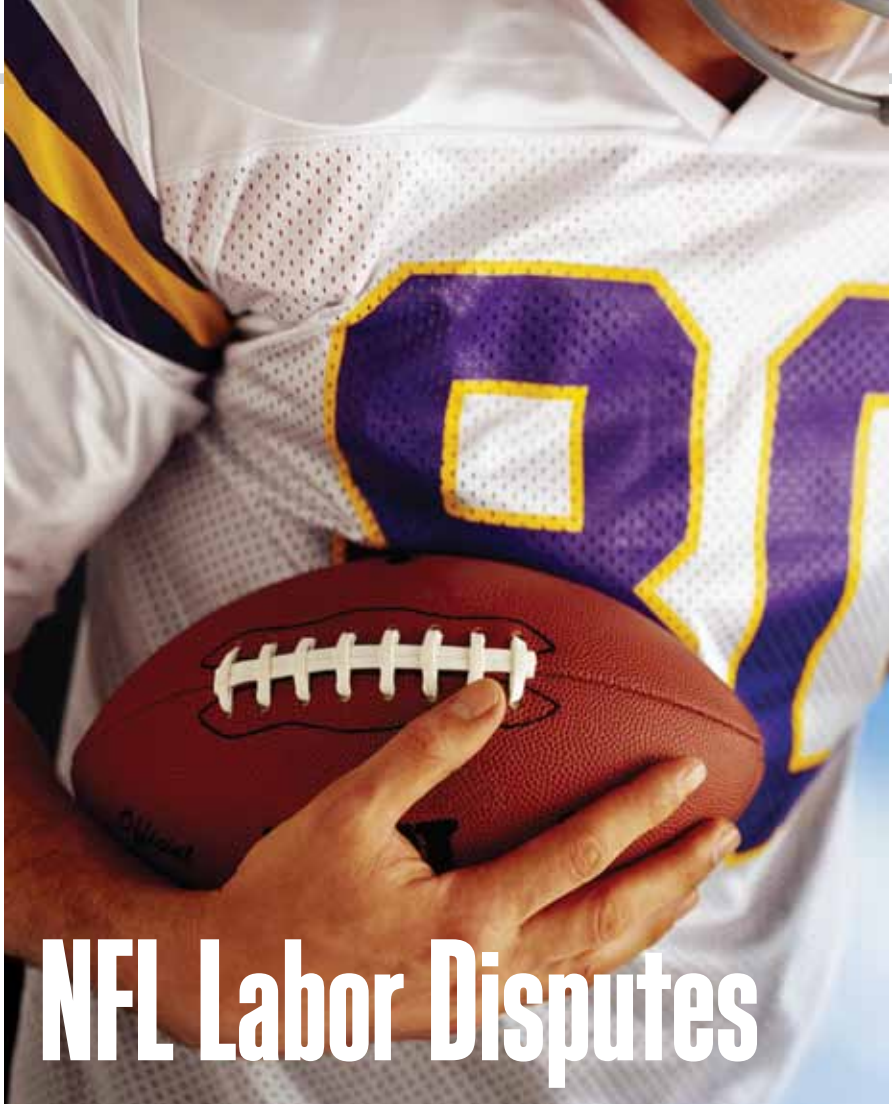

A Short History of NFL Labor Disputes

For years, courts have grappled to reconcile antitrust and labor law issues as the league and players battle to win points.

Professional football is America's most popular sport. The Super Bowl has set the record three years in a row for the most-watched television show in history.[1] Given the sport's popularity, the labor dispute between the National Football League and the NFL Players Association ("NFLPA") — growing out of the expiration of the NFL collective bargaining agreement in March 2011 — captured the attention of millions of Americans.

While it may not have seemed that way to fans, the dispute moved at a rapid pace. Within minutes on the afternoon of March 11, 2011, the parties literally went from the bargaining table in Washington, D.C., to the courthouse in Minnesota, from labor peace to labor strife.

By midnight, the NFLPA had purported to disclaim interest in bargaining, players had filed a class-action antitrust complaint, *Brady v. NFL*, and sought a preliminary injunction, and the NFL owners had locked out the players.

Brady was an antitrust challenge to a labor law tool — a lockout. Throughout the NFL's history, the intersection of federal antitrust and labor law has been a focal point of litigation and dispute. *Brady* is the most recent chapter.

NFL players have often sought to invoke the antitrust laws to challenge terms and conditions of their employment. Because the NFL is an association of individually-owned teams, rules or agreements among the clubs are potentially subject to antitrust challenge (and treble damages), and antitrust claims offer potential bargaining leverage for players.

There is, however, an inherent tension between the labor and antitrust

laws. As Justice Breyer observed, "I was brought up at my mother's knee to believe that antitrust and labor law do not mix."[2] Antitrust law potentially subjects concerted action to treble-damages; labor law encourages concerted action.

Given this paradox, courts have grappled with whether and to what extent antitrust laws can be used to challenge terms and conditions of employment. The NFL has been the *situs* of many of these cases.

Mackey and the "Rozelle Rule"

In *Mackey v. NFL*[3], John Mackey, president of the NFLPA, brought an antitrust challenge[4] to the "Rozelle Rule," which "required any club that signed a veteran free agent to compensate the player's former team."[5] If the two teams were unable to agree, the Commissioner had discretion to determine appropriate compensation; he could award players, draft picks, or both[6] to the franchise whose veteran player was signed by another club.

Mackey was the first in a long series of NFL labor dispute cases brought in federal court in Minnesota. It also was the first major decision to address whether the non-statutory labor exemption to antitrust challenges applies to player-related rules.

This exemption recognizes the inherent tension between antitrust and labor law when it comes to concerted action. Courts have resolved this tension through application of the "statutory" and "non-statutory" exemptions from the antitrust laws.

The "statutory" exemption derives from Sections 6 and 20 of the Clayton Act[7] and the Norris-LaGuardia Act.[8] The non-statutory exemption has its roots in the long history of multi-employer bargaining, wherein employers in a given industry bargain for and agree on common terms and conditions of employment with their employees.

If the antitrust laws were to apply to agreements among the employers, multi-employer bargaining simply could not work. To accommodate the congressional preference for collective bargaining, the Supreme Court has recognized that "certain union-employer agreements must be accorded a limited non-statutory exemption from antitrust sanctions."[9]

> As Justice Breyer observed, "I was brought up at my mother's knee to believe that antitrust and labor law do not mix."

The need for a non-statutory exemption is apparent. The difficulty lies in accommodating the competing interests of the labor and antitrust laws. *Mackey* presented one such challenge.

Following a 55-day trial, the District Court held that the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a *per se* violation of the Sherman Act.[10] The League appealed, arguing that the "labor exemption" to the antitrust laws "immunizes the NFL's enforcement of the Rozelle Rule from antitrust liability."[11]

On appeal, the Eighth Circuit posited the following test for applicability of the non-statutory labor exemption: "First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining."[12]

Applying this test, the panel found that the Rozelle Rule did not qualify for the exemption because the Rule had not been the product of bona fide arm's-length bargaining.

Next, the Eighth Circuit reversed the District Court's finding that the rule was a *per se* violation of the antitrust laws. The court concluded that the "unique nature of the business of professional football" did not lend itself to mechanical application of the *per se* rule.

The Eighth Circuit then proceeded to the rule of reason analysis. In support of its argument that the Rozelle Rule was not an unreasonable restraint, the League had asserted the following justifications: (1) competitive balance; (2) protecting the teams' investment in player developments costs; and (3) maintaining the quality of the product. The panel agreed with the District Court's finding that the Rozelle Rule was too restrictive to survive rule of reason analysis.

As to the competitive balance argument, the Eighth Circuit held that the Rule was over inclusive: "[o]nly the movement of the better players was urged as being detrimental to football[,] [y]et the Rozelle Rule applies to every NFL player regardless of his status or ability."[13]

Likewise, the Eighth Circuit concluded that the need to recoup player development costs did not justify the Rule because this "expense is an ordinary cost of doing business and is not peculiar to professional football."[14]

Finally, the Eighth Circuit rejected the argument that the Rozelle Rule facilitated continuity among the NFL teams by limiting player movement. The Court observed that player movement was already a significant part of the business due to trades, retirements and player drafts.[15]

Following *Mackey*, the parties executed a five-year CBA in 1977. This CBA replaced the Rozelle Rule with a "right of first refusal/compensation" free agent system.

Player Strikes of 1982 and 1987

The 1977 CBA expired after the 1981 season. Two weeks into the 1982 season, the players went on strike, demanding 55 percent of the teams' league-wide reve-

nues. On December 5, 1982, the parties executed the 1982 CBA. Although the owners did not agree to the players' demands for a fixed percentage of revenue, the agreement did guarantee the players $1.28 billion over the five-year period.[16]

While the 1982 CBA increased players' financial compensation, player movement via free agency remained limited. Entering the 1987 negotiations, the players' primary objective was a free agency system with increased player movement.

As before, the NFLPA initiated a strike after the second week of the season. After missing one week, the NFL resumed play with "replacement" players, most of whom were players released during the 1987 pre-season.[18]

Powell v. NFL

On October 15, 1987, after two weeks of replacement games and with more regular players crossing the picket lines, the NFLPA ended its strike and filed an antitrust lawsuit, *Powell v. NFL*, in Federal Court in Minnesota challenging the right-of-first-refusal system.[19] Plaintiff Marvin Powell was the president of the NFLPA.

Powell raised issues not decided in *Mackey*. In *Mackey*, the court had wrestled with whether the non-statutory exemption applied to a particular challenged restraint in an operative CBA. In *Powell*, the issue was whether the non-statutory labor exemption continued to apply to a restraint, the right of first refusal, that had been part of an expired CBA. *Powell* was assigned to Judge David Doty, who would remain a central figure in NFL labor disputes for years to come.

Judge Doty resolved this issue by adopting the following standard: A "labor exemption relating to a mandatory bargaining subject survive[s] expiration of the collective bargaining agreement until the parties reach impasse *as to that issue* … ." [20] Judge Doty defined "impasse" as "whether, following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement." [21]

Judge Doty held that the right of first refusal/compensation system and the "standard player contract" were protected by the non-statutory labor exemption during the life of the 1982 CBA. Thus, the labor exemption would continue to protect these practices until the parties reached impasse as to those issues.

> After two weeks of replacement games and with more regular players crossing the picket lines, the NFLPA ended its strike and filed an antitrust lawsuit.

As for the free agency system, it was unclear to the Court whether the parties had reached impasse. Judge Doty concluded that it would be premature to make the determination prior to the National Labor Relations Board's ("NLRB") "good faith" determination because the NFL had "filed a charge with the NLRB alleging that plaintiffs have not bargained in good faith [and] a finding of good faith must be made as a precondition to determining impasse[.]" [22]

The League appealed. While the appeal was pending, the League implemented a modified free agency system, "Plan B," under which each team could protect 37 players through the right of first refusal/compensation system.[23]

The Eighth Circuit reversed Judge Doty and held that "the non-statutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws." [24] Because the right of first refusal, Plan B, and the draft were part of agreements conceived in an ongoing collective bargaining relationship, the ruling shielded these provisions from antitrust scrutiny.

Decertification/Disclaimer and *McNeil*

Two days after the Eighth Circuit's *Powell* decision, the NFLPA Executive Committee voted to "decertify" the union, abandoning the NFLPA's status as the collective bargaining representative of the NFL players.[25] (This was not actually "decertification" — which requires notice and election supervised by the NLRB — but rather a "disclaimer" by which a union renounces its representation of the members of the bargaining unit.)

Believing that this purported "disclaimer" freed the players from the *Powell* holding, the NFLPA sponsored an antitrust lawsuit by several players, the *McNeil* case, challenging Plan B under the antitrust laws.[26]

Pointing out that, among other things, the NFLPA was still funding the litigation and that its leadership and operations continued unchanged following its "reformation" as a professional association, the NFL argued that the "decertification" was a sham. Judge Doty rejected this defense on summary judgment, notwithstanding considerable testimony from player leaders that the sole purpose of the disclaimer was to pursue antitrust litigation to accomplish their bargaining objectives regarding free agency.[27]

The jury in *McNeil* found that Plan B violated the antitrust laws because it was more restrictive than necessary to achieve competitive balance.[28] But the jury awarded total damages of only $543,000, a small fraction of the amount sought.[29]

White Settlement and 1993 CBA

Within one week of the *McNeil* verdict, the players filed a follow-on lawsuit, *Jackson v. NFL*, seeking an injunction barring continued implementation of Plan B. Some months later, the NFLPA arranged for the filing of a separate class-action antitrust suit, the *Reggie White* case, challenging Plan B, the draft and other NFL rules.

In May 1993, the parties finally resolved the *McNeil*, *Jackson* and *White* lawsuits through the "*White* Stipulation and Settlement Agreement" ("SSA"). The SSA reflected a new system familiar

to fans today — liberalized free agency, a salary cap, franchise and transition players, and a seven-round draft. Commensurate with the *White* settlement, the parties also agreed to a new CBA that paralleled the SSA's terms.

Under the SSA and CBA, player costs were guaranteed as a percentage of gross revenues. Judge Doty continued to exercise jurisdiction over the terms and conditions of player employment by virtue of the *White* settlement.

Brown v. Pro Football

The SSA resolved all but one antitrust case between the NFL and its players. In *Brown v. Pro Football, Inc.*,[30] a class of 235 "developmental squad" players brought an antitrust suit against an agreement among the NFL clubs to pay them a uniform $1,000 weekly salary. The League argued that this agreement, unilaterally implemented after an admitted impasse in bargaining with the NFLPA, was protected by the non-statutory labor exemption.

When the Supreme Court granted certiorari, it seemed that it might finally resolve the issues of when the non-statutory labor exemption applies, and when it expires.

In *Brown*, the Supreme Court held that "the post impasse imposition of a proposed employment term concerning a mandatory subject of bargaining" is shielded from the antitrust laws by the non-statutory labor exemption.[31] Under this standard, the League's agreement was protected by the non-statutory labor exemption. The Court explained that the "conduct took place during and immediately after a collective-bargaining negotiation ... [and] [i]t involved a matter that the parties were required to negotiate collectively." [32]

The Court noted, however, that "an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." [33]

Thus, *Brown* answered one question but raised others.

CBA Extensions 1996–2006

In 1996, 1999 and 2002, the parties negotiated amendments and extensions to the *White* settlement and the CBA. With the CBA due to expire after the 2007 League Year, in negotiations leading up to the 2006 season the NFLPA demanded that the revenue base for calculating the salary cap change from "DGR" ("Defined Gross Revenues," a subset of League revenues) to the League's total revenues.

> The agreement reflected a new system familiar to fans today — liberalized free agency, a salary cap, franchise and transition players, and a seven-round draft.

In March 2006, the NFLPA presented the League with a Term Sheet as its "final offer." The Term Sheet called for replacement of the "DGR" system with a "Total Revenue" or "TR" measure. The League accepted the Term Sheet, and the parties eventually translated its terms into the current CBA.[34]

The Term Sheet also provided for early termination by either the players or the clubs. The League resolution approving the Term Sheet provided that the League would terminate the agreement after the 2010 League Year unless 3/4 of the membership affirmatively voted not to do so. The League gave the Union notice of early termination in May 2008. Accordingly, the CBA was set to expire after the 2010 League Year (which would be uncapped), except for provisions relating to the draft, which remained in effect for 2011.

Brady v. NFL

The SSA and CBA were due to expire at 11:59 p.m. on March 11, 2011.[35] By then, the parties had been engaged for months in ongoing collective bargaining negotiations under the auspices of the Federal Mediation and Conciliation Service ("FMCS"). But on March 11, everything changed in an eight-hour span: The Union announced that it had disclaimed its status as bargaining representative of the players at 4 p.m.; negotiations at FMCS came to a halt at 5 p.m.; the players filed *Brady v. NFL*[36] and a motion for a preliminary injunction against a lockout in Federal Court in Minneapolis at 6 p.m.; at about the same time, the owners amended an unfair labor practice charge with the NLRB to assert that the purported disclaimer by the NFLPA was in bad faith; and at midnight, the owners "locked out" the players.

The *Brady* plaintiffs, nine current players and one prospective early draft pick, alleged that the lockout was an illegal group boycott and therefore a *per se* violation of the Sherman Act.[37] Although there were other claims, the players' principal objective was an injunction against the lockout.

In opposing the motion for a preliminary injunction, the League countered with two jurisdictional arguments, in addition to arguing that its lockout of the players was protected by the labor exemption. First, the League argued that "the Norris-LaGuardia Act precludes any injunctive relief," and second, "that this Court should defer this matter, or at least a portion of it, to the National Labor Relations Board under the doctrine of primary jurisdiction[.]" [38]

Under the doctrine of primary jurisdiction, "a court having jurisdiction to hear an action that involves a particular issue on which an agency has particular expertise may 'refer' that issue to the agency for its views or resolution." [39] The NFL argued that the District Court should stay this action to await the NLRB's ruling on the NFL's unfair labor practice charge that accused the players of engaging in a sham disclaimer.

Judge Susan Richard Nelson[40] rejected the League's primary jurisdiction argument, relying principally on Judge Doty's unreviewed summary judgment decision in *McNeil*.[41] Judge Nelson explained that "[a] union may end its duty

to bargain by disclaiming interest in representing the employees as long as it does so in good faith," and, notwithstanding numerous public statements from NFLPA leadership that the decertification was done solely to increase leverage for the players' bargaining objectives, Judge Nelson concluded that "[h]ere, as in 1990, the good faith requirement is met." [42]

The NFL also argued that the Norris-LaGuardia Act barred the Court from entering an injunction against the lockout. Section 4 of that Act provides: "No court ... shall have jurisdiction to issue any [injunctive relief] in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute ... from doing ... any of the following acts ...." [43] Among these protected acts is "[c]easing or refusing to perform any work or to remain in any relation of employment." [44]

Judge Nelson rejected this argument, explaining that the Act "does not apply here at all, now that the Union has effectively renounced its status as the Players' negotiating agent." [45]

Having resolved the League's objections to its jurisdiction, the Court addressed the merits of the plaintiffs' request for injunctive relief.

Relying on *Brown*, the League argued that the plaintiffs could not show a likelihood of success on the merits because: "(1) the non-statutory labor exemption protects lockouts by multi-employer bargaining units; (2) the exemption continues to apply until the challenged conduct is sufficiently distant in time and in circumstances from the collective bargaining process" and that this lockout could not possibly be sufficiently distant in time and in circumstances from the collective bargaining process (which, at least in the League's view, was still ongoing).[46]

Judge Nelson disagreed, stating that *Brown* "concerned an impasse occurring within the context of a collective bargaining relationship that likely could continue[,]" whereas in the current situation "the parties have left the collective bargaining framework entirely." [47] On April 25, 2011, the District Court entered a preliminary injunction against the lockout.

> The Labor dispute did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining.

On appeal, the Eighth Circuit reversed in a 2-1 decision. The majority disagreed with Judge Nelson's construction of the term "labor dispute," explaining that the "text of the Norris-LaGuardia Act and the cases interpreting the term 'labor dispute' do not require the present existence of a union to establish a labor dispute." [48] The Eighth Circuit found that Judge Nelson had "depart[ed] from the text" of the Act[49] by interpreting the phrase "'one or more employees or associations of employees' [as] not encompass[ing] the Players in this dispute, because 'one or more employees' means 'individual *unionized* employee or employees.'" [50] The Eighth Circuit found "no warrant for adding a requirement of unionization to the text." [51]

Next, the panel majority analyzed the impact of the Union's disclaimer. The majority observed that, "for approximately two years through March 11, 2011[,] the parties were involved in a classic 'labor dispute' by the Players' own definition." [52] "Then, on a single day, just hours before the CBA's expiration, the union discontinued collective bargaining and disclaimed its status ...." [53] The majority concluded that "[w]hatever the effect of the union's disclaimer on the League's immunity from antitrust liability, the labor dispute did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining." [54]

The majority concluded that the Norris-LaGuardia Act prevented the District Court from enjoining the lockout. Its analysis focused on Section 4(a) of the Act, which provides: "No court ... shall have jurisdiction to issue any [injunctive relief] in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute ... from doing ... any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment ...." [55]

The players had argued that this Section did not apply to injunctions against employers. The majority rejected this interpretation, reasoning that a "one-way interpretation of § 4(a) — prohibiting injunctions against strikes but not against lockouts — would be in tension with the purposes of the Norris-LaGuardia Act to allow free play of economic forces and to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer." [56]

Because the panel held that the Norris-LaGuardia Act prevented the District Court from enjoining the lockout, it did not address and expressed no view on whether the lockout could be subject to antitrust damages liability or whether the District Court also should have deferred to the NLRB's primary jurisdiction regarding the validity of the Union's disclaimer.[57]

Meanwhile, the parties had continued to negotiate, settling the *Brady* litigation on July 25 and entering into a 10-year CBA on August 4, 2011

* * *

Brady is the latest chapter in the history of NFL labor disputes, but if history is a guide, it may not be the last, and the issues addressed may rise again, whether in the NFL or other professional sports. ◆

The end notes accompanying this article are posted on the Delaware Bar Foundation's website, www.delawarebarfoundation.org.

A Short History of NFL Labor Disputes

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FOOTNOTES

1. See Associated Press, *Super Bowl is Most-Watched TV Show in U.S. History — Again*, NFL.com, (Feb. 6, 2012, 10:37 AM), http://www.nfl.com/superbowl/story/09000d5d826b388c/article/super-bowl-is-most watched-tv-show-in-us-history-again.

2. Jeffrey L. Kessler & David G. Feher, *What Justice Breyer Could Not Know at His Mother's Knee: The Adverse Effects of* Brown v. Pro Football *on Labor Relations in Prof'l Sports*, 14 Antitrust 41, 41 (Spring 2000), (citing oral argument in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996)).

3. 407 F. Supp. 1000 (D. Minn. 1975), rev'd, 543 F.2d 606 (8th Cir. 1976).

4. Although the Supreme Court had held in *Federal Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs*, 259 U. S. 200 (1922) and *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) that baseball is not subject to the antitrust laws, in *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957), the Court held that football is.

5. Neil Roman, *Illegal Procedure: The Nat'l Football League Players Union's Improper Use of Antitrust Litig. for Purposes of Collective Bargaining*, 67 Den. U.L. Rev., 111, 117 (1990).

6. *See id.*

7. 15 U.S.C. § 17 (2012); 29 U.S.C. § 52 (2012).

8. 29 U.S.C. §§ 101–115 (2012).

9. *Mackey v. NFL*, 543 F.2d 606, 611–12 (8th Cir. 1976).

10. *Id.* at 609.

11. *Id.*

12. *Id.* at 614.

13. *Id.* at 622.

14. *Id.* at 621.

15. *Id.* at 621–22.

16. *See History*, Subsection entitled "*The 1980's - Era of Change*, NFLPA, https://www.nflplayers.com/about-us/History/. [hereinafter History- 1980's]

17. *See* Roman, *supra* note 5, at 120.

18. *See History-1980's, supra* note 16.

19. 678 F. Supp. 777 (D. Minn. 1988), rev'd, 930 F.2d 1293 (8th Cir. 1989).

20. *Id.* at 788.

21. *Id.*

22. *Id.* at 789.

23. *See History-1980's, supra* note 16.

24. *Powell v. Nat'l Football League*, 930 F.2d 1293, 1303 (8th Cir. 1989).

25. *See History-1980's, supra* note 16.

26. *See* History, Subsection entitled *"The 1990's–Growth of the Union*, NFLPA, https://www.nflplayers.com/about-us/History/.[hereinafter *History- 1990's*].

27. *Powell v. Nat'l Football League*, 764 F. Supp. 1351, 1354, 1356–57 (D. Minn. 1991).

28. *See History-1990's, supra* note 26.

29. *Id.*

30. 518 U.S. 231 (1996).

31. *Id.* at 238.

32. *Id.* at 250.

33. *Id.*

34. *See generally* Mark Maske, War Without Death: A Year Of Extreme Competition In The Nfc East (2007).

35. *Brady v. Nat'l Football League (Brady I)*, 779 F. Supp. 2d 992, 1003 (D. Minn. 2011), *vacated,* 644 F.3d 661 (8th Cir. 2011).

36. *Id.*

37. *Brady I*, 779 F. Supp. 2d at 998.

38. *Id.* at 1005.

39. *Id.* at 1006–07.

40. The *Brady* plaintiffs designated their action as "related to" the *White* case closed in 1993, a designation that the NFL opposed.

41. *Brady I,* 779 F. Supp. 2d at 1018.

42. *Id.*

43. 29 U.S.C. § 104(a) (2012).

44. *Id.*

45. *Brady I,* 779 F. Supp. 2d at 1026.

46. *Id.*

47. *Id.* at 1040.

48. *Brady v. Nat'l Football League (Brady II)*, 644 F.3d 661, 673 (8th Cir. 2011).

49. Id.

50. *Brady II,* 644 F.3d at 671 (citing *Brady I,* 779 F. Supp. at 1027).

51. *Id.*

52. *Id.* at 673.

53. *Id.*

54. *Id.*

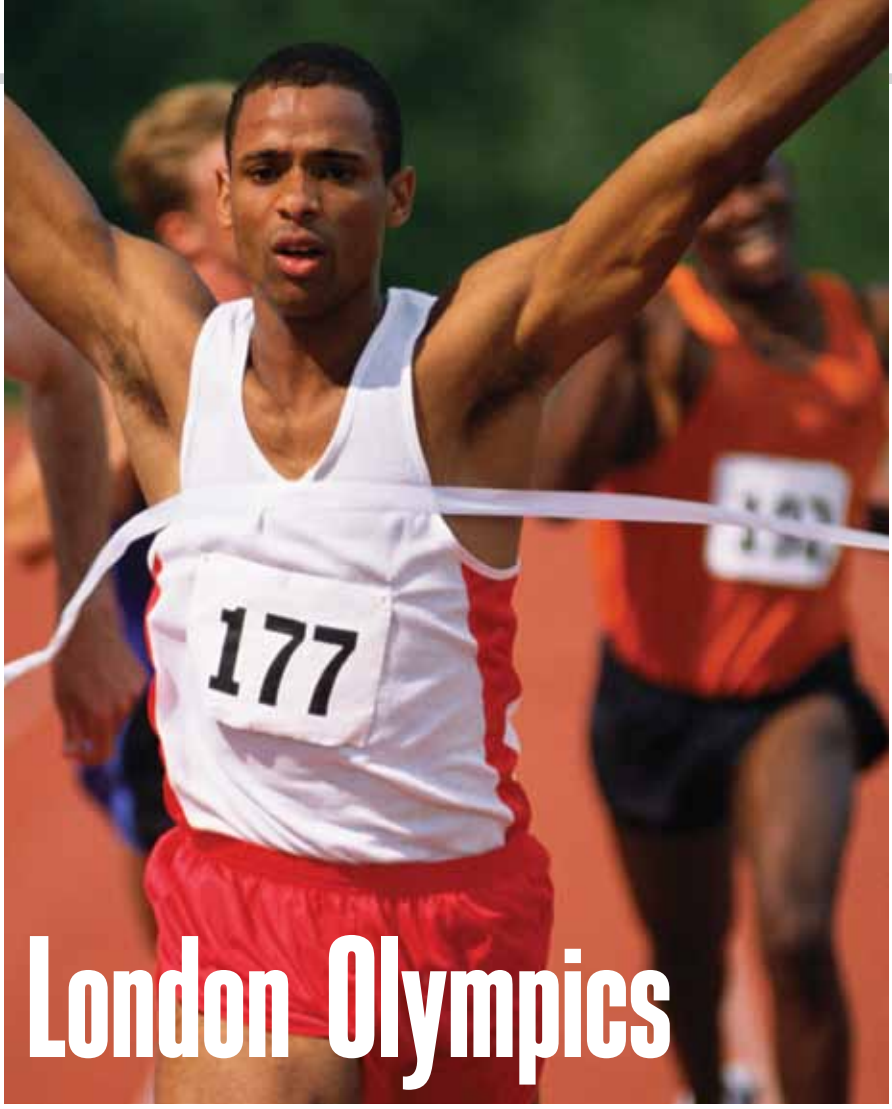
55. 29 U.S.C. § 104(a) (2012).

56. *Brady II*, 644 F.3d at 678.

57. *Id.* at 682.

Michael A.R. Bernasconi

Rapid-Fire Dispute Resolution at the London Olympics



A special team of arbitrators — the *ad hoc Division* of the Court of Arbitration for Sport — handles conflicts in the heat of battle at the Olympic Games.

Last year marked another Olympics and, once again, the Court of Arbitration for Sport's Olympic *ad hoc Division*, comprising 12 arbitrators from all over the world was there to judge any dispute arising out of the competition. One of the 12 "Lords of the Rings"[1] provides an overview on the work of the Court in London.

Introduction

In 1996, when the Olympic Games of Atlanta were just around the corner, there was a wide concern among the members of the "Olympic Family" that the Games might be negatively impacted by the US legal system, and in particular by an abusive and aggressive recourse to such a system by athletes, federations and others.

Out of this concern, the idea of an *ad hoc Division* of the Court of Arbitration for Sport ("CAS") originated. Henceforth, a small group of arbitrators, representing many continents and selected among the members of CAS, would be present on site at the Olympics. These arbitrators adjudicate any kind of dispute arising out of the Games in a prompt manner, so no proceedings block an Olympic event.

Structure and Mandate

In accordance with Articles 2 and 3 of the CAS Arbitration Rules for the Olympic Games ("Rules"),[2] several months before the Olympic Games take place, the International Council of Arbitration for Sport ("ICAS"), acting through the ICAS Board, appoints the CAS *ad hoc Division*, which is comprised of a President, a Co-President, the Court Office and a certain number of CAS arbitrators, generally nine for the Winter and 12 for the Summer Games.

The arbitrators are selected from among the more than 300 arbitrators who appear on the list of CAS members. When selecting the *Division* members, ICAS obviously aims to reach a geographically balanced representation by choosing arbitrators from all over the world and representing both genders.

The President and the Co-President are elected from among the members of the ICAS.[3] Their main duties are to appoint a Panel once an application is filed with the *ad hoc Division*[4] to decide on challenges by a party against an arbitrator, to decide in case of extreme urgency on *interim* measures,[5] and to perform a formal review of the decisions of the *ad hoc Division* before they are served, without affecting the freedom of decision of each Panel.[6]

The Court Office of the *ad hoc Division* is also on site at the Olympic Games, together with the President, the Co-President and the arbitrators. The Court Office is placed under the authority of the Secretary General of CAS.[7]

The purpose of the CAS *ad hoc Division* is "to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games."[8]

Panels of the *ad hoc Division* are expected to render their decisions within 24 hours from the moment the CAS Court Office receives the written application (Art. 18 Rules).

Selected London Cases

1. *A. Peternell vs. South African Sports Confederation and Olympic Committee ("SASCOC") & South African Equestrian Federation ("SAEF")*

The first case of the 2012 Olympic Games involved a South African eventing[9] rider, Alexander Peternell. Peternell had not been selected by the relevant South African sports bodies (*i.e.*, the SAEF and the SASCOC), even though Peternell had met the applicable eligibility criteria. Instead, they favored another rider, Paul Hart. Peternell asked the CAS *ad hoc Division* to annul the negative decisions of the South African sports bodies and to order his selection to represent South Africa in the eventing discipline.

The peculiarity of the *ad hoc* case of Peternell was that just before the Olympics (and before the start of the period of jurisdiction of the CAS *ad hoc Division*) he had already filed – and won – an "ordinary" appeal with CAS against a first round of non-selection decisions. In deciding that first appeal, CAS confirmed that Peternell had met the relevant eligibility criteria and so declared that Peternell was "eligible for selection by SASCOC to compete on behalf of the South African team in the eventing discipline at the 2012 Olympic Games, in lieu of Hart."[10]

However, in spite of that first CAS ruling, SAEF did not endorse the selection of Peternell and recommended that SASCOC select Hart, assumedly because Hart was domiciled in South Africa, while Peternell's place of residence was in Great Britain. Upon receipt of SAEF's communication, SASCOC decided and communicated to the competent international federation, *i.e.*, the *Fédération Equestre Internationale* ("FEI"), not to present any rider at the eventing competition.

With his application to the *ad hoc Division* Peternell asked the cancellation of these two new non-selection decisions of SAEF and SASCOC.

SASCOC's main legal argument was that it considered itself "unable" to select Peternell because of Article 6.3.3 of SASCOC's Memorandum of Association. According to this provision, SASCOC has the power to "[...] select, on recommendation from the relevant National Sports federations (if any), and present multi-sports teams for international and representative competitions at all levels [...]."

SASCOC claimed to be unable to select any rider because SAEF had not recommended Peternell. Therefore, lacking an explicit recommendation, SASCOC considered itself not in position to apply Article 6.3.3 of its Memorandum of Association.

The Panel first highlighted that it is indeed "the right of each National Olympic Committee to select athletes, team officials and other team members for the participation in the Olympic Games."[11] The Panel, however, was not satisfied that the mere fact that no explicit recommendation was submitted to SASCOC was a valid reason to claim impossibility for SASCOC to select any athlete on the basis of Article 6.3.3 of its Memorandum of Association. The Panel noted that the rationale of such provision was that normally a National Olympic Committee is not *per se* in position to evaluate athletes and their performances.[12]

The Panel concluded that in the present circumstances, SASCOC had no reason to apply, or to "hide behind," Article 6.3.3 of its Memorandum of Association. The Panel came to this decision because when SASCOC made its decision not to select Peternell, SASCOC knew very well (i) that Peternell (as established by CAS in the previous "ordinary" appeal proceedings) had met all relevant eligibility criteria for selection and (ii) that CAS had declared Peternell to be eligible to participate in the London 2012 Olympic Games in lieu of Hart.

In other words, the "purpose of receiving a recommendation by the relevant national federation, *i.e.*, the relevant technical knowledge, was, therefore, fully replaced by the knowledge obtained by SASCOC within the framework of the CAS 2845 procedure."[13]

The Panel therefore granted the request, annulled the non-selection decisions of SASCOC and SAEF, declared Peternell selected and ordered SASCOC and SAEF to place Peternell on the South African Olympic Team. Finally, the Panel commented in a side note that its decision did not have as a consequence the non-selection of Hart since neither SAEF nor SASCOC had ever applied to FEI or IOC for a replacement of Peternell by Hart.

Peternell and his horse *Asih* finished 49th in the eventing competition of the 2012 London Games.

2. *Ángel Mullera Rodriguez vs. Royal Spanish Athletics Federation (Real Federación Española de Atletismo – "RFEA") & Spanish Olympic Committee (Comité Olímpico Español – "COE") & Superior Sports Council (Consejo Superior de Deportes –"CSD")*

Ángel Mullera, the applicant, was a Spanish runner, competing at the international level in the 3000m Steeplechase. He claimed to have been excluded from the Spanish Olympic team without any valid reason, and only because of an article that appeared in the Spanish media just a few days before his exclusion.

In fact, it was true that Mullera, at the beginning of July 2012, had been selected as a member of the Spanish team and that such selection had been confirmed in the public notice of the RFEA. Just a few days after the publication of the official list of Spanish athletics team members, on July 19, 2012, the Spanish newspaper AS published an article entitled: *We Discovered the Doping Plan of a Spanish Olympic Athlete.*

The newspaper disclosed some emails exchanged between Mullera and an unnamed trainer concerning doping practices: "In those e-mails, Mr. Mullera and the trainer were explicit in asking and giving advice on some very specific doping protocols and on how to come out clean in any anti-doping controls."[14]

Mullera did not dispute *in toto* the existence of the emails, but claimed that their content had been manipulated. The day after the publication, on July 20, 2012, Mullera met some representatives of the RFEA who told him that they had received copies of the emails six months earlier and, for this reason, they had subjected him to several out-of-competition anti-doping tests, though all with no adverse analytical findings.

The same day, however, the Technical Committee of the RFEA informed Mullera "[...] that by decision of the Technical Committee of this Royal Spanish Athletics Federation, having consulted the Superior Sports Council and the Spanish Olympic Committee, and having studied the circumstances occurring in your case, you will not be part of the Spanish Athletics Team that will participate in the forthcoming London Olympic Games."[15]

It was against this decision that Mullera filed his application with the CAS *ad hoc Division*, asking to be reinstated as a full member of the Spanish team.

A few days later, after the Technical Committee sent the email to Mullera, the RFEA's Disciplinary Committee initially declined to, but eventually did open a disciplinary procedure on Mullera. When the case was heard by the CAS *ad hoc Panel*, the disciplinary procedure was still pending.

The positions of the (main) parties were quite clear: Mullera claimed that his exclusion was unlawful and the result of public, media-driven pressure. On the other side, the RFEA was of the view that it had the technical discretionary power to select or not select an athlete. The RFEA principally relied upon the second paragraph of its Circular No. 258/2011 of December 5, 2011: "As a general rule, the Technical Committee, using its private unregulated federative functions, relying on the evaluation it deems appropriate and without being subject to any pre-established rules, reserves the right to make its choice of the athletes that form part of the national team in all categories, its own discretion and technical criteria prevailing in all cases over any other circumstance."[16]

The RFEA, however, did not provide the Panel with any evidence to corroborate the technical reasons that could have justified the exclusion of Mullera. In fact, the RFEA admitted that the triggering event for the exclusion had been the publication of the article in the media.

Against this background, and taking into consideration not only the lack of any evidence but also the fact that RFEA had known about the emails exchanged by Mullera and the "trainer" for many months, the Panel found that the RFEA arbitrarily excluded Mullera from the Spanish team and thus violated its own selection criteria.[17]

The Panel highlighted that the behavior of Mr. Mullera, assuming that in fact he had written such emails, was likely to be reproachable; but at the same time, any disciplinary measure had to be taken in accordance with the applicable rules.

Finally, the Panel acknowledged that in the meantime the IOC had denied the request filed by the COE (a so-called "late replacement request") to replace Mullera with another Spanish athlete. Therefore, by allowing Mullera to compete, no other Spanish athlete was "deselected."

Mullera was declared eligible by the CAS Panel and was so able to compete in the Men's 3000m Steeplechase event, where he reached a rank of 30.

3. *Nour-Eddine Gezzar vs. Fédération Française d'Athlétisme ("FFA")*

The case was linked to the non-selection of a 3000m Steeplechase runner, Nour-Eddine Gezzar of France.

Gezzar was challenging the provisional suspension which had been imposed on him by the FFA further to a positive doping test for EPO at the French Championships on June 17, 2012. The athlete argued that at the occasion of said doping test several errors had been made during the testing procedure. He also argued that further doping tests made on him in the following weeks after the French Championships were all negative.

The Panel recalled the conditions that are necessary, under CAS jurisprudence and under the Rules, to grant a measure like the one requested by Gezzar: (i) the relief requested, here the lift of the provisional suspension, must be necessary to protect the athlete from irreparable harm; (ii) the claim in the merits must have, *prima facie*, a certain likelihood of success and (iii) the interests of the athlete shall outweigh those of the counterparties or of the other members of the Olympic Community.[18]

The Panel considered the chances of Gezzar on the merits to be quite limited (*"ne sont pas raisonnables"*)[19]: in fact, the claims raised against the doping test of June 17, 2012, did not seem justified, at least on the basis of the evidence submitted by the athlete. Therefore the Panel was satisfied that it was neither appropriate nor justified to lift the provisional suspension of Gezzar.

The Panel also noted in its conclusion that because the claim was rejected on its merits, it was unnecessary to consider the procedural issue of whether the athlete had neglected to name the correct counterparties when he filed the application against the FFA only, and not also against the International Association of Athletics Federations ("IAAF").

4. *Swedish National Olympic Committee ("Swedish NOC") & Swedish Triathlon Federation ("STF") vs. International Triathlon Union ("ITU")*

This case was directed at changing the results and in particular the attribution of the medals of an Olympic event (the Women's Triathlon).

The Swiss athlete Nicola Spirig had edged out the Swede Lisa Norden in a photo-finish end to the women's Triathlon in Hyde Park on August 4, 2012. On August 9, 2012, the Swedish NOC and the STF lodged their application with the CAS *ad hoc Division*. Interestingly, they did not ask for the ranking to be changed so that Spirig would be second and Norden first. The request was to declare a tie between the two athletes, with two gold medals to be awarded *ex aequo*.

The facts of the case were to a large extent undisputed. When the Swiss and the Swedish athletes crossed the finish line, the referee decided that the finish was so close as to require the photo-finish procedure to be implemented. The referee was provided with an image taken from the official photo-finish camera.[20] After having reviewed the image, the referee confirmed the results, and awarded the first place to Spirig, the second to Norden and the third to Erin Densham of Australia.

Before the medal ceremony, a delegation from the STF met the referee and reviewed the photo-finish image. After such review, they accepted the decision of the referee.

Two days later, on August 6, 2012, the Swedish NOC filed a protest against the attribution of the Silver medal to Norden. The same day, the ITU Co-technical Delegates confirmed both the receipt of the protest as well as the correctness of the decision of the referee.

On August 8, 2012, the ITU Executive Board rejected the request of the Swedish team and confirmed the results of the event, with Spirig winning the gold and Norden winning the silver medal.

The hearing of the *ad hoc Panel* took place on August 10, 2012, and was attended by a group which included representatives of the athletes and the respective national and international sporting bodies, as well as an expert of the official timekeeper agency.

The Swedish NOC and the STF argued that the decision at the finish line was not taken in accordance with ITU rules. They claimed that the decision at stake was not a field-of-play decision, but rather one of application of the wrong rule.

The Panel first referred to the long-standing jurisdiction of CAS according to which CAS has the jurisdiction to review field-of-play decisions only where it can be demonstrated that there has been arbitrariness or bad faith in arriving at the decision.[21] In this case, however, the Panel was satisfied that because the referee "applied the correct rule, the Referee's Decision fell squarely within the definition of a field-of-play decision." [22]

For this reason, and due to the lack of any arbitrariness or bad faith, the Panel decided not to review the decision of the referee. Accordingly, the medal positions in the Olympic Women's Triathlon were confirmed.

5. *Russian Olympic Committee ("ROC") vs. International Sailing Federation ("ISAF")*

The last case of the CAS *ad hoc Division* at the London Olympics was the only case dealt with by a Sole Arbitrator. It involved a quite peculiar scheduling issue: CAS received an urgent application by ROC on August 11, 2012, at 8 am. The application was directed against the decision taken by the ISAF the day before to terminate the Women's Elliott 6m semi-final races after only three rounds because of lack of wind, and to declare the Spanish team as a winner of that semi-final.

The ROC requested CAS to oblige the ISAF to conduct round four of the semi-final races and, if needed, round five, the same day.

Less than four hours later, at 11:45 am, the Sole Arbitrator rejected the application. He did not have to consider whether or not the decision made by the ISAF was a field-of-play decision or not: the Sole Arbitrator rejected the jurisdiction of the CAS *ad hoc Division* because ROC had not exhausted all the internal remedies available prior to its application to CAS.

In fact, the ROC had not complied with the applicable ISAF Racing Rules of Sailing and had not filed a request to the ISAF Jury Office within two hours after the termination of the semi-finals. Therefore, pursuant to Article 1 of the Rules, "the jurisdiction of the Sole Arbitrator is not engaged."[23]

Finally, on a side note, the Sole Arbitrator stated that in any event, there was no evidence to believe that "the decision to terminate the semi-final [...] has been undertaken by ISAF or its officials in an arbitrary or capricious manner." [24]

As to the Women's Elliott 6m Olympic event, the Spanish and the Australian teams participated in the final, which was won by Spain, while Finland won the bronze medal by beating the Russian team in the so-called *"petite finale."*

Conclusion

The author had the great honor to be one of the members of the 2012 CAS *ad hoc Division*. It is therefore impossible for him to comment on the quality of the work done by the Division. It is true, however, as in previous Games, that the work of the CAS *ad hoc Division* at the London Olympic Games has generally been very positively perceived.

The speed of the proceedings, the strong consideration of the parties' and any potential interested party's right to be heard, the fact that the proceedings are free and the possibility for the athletes to submit a case to an independent judiciary body available on site, without any strict formal requirement, are all reasons for the success and the acceptance of the CAS *ad hoc Division* model. ◆

The end notes accompanying this article are posted on the Delaware Bar Foundation's website, www.delawarebarfoundation.org.

Rapid-Fire Dispute Resolution at the London Olympics

Michael A.R. Bernasconi

FOOTNOTES

1. Allison Ross, *Team CAS Ready for the Olympics*, Global Arbitration Review, Vol. 7 Issue 4, (2012) at 10-15.

2. Court of Arbitration for Sport Rules (hereinafter "Rules") available at http://www.tas-cas.org/adhoc-rules.

3. Rules, *supra* note 3 at Article 4.

4. *Id*. at Article 11.

5. This responsibility applies so long as a Panel is not constituted yet; *See* Rules *supra* note 3 at Article 14.

6. Rules, supra note 3 at Article 19.

7. *Id*. at Article 5.

8. *Id*. at Article 1.

9. *"Eventing"* is an equestrian competition comprising dressage, cross-country and show jumping.

10. *See Peternell v. S. Afr. Sports Confederation & Olympic Comm. et. al.*, N° CAS 2012/A/2485, (Court of Arbitration for Sport, July 23, 2012),

http://www.tas-cas.org/d2wfiles/document/6113/5048/0/FINAL20AWARD20_2012.07.pdf.

11. *Peternell v. S. Afr. Sports Confederation & Olympic Comm. et. al.*, N° CAS OG 12/01, ¶ 41, (Court of Arbitration for Sport, July 25, 2012), http://www.tas-cas.org/d2wfiles/document/6128/5048/0/FINAL20AWARD20OG2001-12.pdf

12. *Id*. at ¶ 44.

13. *Id*. at ¶ 48.

14. *Rodriguez v. Royal Spanish Athletics Fed'n et. al.*, N° CAS OG 12/06, ¶ 2.6, (Court of Arbitration for Sport, August 1, 2012), http://www.tas-cas.org/d2wfiles/document/6186/5048/0/Award20OG2012200620_FINAL_.pdf.

15. *Id*. at ¶ 2.9.

16. *Id*. at ¶ 7.1.

17. *Id*. at ¶ 7.5.

18. *Gezzar v. Fed'n Francaise d'Athletisme*, N° CAS OG 12/09 ¶ 6.4. (Court of Arbitration for Sport, 2012) (citing to CAS N° OG 02/04 (Salt Lake City)). *See also* Rules *supra* note 3 at Article 14.

19. *Gezzar*, N° CAS OG 12/09 at ¶ 6.6.

20. *See* http://www.london2012.com/news/articles/spirig-takes-photo-finish-triathlon-gold.html.

21. *Swedish Nat'l Olympic Comm. et. al. v. Int'l Triathlon Union*, N° CAS OG 12/10 ¶ 7.2 (Court of Arbitration for Sport, August, 11, 2012), http://www.tas-cas.org/d2wfiles/document/6238/5048/0/Decision2010.PDF. et seq., with references to CAS 2004/A/727, CAS 2008/O/1483, CAS 2008/A/1641 and CAS 00/13 (Sydney).

22. *Swedish Nat'l Olympic Comm. et. al.*, N° CAS OG 12/10 at ¶ 7.5.

23. *Russian Olympic Comm. v. Int'l Sailing Fed'n*, N° CAS OG 12/11, ¶ 5.10 (Court of Arbitration for Sport, August, 11, 2012), http://www.tas-cas.org/d2wfiles/document/6247/5048/0/Final20Award.PDF

24. *Id*. at ¶ 5.11.

Lisa Davis
Jacqueline Paradee Mette

Title IX: Its History and Impact on Female Athletes

What started as an effort to provide women with equal opportunities to attend college became a transformative law promoting women's athletics.

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…"

History of Title IX

The first hearings on what would become Title IX occurred in the early 1970s when United States Representative Edith Green from Oregon, Chair of the Subcommittee on Higher Education of the House Education and Labor Committee, introduced a higher education bill that included provisions regarding gender equality.[1] Proposed as an amendment to Title VII of the 1964 Civil Rights Act to prohibit discrimination against employees in educational institutions, the proposal also sought to amend Title VI of the Civil Rights Act to address sex discrimination, and to extend the Equal Pay Act.[2]

The proposal was part of the Education Amendments of 1971, and provided that "no person … on the ground of sex, be subject to discrimination … under any program or activity conducted by a public institution of higher education … which is a recipient of Federal financial assistance."[3]

United States Senator Birch Bayh also was working on issues regarding women's rights. Senator Bayh joined Representative Green in her efforts and worked the higher education bill in the Senate, along with Senator George McGovern.[4] Senator Bayh believed that the education amendments were intended to "close this loophole" of the Civil Rights Act, which "unfortunately … does not apply to discrimination on the basis of sex," and prohibit sex discrimination as well because "our national policy should prohibit sex discrimination at all levels of education."[5]

The House and Senate conference committee took months to settle the many differences in the House and Senate Education Bill.[6] When concerns about amending Title VI of the Civil Rights Act were raised, Representative Green proposed a separate and new title for the education amendment, which became Title IX.[7] On June 23, 1972, President Richard Nixon signed the bill into law; Title IX took effect on July 1, 1972.[8]

As written, Title IX applied to any institution of higher learning that received Federal funds and prohibited any discrimination in all educational programs and activities in three general areas: 1) no one could be excluded from participation in any educational program or activity; 2) no one could be denied benefits of any educational program or activity; and 3) no one could be subjected to discrimination under any educational program or activity, including sexual discrimination or harassment in athletic programs.[9]

While athletics has been one of the more prominent features of Title IX during its 40-year history, the law does not include the words "sports" or "athletics," or any specific reference to athletic programs.[10] The ten areas of protection within Title IX include: Access to Higher Education, Career Education, Education for Pregnant and Parenting Students, Employment, Learning Environment, Math and Science, Sexual Harassment, Standardized Testing and Technology.[11] The law's main purpose was to give women equal opportunities to attend college.

There were attempts early on in Congress to remove athletics from Title IX protection. In 1974, Senator John Tower introduced an amendment to exclude revenue-producing sports from Title IX's reach.[12] It was rejected.

In 1975, President Gerald Ford approved the Title IX regulations that the Department of Health, Education and Welfare took three years to promulgate.[13] The regulations provided:

> 1. School systems or other recipients of federal funds must designate at least one employee as the Title IX coordinator to oversee compliance efforts and investigate any complaints of sex discrimination;
>
> 2. All students and employees must be notified of the names, office address(es), and telephone number(s) of the designated coordinator(s) of Title IX;
>
> 3. Grievance procedures and nondiscrimination policies must be made public;
>
> 4. Recipient school systems [must] … perform a one-time self-evaluation, with obligations to modify practices that did not comply with Title IX;
>
> 5. School systems may take remedial and affirmative steps to increase the participation of students in programs or activities where bias has occurred.[14]

In 1984, the United States Supreme Court, in *Grove City College v. Bell*,[15] concluded that Title IX was program-specific and applied to the college program/department that actually received financial assistance (in that case, the Office of Financial Aid).[16] In response to the *Grove City College* case and others, Congress passed the Civil Rights Restoration Act of 1988, overriding a veto by President Ronald Reagan, which, among other things, required that any institution receiving any federal funds to comply with Title IX throughout its entire institution.[17] Athletics were once again included in Title IX.[18]

Title IX Compliance

Title IX is currently enforced by the U.S. Department of Education's Office of Civil Rights (OCR), which was originally part of the U.S. Health, Education and Welfare Department until 1979.[19] In evaluating compliance, the OCR regulations focus on three general areas: "effective accommodation of student interests and abilities (participation); athletic financial assistance (scholarships); and other program components," which include equipment and supplies, tutoring, coaching, locker rooms, facilities, travel, per diem allowances, provision of medical and training facilities and services, and publicity.[20]

The first of the three general areas for evaluating compliance, the participation requirement, focuses upon the total number of men's and women's programs provided compared to student enrollment — not by comparing, for example, the football program to women's volleyball.[21]

In 1979, the OCR created the "three-prong-test" for evaluating college compliance with Title IX.[22] An educational program has achieved participation compliance if any one of the following three prongs is met:

> 1. Proportionality: Athletic opportunities must be available substantially proportionate to the undergraduate enrollment population for men and women;
>
> 2. History and Continued Practice of Program Expansion: The institution is making a good-faith effort to expand the opportunities for athletic participation of the underrepresented sex, or shows a history of program expansion; or
>
> 3. Full Accommodation of Interest and Abilities: The needs and interests of the underrepresented sex are being met, even though the institution cannot show a continuing practice of program expansion.[23]

As part of its guidelines for ensuring compliance under the third prong (arguably the most subjective), the OCR evaluates the following: "[i]s there unmet interest in a particular sport; is there sufficient ability to sustain a team in the sport; and is there a reasonable expectation of competition for the team."[24] If the answer is "yes" to all three questions, the institution is out of compliance.

As part of its assessment, the OCR considers "whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students; whether a viable team for the underrepresented sex recently was eliminated; multiple indicators of interest; multiple indicators of ability; and frequency of conducting assessments."[25]

With respect to scholarship compliance with Title IX, it is important to note that Title IX does not require equal spending for men's and women's athletics. Schools in the Division I Football Bowl Subdivision of the National Collegiate Athletic Association (NCAA) spent a median amount of $20,416,000 on men's programs compared to $8,006,000 on women's programs in 2010.[26]

What Title IX does require is spending on scholarships to be proportional to the population of the institution within one percentage point, unless justification can be made as to the spending differential and why the difference is not discriminatory.[27] While scholarships for Division I and Division II schools are to be proportionate to the institution's male and female population (Division III is not permitted to offer athletic scholarships), the NCAA, not the OCR, determines the maximum number of scholarships by sport and by sex a school is permitted to award.[28] Only 2% of high school athletes are offered any sports scholarships from the NCAA's Division I or Division II schools.[29]

NCAA Division I Head Count sports, also known traditionally as revenue-producing sports, include basketball and football for men, and basketball, tennis, volleyball and gymnastics for women. Any dollar awarded to an athlete in a Head Count sport is considered a full scholarship.[30] Non-revenue-producing sports offer equivalency scholarships that can be shared among many athletes. For example, at a Football Bowl Subdivision (FBS) school, the NCAA allows football to offer scholarships to a maximum of 85 athletes per year (Head Count scholarships) which may or may not be full scholarships, while the 12 women's field hockey scholarships can be shared among many players (equivalency scholarships).

Finally, Title IX also requires that men's and women's teams receive the same treatment in terms of facilities, scheduling, equipment, travel expenses and other similar areas. If there is a difference, it must be minimal.

Title IX requires that each educational institution have a Title IX Compliance Coordinator who is responsible for its enforcement. Failure to comply with Title IX can result in loss of federal funds. The federal government, though, has never brought a single enforcement action against a school for compliance violations.[31] The OCR has opted instead to negotiate settlements with non-compliant schools that include a plan to comply. Enforcement efforts have been challenging.

In 1999-2000, almost 30 years after passage of the law, women represented 54% of the undergraduate population, and only 23% of the Division I schools were within five percentage points of its school's population for participation in athletics.[32] Four years prior, the percentage was only 9%.[33]

Today, female collegiate athletes still receive 63,000 fewer participation opportunities than men and $183 million less in athletic scholarships.[34] In 2011, 57% of undergraduates were women, and had athletic participation rates of 43%. At Football Bowl Subdivision schools, women received only 28% of the total athletic expenditures, 31% of the recruiting dollars, and 42% of the athletic scholarship money.[35]

Title IX and Career Success

Athletes and others argue whether Title IX is to blame for the elimination of certain men's athletic programs. Overall, the opportunities for men in sports have increased since the passage of Title IX. Since 1988-1989, the NCAA has added more than 500 men's teams. From 2002 to 2011, the number of male athletes grew from 214,464 to 252,946, a gain of 38,482. During the same time frame, female athletes increased from 158,469 to 191,131, a gain of 32,662.[36]

The NCAA dictates how many scholarships a school can offer — by sport and by sex. In Division 1 Football Bowl Subdivision (FBS) schools, football and basketball represent 78% of the expenses, while all other men's sports average 22%. In Division III schools (where athletic scholarships cannot be offered) football and basketball represent 41% of the expenses.[37] Because the NCAA sets the scholarship numbers so high for Division I football and basketball programs (85 for football and 13 for basketball per year), it impacts how schools fund and address participation opportunities for non-revenue-producing men's sports. In 2011, an NCAA subcommittee researched reducing the limit of FBS scholarships from 85 to 80, but the proposal was rejected in 2012 after being criticized by football coaches.[38]

Unfortunately, some non-revenue-producing men's sports have been eliminated. Schools sometimes find it easier to cut a program than trim line by line on the overall budget.[39] In 2012, the University of Richmond cut men's soccer and men's indoor and outdoor track and field in order to add men's lacrosse, one of the fastest growing sports in the country. The cuts were not another Title IX casualty, but an opportunity to be competitive nationally in a popular sport. In its press release, the University of Richmond stated: "Lacrosse is one of the fastest growing NCAA men's sports. Because there are only 65 Division I men's lacrosse teams, the University has the opportunity to build a highly competitive men's lacrosse program while the field is still relatively small."[40]

And in the same year Rutgers University cut its men's tennis team (with an annual budget of $175,000), the National Women's Law Center noted that Rutgers' football program spent $175,000 for hotel rooms for its players for home games.[41]

Ironically, since Title IX has passed, the opportunities for women athletes have soared, but the opportunities for female coaches have plummeted. When Title IX was authorized, 90% of the coaching positions for women's athletic teams were held by women. In 2012, it was down to 42.9%. Men have filled 1,220 of the 1,774 openings since 2000.[42]

While the coaching trend is disappointing, there could be a correlation between women in athletics and successful women in business since the passage of Title IX. IMF Managing Director Christine Lagarde competed in synchronized swimming, PepsiCo CEO Indra Nooyi played cricket, Kraft Foods CEO Irene Rosenfeld played four sports in high school and basketball in college, and HP CEO Meg Whitman played lacrosse and squash.[43] The number of women on boards and executive positions is much higher than in previous decades.

A 2002 Oppenheimer Fund study found that 82% of women business executives played organized sports after elementary school, 20% more than the general population. Title IX is cited as the key contributor. A 2010 study by Betsey Stevenson, Chief Economist of

the U.S. Department of Labor, found that Title IX accounted for a 20% increase in education and a 40% increase in employment for women ages 25 to 34.[44]

Personal Reflections

Title IX has allowed many women the same personal growth as men that athletics provides, leading them to career opportunities and confidence in pursuing those jobs that may not have been accessible to them otherwise.

Pam Allingham, a former law clerk for Justice Carolyn Berger of the Delaware Supreme Court and associate with the law firm of Skadden, Arps, Slate, Meagher, and Flom, loved playing baseball as a child. She played softball at Drexel University from 1985-1989. Most of the players on the team at that time were from the Tri-State area. The players paid for their own shoes and sweatshirts. When the team traveled, they were two-to-four per room and were given $5 for dinner. The team had one full scholarship.

Times have changed for Drexel University softball. The recruiting is much more aggressive and the team consists of athletes from all over, including Canada. The team also has a new Field House and more scholarship money.

Wiz Applegate graduated from Colgate University in 1983, where she played field hockey and lacrosse. Colgate participated in Division II during her freshman and sophomore years, and then went to Division I her junior year (1981). There were no scholarships for her teams. While Colgate worked hard at treating its women's programs well, on Friday evenings before Saturday football games, the football team had a team dinner in a private banquet room while the women's hockey team went to the cafeteria, even though they had a Saturday game as well. The football team traveled on coach buses for every away game, while the women's hockey and lacrosse teams traveled in vans for shorter trips and used coach buses only for longer trips. Colgate's field hockey coach frequently raised the topic of Title IX.

College sports helped Ms. Applegate organize her time efficiently and develop a wide range of traits that are applicable today, including how to lead, how to compete and how to effectively work with people to achieve goals. Currently, Ms. Applegate teaches history and coaches girls' lacrosse at Tower Hill School.

Andrea Sudell Davey, an attorney with the United States Department of Health and Social Services, attended Georgetown University from 1993-1997, where she swam for the Hoyas. Georgetown did not offer swimming scholarships when she attended. The men's and women's teams practiced and attended meets together, and were treated equally from her perspective.

Swimming for Georgetown helped Ms. Davey learned to better manage her time, and to schedule wisely, given the practice and travel demands on the team.

Ms. Davey suggests one of Title IX's best outcomes was breaking down barriers to women's participation in athletics. Participating in women's sports in high school and college approximately 20 years after the enactment of Title IX, Ms. Davey felt that there were equal opportunities for both males and females in sports and otherwise.

In 1978, Lisa Davis attended Pennsylvania State University where she played volleyball. During her freshman year, the women's volleyball team was coached by the men's volleyball team coach. In her sophomore year, the university hired a separate coach for the women's volleyball team. The team paid for its uniform tops, shoes, knee pads and other equipment. Many of the women's parents made contributions to help cover the expenses of off-season travel. Tournament choices in the off-season were often made in a city where one of the teammates lived so that the team could save on housing expenses.

This changed her junior year when the team was sponsored by Mizuno; each player received a uniform, sweat suit, bag, shoes and knee pads. After graduation, Ms. Davis's interview with the Human Resources Manager at Macy's was spent discussing her volleyball experiences at Penn State, and the qualities that made her a successful player would also make her a successful executive at the company.

Alice Ivy graduated from Wilmington Friends School in 1948 and attended the all-women's school Marjorie Webster Junior College in Washington, DC, graduating in 1950. The school was a "Career College" for women. While there, she participated and received letters in 10 different sports. After graduating, Ms. Ivy taught Physical Education and coached field hockey, basketball and tennis at Tatnall School, which was then an all-girls school, from 1950-1953. She also participated in the Delaware Field Hockey Association, played semi-pro basketball for the Zippers, and played in a badminton league in Philadelphia. At 83 years young, she still plays competitive tennis and paddleball.

Marcy Gause Kempner graduated in 1979 from Ursuline Academy, where she was a member of the basketball team. She attended Fordham University from 1979-1983, joining its basketball team her sophomore year. A three-time letter winner at Fordham, Ms. Kempner's appreciation for athletics influenced her career. She is currently a freelance sports television Associate Director. Her work has earned her seven Emmy Awards, including for her work with the US Tennis Open, NFL and other athletic events.

Vicky Huber Rudawsky attended Villanova from 1985-1990. She was recruited for both women's cross country and track and field. Most of the women on her team were on full scholarships. One favorite benefit at Villanova allowed athletes to pick classes before the other students. At Villanova, although the basketball team had more perks, the athletes were generally treated equally.

A massage therapist and columnist for the News Journal, Ms. Rudawsky Ms. Rudawsky believes playing sports in college teaches time management, among other things. Ms. Rudawsky says the original intention of Title IX, to give women more, if not equal, opportunities in sports, was necessary. Today, however, she believes that Title IX, in particular football scholarships, should be revisited because men's programs suffer in an attempt to balance the numbers. ◆

The end notes accompanying this article are posted on the Delaware Bar Foundation's website, www.delawarebarfoundation.org.

Title IX: Its History and Impact on Female Athletes

Lisa Davis & Jacqueline Paradee Mette

FOOTNOTES

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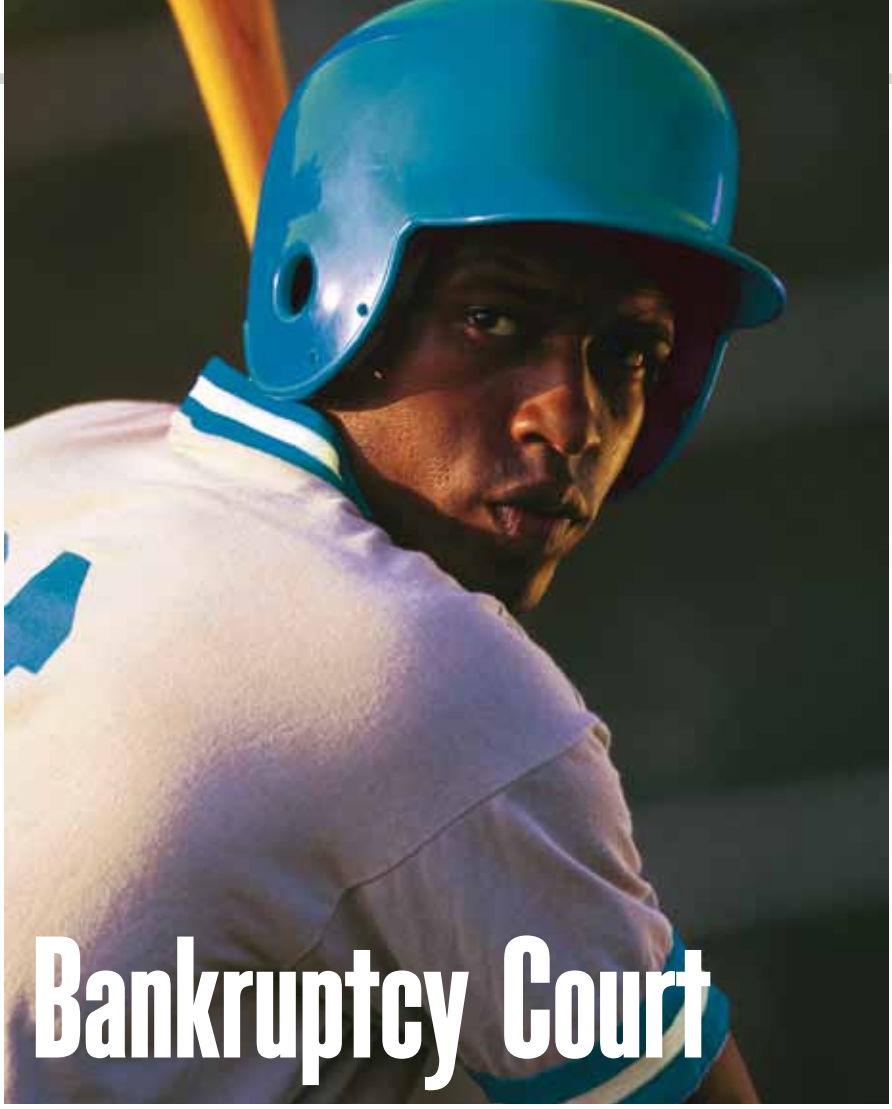
Jeffrey M. Schlerf



At Bat in Bankruptcy Court

An avid baseball fan — and veteran Delaware bankruptcy lawyer — shares insights on the battle over control of the LA Dodgers.

I have seen a full array of issues put before the Delaware Bankruptcy Judges. Companies of various shapes, sizes and notoriety including Marvel Entertainment,[1] Napster, Zenith, Smith Corona, Montgomery Ward, Washington Mutual, Tribune, TWA, Continental Airlines, Phoenix Steel, Tower Records and Solyndra have filed here. However, as a sports fan, and most particularly a devout follower of Major League Baseball and the Philadelphia Phillies, there has not been a case more fascinating than the LA Dodgers' bankruptcy filing during the 2011 baseball season.

Shortly after that filing, I was retained as Delaware counsel to the Commissioner of Baseball, Bud Selig. Our legal team was immediately preparing for a court hearing to object to proposed bankruptcy financing negotiated by the Dodgers' beleaguered owner, Frank McCourt. Soon I was welcoming top MLB executives at our offices prior to that hearing. During breaks at the hearing I listened as Mr. Selig's top lieutenants called him to discuss strategy.

That first hearing was a precursor of things to come. It was important for the Dodgers to immediately obtain "debtor-in-possession" financing. The team was low on liquidity and had various payroll obligations coming due at the time it filed, including amounts due to former players including Manny Ramirez.[2] At the hearing the team did obtain interim approval for $60 million in financing from Highbridge, a Goldman Sachs affiliate.

MLB ended up not pressing its ob-

jection but fully reserved its rights regarding final approval. The proceeding was a warm-up for the final hearing on approval of $150 million in total financing several weeks later. Before delving into that fight, some background on McCourt's deteriorating relationship with the League will be helpful.

The Dodgers were a proud franchise. As recently as the 2008 and 2009 seasons, the team experienced success, reaching the National League Championship Series both seasons (but losing to my beloved Phillies!). By most accounts the team's situation began to unravel when McCourt and his wife Jamie separated after the 2009 season and subsequently commenced divorce proceedings.

As the McCourts' marriage unraveled, so did the Dodgers' performance, as they failed to make the playoffs the following season. The divorce proceeding languished. The media frenzy in LA worsened over time. Stories came out about the McCourts' lavish lifestyle and an alleged affair involving Jamie that led to the divorce. But what really sensationalized the divorce was the revelation that Jamie was claiming she owned 50% of the team. More on that later, but the cumulative effect of all this was instability for the team.

As the on- and off-the-field distractions from the divorce continued into the offseason after 2010, the team's finances worsened. What surfaced in press reports was a strategy by McCourt to address that issue. One potential source of liquidity was leveraging an increasingly valuable asset of professional sports franchises – so-called "media rights." The Dodgers had negotiations with Fox Sports Net West2, LLC ("Fox"), the regional television network broadcasting most of its games. The Dodgers would agree to an amendment of their existing agreement whereby Fox would advance $25 million in fees payable for the 2011 season.

MLB had concerns with this transaction (besides that it had not been submitted for its approval). The advance represented a large share of the Dodgers' telecast rights fees for the 2011 season (greater than 70%), thereby reducing revenues available for 2011. Disputes with the League regarding the team's media rights would continue.

By most accounts the team's situation began to unravel when McCourt and his wife Jamie separated after the 2009 season and subsequently commenced divorce proceedings.

MLB also asserted that during that offseason McCourt caused the Dodgers to pay rent four months in advance to an entity of his which owned the stadium parking lots in order to fund McCourt's marital support obligations. MLB believed that McCourt personally had relatively modest personal assets outside of his Dodgers ownership in relation to his personal expenses and marital obligations.[3] Purportedly his "only" source of income was $5 million per year obtained through lease payments made by the Dodgers.

There was not much optimism among the Dodgers faithful as the 2011 season got underway, and matters only worsened. On Opening Day at Dodgers Stadium, Giants fan Brian Stow was brutally attacked by Dodgers fans in the stadium parking lot. Very negative publicity followed this incident. The team was accused of having lax security and poor lighting in their parking lots.[4] Criticism of McCourt as communicated in the media reached a new low.[5]

Relations with the League were reaching a tipping point at this time. MLB had already commenced an investigation of the Dodgers' management. In early 2011, MLB had raised specific issues with McCourt relating to his 2004 acquisition of the team, undisclosed transactions that followed involving team assets, and deficiencies in team operations. The League had an overriding concern that McCourt apparently did not have any independent source of wealth or income other than the Dodgers and the team's related real estate assets.

MLB believed that during his tenure as owner, McCourt had "siphoned off" more than $180 million in direct and indirect cash distributions from team revenues.[6] The League was concerned about the cumulative effect of that. Other major areas of concern included the Club's ability to fund planned capital expenditures, including $360 million in planned renovations of Dodger Stadium.[7]

In April 2011, the first month of the new season, MLB concluded its initial investigation and announced the appointment of a monitor, Ambassador J. Thomas Schieffer. The League viewed the Club's situation as serious. Fan and media scrutiny of team ownership was at its peak, while the team's on-the-field performance and attendance were in further decline.

Notwithstanding the Monitor's presence at team headquarters, he was excluded from critical decisions. First, a deal was announced in which a McCourt entity would receive a substantial $385-million advance in exchange for Fox's broadcasting rights being extended for 17 years. The Commissioner's Office reviewed this new deal, and on June 20, denied approval.[8]

Additionally, while negotiations with Fox took place and as the Dodgers were waiting for MLB's decision, unbeknownst to the Monitor the team was making preparations for a momentous back-up plan – a chapter 11 filing – and McCourt was negotiating bankruptcy financing.[9] The team did file in Delaware one week after the League denied approval, becoming the second team in a year to file for chapter 11 (the Texas Rangers being the other).

With this backdrop, it would be an understatement to say relations were strained between McCourt and the

League as the battle over final approval of bankruptcy financing ensued. McCourt had a choice of two lenders. MLB was willing to provide financing as an alternative to Highbridge, McCourt's preferred lender. MLB's terms were clearly more favorable.[10] The League argued the Dodgers would not be properly exercising business judgment by refusing to accept their better offer. The Dodgers argued the League was seeking control. Expedited discovery followed.

A one-day trial was held before Chief Judge Kevin Gross. While generally approval of debtor financing is subject to a business judgment standard, MLB argued that the Dodgers were not entitled to that protection. Since McCourt was personally subject to a $5-million fee – not previously disclosed to the Court – payable to Highbridge if that financing was not approved, his personal interests rather than the debtor's best interests were driving the decision. MLB pointed out that the Dodgers were seeking approval of financing on clearly less favorable terms and were refusing to negotiate with the League. MLB also argued that McCourt could not use bankruptcy to avoid the MLB Constitution and various other contractual obligations entered into when buying the team in 2004. The Dodgers disagreed.[11]

At the conclusion of the trial, Judge Gross announced he was taking the matter under advisement and would issue a prompt decision, which he did.[12] The Court's Opinion was short and direct. Judge Gross began his decision in gracious fashion by noting the Dodgers' "rich and successful history is of mythical proportions."[13] In acknowledging the "underlying feud" between the Commissioner and McCourt, the Judge added: "It is clear that Baseball needs and wants the Dodgers to succeed and the Debtors are best served by maintaining Baseball's good will and contributing to the important and profitable franchise group under the Commissioner's leadership."[14]

The Judge then cut to the chase and compared the terms of the Debtors' financing with MLB's proposed terms, finding the "substantial economic superiority" of the latter. The Court found:

MLB argued that McCourt could not use bankruptcy to avoid the MLB Constitution and various other contractual obligations entered into when buying the team in 2004.

"Debtors not only failed to attempt to obtain unsecured financing [as required by statute], they refused to engage Baseball in negotiations because, they explained, Baseball has been hostile to Debtors."[15]

The Judge could have stopped there, but went on to address the Dodgers' view that courts typically apply a business judgment standard to a debtor's selection of its lender. The Court agreed that deference is given to the business decisions of directors of Delaware corporations, but then pointed to the exceptions to that rule, including when directors are not disinterested. Since McCourt had a personal stake in seeing that the Highbridge loan was approved the Dodgers' decision was not protected by the business judgment rule. Therefore, the Court applied the entire fairness standard, which it found was not met. In concluding his opinion, Judge Gross directed the team to negotiate with MLB in good faith.[16]

This had been an epic battle and the Commissioner's Office was pleased with the result. However, disagreements between McCourt and MLB were not limited to financing. McCourt had purchased the team in 2004 from Fox Entertainment Group, a subsidiary of News Corp., for approximately $421 million. From all accounts, the MLB approval process for the sale was not contentious.

McCourt, however, funded the purchase by incurring a significant amount of debt, much of it borne by the team itself. MLB anticipated this debt load would be reduced over time, which did not happen. Additionally, after the sale, assets were transferred away from the team to affiliates of McCourt. One example was the Dodgers' parking lots being transferred to a McCourt entity and then leased back. [17] Another example was the rights to sales of Dodgers tickets being transferred to a McCourt entity named Dodgers Tickets LLC. MLB contended that these transactions had not been disclosed to the league at the time and required its approval.

These issues were percolating in the years following McCourt's acquisition of the team, but as described above his relationship with the League started unraveling during his divorce from his wife Jamie.[18] Things got even more interesting when it was learned Jamie claimed a 50% ownership interest in the Dodgers. When the team was purchased in 2004 the McCourts entered into a post nuptial agreement which, unlike other marital assets to be divided 50/50 (at least clearly in McCourt's view), provided that Frank McCourt owned 100% of the team.

During the divorce proceeding, however, it came to light that there was a second version of the post nuptial agreement with slightly different wording which suggested that Jamie owned half the team.[19] The dispute was approaching a trial in 2011, soon after the bankruptcy filing, when it was announced that the couple had reached a settlement. Frank agreed to pay Jamie $130 million by April 30, 2012 in exchange for her release of any interest in the team. That agreement created a substantial financial commitment for Frank, however, which caused MLB even greater concern that McCourt's governance of the Dodgers was driven by his personal financial situation.

Given the relationship between MLB and McCourt, questions about the Dodgers' financial stability, and the sustained negative media coverage, the

Commissioner's position was clear: McCourt must sell the Dodgers. Accordingly, the skirmish over financing was just the beginning. Everyone knew this, including Judge Gross.

The public war between MLB and McCourt would worsen before peace broke out. As anticipated, the Dodgers filed a motion for approval of "procedures" for the marketing of their media rights. The team wanted the Court to approve essentially modifying the contract between Fox and the Dodgers by moving up by a year the 45-day period in which the team was required to exclusively negotiate with Fox over an extension of their agreement. Fox did not consent to this.

MLB filed a motion to terminate the Dodgers' exclusive period to file a chapter 11 plan or alternatively compel the Club to assume all MLB-related agreements (which in the view of MLB, could not be done because the previous breaches thereof by McCourt could not be cured).

Judge Gross scheduled the matters for a mid-October trial and in an Order set forth the specific issues to be tried.

There had been a new development in the case during that summer which at first was not public knowledge. Former Delaware District Court Chief Judge Joseph Farnan was asked by Judge Gross to serve as a mediator of disputes between MLB and the Dodgers.[20] Judge Farnan's involvement as a mediator "behind the scenes" would pay off.[21]

On November 1, 2011 MLB announced it had reached a global settlement with the Dodgers. Most critically, McCourt agreed to sell the Dodgers in an auction process. But there was a time constraint: under his settlement with his ex-wife, McCourt had to make a $130-million payment by April 30, 2012. He would need a sale of the team to be approved by MLB and the Court and then close by that time. More on the sale later; the Dodgers still had issues with Fox.

The Dodgers' skirmishes with Fox began with the MLB settlement. Since bankruptcy requires court approval of settlements, the Dodgers filed a motion which Fox challenged. The settlement terms described in the motion referenced the Dodgers' media rights as potentially part of a sale. Fox objected because, among other reasons, there were separate confidential terms between MLB and the Dodgers which by agreement were not part of the record and not to be disclosed to other parties including Fox. Judge Gross approved the MLB settlement, overruling the objection. The larger battle between the team and Fox would be over the Dodgers' proposed media rights procedures.

The Dodgers filed a motion for approval of amended procedures for marketing their media rights which included a modification of Fox's exclusive negotiating rights. Due to the accelerated sale process, driven by McCourt's obligations due on April 30, this proceeding had to be expedited. Interestingly, MLB had agreed in its settlement to be neutral, although it would still get caught in the fray with discovery.[22] As Fox and the Dodgers prepared for trial, Judge

Farnan continued to attempt to broker another deal.

A two-day trial was held in December, 2011. Fox had two expert witnesses.[23] After closing argument, the Judge announced that he was going to issue a written decision but then explained he was going to rule in the Dodgers' favor. The litigation quickly shifted to the District Court after Fox filed an expedited appeal. Remember that the Dodgers and Blackstone, their investment bankers, were working feverishly on the sale of the team, aiming to complete the process in a matter of weeks.

Soon the complexion of this litigation would change. District Court Judge Leonard Stark granted Fox's motion for a stay pending appeal and established an accelerated briefing schedule. The Judge, who was relatively new to the bench, demonstrated he was more than capable of keeping up with the bankruptcy lawyers' fast-paced ways by issuing an oral decision and then keeping his promise to issue a written opinion a few days later. The Dodgers were going to be perilously near the end of their marketing process while the appeal was pending. It was not surprising when days before appellate argument the Dodgers announced a settlement with Fox.

Heading into the late innings of its bankruptcy, the Dodgers still had to select a high bidder for the team, obtain MLB approval and consummate a sale through a chapter 11 plan. Under the settlement with the League, a sale could include assets not owned by the Dodgers (including the parking lots), but did not have to. In addition, the settlement with Fox meant that bidders could discuss media rights (but the bankruptcy could not be used to reject the existing telecast agreement).

Interested bidders mentioned in the media included Steve Cohen of SAC, former Dodgers and Yankees manager Joe Torre, former Dodgers owner Peter O'Malley, former Dodgers players Orel Hershiser and Steve Garvey, Dallas Mavericks owner Mark Cuban and investor Ron Burkle.

Eventually, in March 2012, the earth-shattering winning bid was announced.

The Dodgers still had to select a high bidder for the team, obtain MLB approval and consummate a sale through a chapter 11 plan.

A group led by former NBA great Magic Johnson (an LA fan favorite), seasoned MLB executive Stan Kasten and hedge fund Guggenheim Partners would buy the team for an astonishing $2.15 billion. The purchase price was record setting for a U.S. professional sports franchise.[24] The price was a reflection of how valuable media rights had become in professional sports (the new owners did not negotiate a new media rights deal in connection with their acquisition, but the contract with Fox expires after the 2013 season).[25]

Now that the team had a buyer, court approval through confirmation of a chapter 11 plan was necessary.[26] Confirmation is a two-step process. First, a disclosure statement must be approved. A disclosure statement provides information necessary for a creditor or equity holder entitled to vote on a chapter 11 plan to decide to accept or reject it. Here, the proceeds from the sale of the team would be so large that all creditors would be paid in full and equity in the debtor "LA Holdco LLC" – Frank McCourt – would receive a substantial distribution.[27] As such, the only party needing to vote on the Plan was McCourt himself.

Under this scenario this process would seemingly proceed smoothly, but nothing was easy in this bankruptcy. For instance, the creditor who had potentially a very large claim – Brian Stow, the Giants fan severely injured on Opening Day – raised issues with the Plan. His personal injury claim would have to be liquidated outside of the Bankruptcy Court in the California state court litigation commenced before the bankruptcy, which was stayed by the filing.[28] Nevertheless, the Dodgers attempted procedurally in the bankruptcy to disallow a proof of claim filed on behalf of Stow and his children. Stow, who retained a highly regarded firm specializing in bankruptcy, opposed this procedural move, and also argued that the Plan improperly granted releases of third parties and questioned the adequacy of reserves for creditor claims. Matters with Stow in the bankruptcy did get resolved, and the confirmation hearing was scheduled on April 13, 2012. Again, timing was important – McCourt's deadline for payment of $130 million to his ex-wife was April 30. The team's objective was to remain on schedule for confirmation.[29]

On the eve of the confirmation hearing, there was still much to accomplish. One very significant hurdle was obtaining League approval of all aspects of the purchase of the team. Since MLB had open issues as of the deadline for opposing the plan, it filed an objection. On the morning of the hearing, MLB's legal team headed over to Young Conaway's Delaware office for discussions with the Dodgers and Guggenheim and the mediator, Judge Farnan.

Judge Gross moved the hearing to 4 p.m. (on a Friday, which happened to be the 13th). Surely that would give the parties enough time to resolve open issues? Not quite. By the time the hearing began at 6 p.m., there was not a festive atmosphere. MLB expressed various concerns to the Judge over details of the sale.

Judge Gross, however, eventually decided to confirm the plan that evening, paving the way for the $2+ billion sale to close. The League got its wish through McCourt's sale of the team, the transaction closed by April 30 and the McCourts each received their millions.[30] ◆

The end notes accompanying this article are posted on the Delaware Bar Foundation's website, www.delawarebarfoundation.org.

At Bat In Bankruptcy Court

Jeffrey M. Schlerf

FOOTNOTES

1. A book was written about the Marvel Entertainment case. D. Raviv, Comic Wars, 2002 (Broadway Books).

2. The top unsecured creditors listed on the chapter 11 petition included various notable MLB players: Manny Ramirez ($21 million), Andruw Jones ($11.1 million), Hiroki Kuroda ($4.5 million), Rafael Furcal ($3.7 million) and Ted Lilly ($3.4 million), plus the Chicago White Sox and famed broadcaster Vince Sculley.

3. Motion of Major League Baseball to Terminate Exclusivity or, in the Alternative, to Compel the Debtors to Seek Assumption or Rejection of the Baseball Agreements, at para. 32.

4. On May 24, 2011, Mr. Stow commenced litigation in California state court against the Dodgers and affiliates and certain unnamed "Doe" defendants, asserting claims for negligence and seeking compensatory and punitive damages.

5. Michael Martinez & Stan Wilson, *What Has Happened to the Dodgers?*, CNN.COM (June 10, 2011), http://www.cnn.com/2011/US/06/09/dodgers_fan.exodus/index_html; Editorial, *True to the Dodgers: The storied franchise of Rickey and O'Malley must be owned by someone other than Frank McCourt*, L.A. Times (Jul. 2, 2011), http://latimes.com/news/opinion/opinionla/la-ed-dodgers-20110702,0,1265931.story); Larry Behrendt, *Frank McCourt Must Go*, IT'S ABOUT THE MONEY.NET (June 21, 2011),http://itsaboutthemoney.net/archives/2011/06/21/commissioner-selig-frank-mccourt-must-go-a-petition.

6. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 3, at para. 30.

7. *Id*. at para 32.

8. Denial was for various reasons, including that McCourt did not shop for better offers for the team's media rights, the advance payment would sacrifice the Dodgers' future, the deal would separate a valuable asset from the team and nearly half of the advance would be used for McCourt's marital obligations, and the deal was only a short-term fix and would prevent the Dodgers would re-valuing the asset for 17 years.

9. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 3, at para. 37.

10. Among other things, MLB would lend on an unsecured basis (i.e., without taking any collateral).

11. Other parties to this proceeding included the unsecured creditors' committee (consisting of Brian Stow; the Major League Baseball Players Association; KABC Radio; plus two trade creditors), the Office of the United States Trustee and Jamie McCourt.

12. In what can only be described as a "Delaware moment", on the Friday afternoon when the opinion was issued, Bob Brady, Delaware counsel to the Dodgers and I crossed paths at – of all places – the local Phillies summer baseball camp. We speculated when the Judge's opinion would be released. The decision hit the docket while I was driving back to the office.

13. The Judge noted the team was "[f]ormerly the Brooklyn Dodgers, the team name is derived from the fans who used to "dodge" that city's trolleys." Memorandum Order, at 1 n. 1 (July 22, 2011).

14. *Id*. at 4.

15. *Id*. at 5.

16. *Id*. at 7. The Court also advised that he expected the League to propose a "short form credit agreement" which was "uncoupled" from MLB's oversight and governance of the Dodgers. Soon thereafter the Dodgers and MLB agreed to such a contract.

17. McCourt had been a commercial developer in New England at the time he purchased the Dodgers in 2004. There was some media speculation at that time that McCourt's motivation for buying the team included a desire to develop what was perceived as valuable land surrounding the stadium at Chavez Ravine in Los Angeles. The subject of McCourt's intentions regarding these non-debtor assets would surface again during the bankruptcy when the team was finally put up for sale.

18. One obvious complication arose from the fact that after the team was purchased, Jamie played a significant role in the operations of the team.

19. What is alleged to have happened is the firm drafting the agreement had created six originals, three of which were what Frank had intended (100% ownership) and three of which reflected that the marital property included the Dodgers.

20. Judge Farnan served as a United States District Court Judge for 25 years, until 2010, in the District of Delaware. He was Chief Judge from 1997 to 2001, during a time when due to the workload of Delaware Bankruptcy Judges (there were only two), the Delaware District Court Judges presided over bankruptcy cases. After his retirement from the bench in 2010, Judge Farnan started his own law firm and, in addition to practicing in the area of patent litigation (in which he had vast experience as a trial judge), he has served as an arbitrator and mediator.

21. There were rumors that reaching a settlement required at least one visit to Wilmington by the Commissioner and McCourt.

22. In an interesting twist, previously Fox had not filed a formal objection to the Debtors' first media rights motion but rather a joinder to MLB's objection. Additionally, Fox had not served discovery earlier. The Dodgers took the position that Fox was not entitled to take any discovery in connection with the upcoming trial on the team's amended motion for approval of marketing procedures. Fox disagreed, serving discovery on, among others, MLB. On December, 22, 2011, Judge Gross ruled that Fox was entitled to discovery from the Debtors related to its motion to dismiss the Debtors' chapter 11 cases.

23. Fox hired a new law firm shortly before trial, which resulted in its Delaware counsel taking a lead role at trial.

24. The Miami Dolphins football team sold for approximately $1 billion in 2009.

25. On January 28, 2013 the Dodgers announced they had reached a 25 year deal with Time Warner involving the team launching its own network beginning in 2014. The deal was estimated to be worth between $7 billion to $8 billion. Bill Shaikin, *Dodgers, Time Warner Cable announce new channel: SportsNet LA*, LATimes.com (Jan. 28, 2013), http://www.latimes.com/sports/dodgersnow/la-sp-dn-dodgers-time-warner-cable-sportsnet-la-20130128,0,1454054.story

26. In a chapter 11 case, the sale of a debtor's assets outside of the ordinary course of business can occur pursuant to Section 363 of the Bankruptcy Code or under a chapter 11 plan. 11 U.S.C. § 363(b)(1). 11 U.S.C. § 1123(a)(5)(D) allows for a chapter 11 plan to include the "sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate. . ." In contrast to the Dodgers' sale, the sale of the Texas Rangers in their bankruptcy was originally attempted through a § 363 sale. Ultimately, however, due to numerous objections raised by creditors, it was accomplished pursuant to a confirmed plan.

27. It was estimated that McCourt would receive almost $1 billion from the sale, even after payment of taxes, legal fees and other obligations, including $131 million paid towards his settlement with his ex-wife.

28. The Bankruptcy Code precludes the Bankruptcy Court from conducting a trial on a personal injury claim without the claimant's consent.

29. The Dodgers had very experienced bankruptcy professionals representing them during the case: Dewey LaBoef as lead counsel, Young Conaway Stargatt & Taylor as Delaware counsel and The Blackstone Group as investment bankers. These professionals were worthy adversaries. In addition to the challenge of getting the sale under the plan consummated by April 30, the lawyers at Dewey LaBoef faced daily stories in the financial press about partner attrition at their firm and its financial instability. There was increasing speculation that the firm itself would soon file for chapter 11. Dewey LaBoef eventually did file for bankruptcy.

30. The bankruptcy may have come to an end after the plan was confirmed, but the McCourts' divorce proceeding continued to make the headlines. In September, 2012, Jamie McCourt filed a motion to set aside the couple's divorce settlement, claiming that Frank McCourt fraudulently misrepresented the value of the Dodgers' franchise.