Fowler Sues White Sox, Sports Facilities Authority Over Injury

By Ed Edmonds

Thursday, June 29, 2017, is a date that Dustin Fowler will never forget. Fowler made his major league debut that evening playing right field for the New York Yankees against the Chicago White Sox in a game at Guaranteed Rate Field. After flying from Syracuse to join his major league teammates, Fowler battled traffic from O’Hare International Airport to arrive at the ballpark about 2 hours and 30 minutes before the scheduled first pitch. The start of game was subsequently delayed for 2 hours and 50 minutes by heavy thundershowers that rolled through Chicago that evening. After the Yankees scored in the top of the first inning to take a 1-0 lead, Fowler took his position in right field. Yankees starter Luis Cessa retired the first two White Sox batters before José Abreu lined Cessa’s third pitch down the right field line. Fowler sprinted towards the ball as it sliced foul towards the seats. The ball eluded Fowler’s grasp, and he crashed into a low wall and nearly flipped into the first row of seats. Unfortunately, he also slammed his right knee into an unpadded, exposed metal box that supports Wi-Fi transmissions. Fowler tried to return to his position. He hopped on his left leg but quickly crumpled to the ground. Yankees manager Joe Girardi, center fielder Jacoby Ellsbury, eventual right field replacement Rob Refsnyder, first base coach Tony Peña, and a member of the Yankees medical staff

Appeals Court Dismisses Ex-Coach’s Defamation Suit Against Attorney

The 11th U.S. Circuit Court of Appeals has upheld a district court’s dismissal of a defamation suit lawsuit brought by former Miami Dolphins Offensive Line Coach Jim Turner against attorney Ted Wells, who led an investigation on behalf of the NFL into the role of Turner in the allegations that Dolphins teammates bullied their teammate, offensive lineman Jonathan Martin.

Wells’ 144-page report suggested that Turner’s “unprofessional conduct played a role in Martin’s struggles.”

But the appeals court found that the Wells report did not defame Turner when describing three specific incidents, as reported by the Dallas Morning News: Turner’s gift of a male “blow-up doll” to an anonymous lineman taunted for supposedly being gay; texting Martin while the-Dolphins lineman Richie Incognito was criticized in the media and accused of bullying; not stopping some of the “sexually crude references” about Martin’s mother and sister.

By way of background, the following was written by Shawn Schatzle, of Havkins Rosenfeld, Ritzert & Varriale, for Sports

See FOWLER on Page 19

See APPEALS COURT on Page 15
Reed Smith Adds Insurance Recovery Partner Richard Giller in Los Angeles

Reed Smith LLP has announced that Richard C. Giller has joined the Insurance Recovery Practice Group as a partner in the firm’s Los Angeles office.

Giller was formerly a principal in the Los Angeles office of Polsinelli, where his practice focused on insurance disputes and insurance recovery with an emphasis on sports and entertainment insurance recovery. He also has a complex litigation and appellate practice.

“Richard is an exceptional fit for Reed Smith,” said David M. Halbreich, Practice Group Leader of Reed Smith’s Insurance Recovery Practice Group. “He is a strong advocate for policyholders and his work with the sports and entertainment industries on loss-of-value and event cancellation insurance is particularly well aligned with the needs of our clients served by our global Entertainment & Media Practice.”

Giller is one of a handful of lawyers in the country representing professional athletes in the NBA, NFL and MLB in insurance recovery matters. Among his clients are Los Angeles Dodgers pitcher Walker Buehler, the team’s first round draft pick in 2015, Mitch Moreland, the first baseman for the Boston Red Sox, Meyers Leonard, center for the Portland Trail Blazers, and Brady Aiken, a pitcher for the Cleveland Indians, among others.

Giller is a 1984 graduate of the University of California at Los Angeles. He has represented both individual and institutional policyholders nationwide in complex business disputes with insurers, and secured substantial defense and indemnity payments for clients under a variety of insurance lines. His representation of professional athletes includes successfully resolving their insurance disputes involving disability, loss-of-value, and workers’ compensation claims.

“I was drawn to Reed Smith because of its well-respected and award-winning insurance recovery practice; perhaps the most acclaimed insurance recovery group in the country if not the world” Giller said. “Just as important though, were the people I met while interviewing at the firm; Reed Smith defines the collegial and entrepreneurial climate in which I thrive.”

In addition to a focus on insurance recovery dispute resolution, Giller counsels clients about their insurance needs and claims; analyzes and advises complex insurance coverage issues; deals with insolvent insurance carriers, retrospective premium disputes, and captive insurance programs; as well as prosecuting and defending insurance coverage and bad faith cases. His general litigation background includes defending complex products liability, environmental and toxic tort cases.

Giller has tried a number of state and federal cases and has substantial arbitration and mediation experience as well as extensive appellate experience, including numerous appearances before several California Courts of Appeal and authoring several amicus briefs filed with the California Supreme Court.

Reed Smith’s Los Angeles Managing Partner Lorenzo E. Gasparetti said, “Our Insurance Recovery attorneys are providing a great deal of the vision and leadership driving our growth in the California market. Richard is well positioned to play a key role in meeting the demands and needs of our clients.”
Aspen Institute Panel Examines Whether Football Is at Risk

By Ellen J. Staurowsky, Ed.D., Professor, Sport Management, Drexel University
Contributing Writer

On Jan. 25, 2018 the Aspen Institute Sport and Society Program hosted a roundtable discussion entitled “The Future of Football: Reimagining the Pipeline” that featured an array of perspectives from panelists representing various sectors of the football community. Representatives included an executive from a football governing body (Scott Hellenbeck, USA Football), former National Football League (NFL) players (Chris Borland, San Francisco 49ers linebacker who left the game after one season; Dominique Forxworth, former president of the National Football League Players Association and writer with ), physicians (Dr. Robert Cantu, Legacy Foundation; Dr. Andrew Peterson, University of Iowa team physician), coaches (Tom Green, athletic director and head football coach, Eleanor Roosevelt High School; Buddy Teevens, Dartmouth head football coach), and a parent (Jennifer Brown Lerner, Aspen Institute). Held in the Aspen Institute’s new offices in Washington, D.C., the timing of the program was contemporaneous to legislators introducing bills in New York and Illinois calling for bans on tackle football in youth leagues and in schools (Associated Press, 2018; Belson, 2018; Kenning, 2018). The New York bill, which at present does not have any co-sponsors, would prevent children ages 13 and under from playing tackle football while the Illinois bill sets an age standard of 12 years.

The primary focus of the program centered on the question of whether allowing youth sport athletes to start playing tackle football at age 14 was a feasible and realistic way to ensure the sport’s future in light of growing awareness regarding the health risks associated with the game. Numerous positions were taken on the issue. Some argued that such a step would alleviate concerns about placing children at risk of harm when their brains are still developing. Pointing out that numerous NFL players (current and former) did not start to play tackle football until they went to high school, there was some sentiment that delayed exposure to the sport would not undermine the ability of players to succeed and for the quality of the game in the elite levels to be served. Others pointed out that, in the absence of a national policy, a determination of age restrictions on a state-by-state basis could potentially create a more dangerous situation as athletes moved up the pipeline to college.

Notably, Forxworth and Borland, the youngest members of the panel and the ones who played the game, both rejected the framing of the question itself. Embedded in the title of the program was an assumption that the pipeline to the game needed to be preserved. While Forxworth did not argue outright for an end to the game, he indicated that he did not expect that he would allow his son to play given the unavoidable toll the game takes on the health of people who play it. He talked about the need to reframe expectations for men in terms of how they express their masculinity and the pressures that boys and men experience in the sport to be “tough” and the penalties associated when accused of being “soft” (i.e., coaches who punish players with more drills when their teams are seen as not being tough enough). He also spoke about the racial dynamics at play and the issues associated with the fact that there are far fewer alternatives for young black males to play sports other than football that provide the social capital, access to upper mobility, and proving ground that football offers. As such, he along with other panelists, pointed out that while the sport is flawed, it ought not to be removed without something of significance to replace it.

Borland, in turn, questioned the fundamental moral basis on which the game is premised, challenging the idea that whatever lessons learned by playing football are exclusive to it and could not be learned by playing other sports or from other activities. Among the panelists, Borland uniquely situated the concern about injuries in football as a public health issue. He commented, “I’m somewhat incredulous that we discuss the reasonability of hitting a 5-year-old in the head hundreds of times. It baffles me.”

Much of the discussion focused on promoting flag football as an alternative at the youth level and developing public policy to facilitate that step. Tom Farrey, the director of the AI Sport and Society Program, indicated that following the program, audience members and participants would be given an opportunity to complete a survey and offer their perspectives on the issues. Based on responses, a report is expected to be issued in the future.

For those interested in the Future of Football: Reimagining the Pipeline program, it can be viewed online here.

References
Contending that it owes them a larger reimbursement for ballpark improvements, the Pittsburgh Pirates are considering legal action against PNC Park’s owner.

The issue between the Pirates and ballpark owner Sports & Exhibition Authority of Pittsburgh and Allegheny County (SEA) is the amount of money that the team is owed for upgrades that were completed at PNC Park prior to the 2017 season. The authority did approve a $2.6 million reimbursement to the team for some of those renovations. However, the Pirates—who say that they spent over $10 million on upgrades before the 2017 campaign—had sought a $4.5 million reimbursement to the team for some of those renovations. However, the Pirates—who say that they spent over $10 million on upgrades before the 2017 campaign—had sought a $4.5 million reimbursement, and contend that they are owed the remaining $1.9 million.

SEA officials believe that they properly followed the due diligence process in making their decision on what was a reimbursable expense, but the Pirates have come out in disagreement. Via team senior vice president Bryan Stroh, the Pirates indicated that they will not rule out taking the authority to court over the issue. More from the Pittsburgh Tribune-Review:

“It’s not a dollar-for-dollar where they seek reimbursement and we pay them,” board Solicitor Morgan Hanson said. “There’s a due diligence process that we’re required to do under the lease to ensure it’s a correct reimbursable expense. That process was followed with the use of several different experts and independent consultants at arriving at this amount. We respect that they have a different view on that issue.”

Stroh said the team would seek the remainder in court if necessary.

“This does not resolve the outstanding capital repairs the Pirates put into PNC Park over a year ago,” he said. “We intend to continue to pursue our rights under the lease.”

The two sides have argued for more than a year over how much the authority was obligated to pay.

The SEA pays for capital improvements through money generated by a 5 percent surcharge on tickets. The Pirates receive the first $1.5 million generated annually by the surcharge and the SEA receives $650,000, authority Executive Director Mary Conturo said. Anything left over goes to the team, she said. About $2.5 million remained in the fund after Thursday’s payment.

Among the upgrades that were completed prior to last season included seating replacements, along with a new out-of-town scoreboard, improved field lighting, and new carpeting and painting in some areas of the facility. SEA owns PNC Park and the Steelers’ Heinz Field, among other area venues.

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A Good Governance Approach to Stadium Subsidies

By Ryan Gauthier, Assistant Professor at Thompson Rivers University in Canada

Publicly Financing a Stadium — Back in the Saddle(dome)

Calgary, Canada, held their municipal elections on October 16, 2017, re-electing Naheed Nenshi for a third term as mayor. What makes this local election an interesting issue for sports, and sports law, is the domination of the early days of the campaign by one issue — public funding for a new arena for the Calgary Flames. The Flames are Calgary’s National Hockey League (NHL) team, and they play in the Scotiabank Saddledome.

The team began play in 1972 as the Atlanta Flames, moving to Calgary in 1980. The Saddledome was built in 1983 to support both the newly-arrived Flames, and Calgary’s 1988 Winter Olympic Games. Today, the Saddledome is the oldest arena in operation in the NHL. Due to its age, and the damage caused by floods in 2013, the Flames are looking for a new home. As is the norm in North America, the Flames have no intention of going it alone, but are seeking a deal with the City of Calgary where the city would subsidize part of the arena. Negotiations have been ongoing for several years, with a few possible sites discussed.

Shortly into the 2017 municipal election campaign, negotiations between Calgary and the Flames broke down. The City of Calgary publicly released their proposal for a $555 million stadium, where the city would effectively subsidize 33% of the stadium through a mix of funding, land, and demolition of the old Saddledome. The team would pay 33% of the costs, and the fans would kick in the final 33% through a ticket tax. The Flames responded by releasing their proposal for a $500 million stadium, where the city would provide 45% of the funding through a ‘Community Revitalization Levy’ (a loan from the province of Alberta, paid off by property taxes on new developments around the arena), with the team providing 55% of the remainder. The difference in costs may be that the Flames’ proposal does not appear to consider the demolition of the old Saddledome. While the team’s proposal has the team paying more costs up-front, it would also see the Flames pay no property tax or rent during their tenure in the new stadium, while keeping all revenue generated by the arena.

Canadian national media praised Mayor Nenshi for not simply capitulating to the demands of the Flames. Print media exhorted taxpayers to “Just say ‘No’” to subsidizing the Flames, and called Nenshi’s re-election “a win for every city blackmailed by a sports team”. The Calgary Flames, and the NHL, were less sanguine, as NHL Commissioner Gary Bettman blamed Nenshi for not getting a new arena for the Flames, and Flames’ management suggesting that the team would have to move. The night of Nenshi’s re-election saw the communications director of the Flames, Sean Kelso, take a more direct stance:

The ongoing dispute in Calgary is emblematic of a larger problem in North America — the public financing of stadiums for professional sports teams.

Public Financing of Stadiums in North America — A General Overview

North American cities have subsidized stadiums for professional sports teams for decades. However, cities rarely simply transfer cash to a team. Instead, more complex mechanisms are used: issuing bonds, tax increases, lotteries, and the use of “eminent domain”.

First, cities may provide money for stadiums through providing bonds to team owners. These bonds are tax-exempt, and are normally used by cities for public improvements. Cities have been able to justify their use for stadiums, and the tax-exempt nature of the bonds lowers the lifetime borrowing costs for a team. Second, cities may simply increase taxes. Cities used to increase property taxes to raise money for stadiums, but local residents began to resent such increases. Today, cities often increase “sin taxes” (e.g., on alcohol, or gambling), or taxes on hotels, in an attempt to move the burden of increased taxation to out-of-town people who won’t be voting in the next municipal election. Third, cities may set up lotteries, in conjunction with the state or province, to raise money for the stadium. Finally, cities may exercise their use of “eminent domain”. This tactic enables cities to condemn the land, with payment of just compensation (which is often not market value) to the original owner, for the furtherance of a “public purpose” (what constitutes a public purpose is broad, following the US Supreme Court decision in Kelo v. City of New London, 545 U.S. 469 (2005)).

After understanding the what, the question remains: why do cities subsidize sports stadiums? Ultimately, there is a limited supply of major-league teams, and cities view being a “major league” city as a benefit. Unlike European professional leagues, where any local team could make it to the top league through promotion, the top leagues in North America are closed leagues, currently limited to 30-32 teams in the “big four” leagues. Cities that want to be home to a professional team must convince a league to expand, placing a new team in their city (as Las Vegas recently did with the NHL), or convince an owner of an already-existing team to relocate (as Las Vegas has done with the National Football League’s Oakland Raiders). One way to encourage expansion or relocation is to offer a subsidized stadium. It can be argued that these tactics are no different than a city offering a subsidy to convince a company to establish...
or relocate an office — like what is happening with Amazon right now — except for the scale of the subsidy.

Boosters of stadium subsidies have argued that cities should be happy to have sports teams, as the teams will generate an economic boost. They claim that the team, and their new stadium, will increase local income, employment rates, property values, and the well-being of citizens. However, economists have generally debunked these claims. While there are examples of successful stadiums, they are generally not as successful as predicted, often not worth the costs, and the few successes are drowned out by every other instance where the economic impact was not realized (sort of like hosting the Olympic Games or FIFA World Cup).

**Proposed Legal Solutions to Halt Public Financing of Stadiums**

Given the lack of economic benefits generated by stadiums, particularly given the hundreds of millions of dollars of subsidies granted to each stadium, legal scholars have proposed legislative, regulatory, and judicial solutions to halting this gravy train.

In regards to legislative solutions, Canada and the United States could follow the model of the European Union (EU). The EU has restrictions on government assistance to private industries, to prevent the distortion of competition across the EU — these are known as the “State Aid” rules, found in Art. 107 of the Treaty on the Functioning of the European Union. In practice, the EU has an uneven history of applying the State Aid rules to sport. However, it has shown more enthusiasm over the past year to find evidence of state aid that is incompatible with the Treaty, including in a case that involved a questionable deal involving land next to Real Madrid’s Bernabéu Stadium. However, legislative solutions are unlikely to be enacted by either the American Congress or the Canadian Parliament (or local legislative bodies). There appears to be no interest to do so, and why would there be? Politicians can benefit from new stadiums by working with business elites who support the stadiums, and the evidence of repercussions at the ballot box appear to be mixed.

Some legal scholars have suggested regulatory or judicial solutions, such as: halting the tax-free status of municipal bonds, ending the use of eminent domain to obtain land for stadiums, and advocated a stronger role for antitrust oversight over the conduct of teams and leagues in this regard. However, courts have construed

See A GOOD on Page 7
A Good Governance Approach to Stadium Subsidies

Continued From Page 6

these particular laws broadly enough to allow the public financing of stadiums to continue.

A Good Governance Approach to the Public Financing of Stadiums — Atlanta Braves Case Study

When even Calgary’s stance, which had the city subsidizing at least 1/3 of the stadium, is considered brave, it seems reasonable to presume that publicly-subsidized stadiums will continue apace in North America. As such, it may be more helpful to consider what happens after a stadium project is proposed. Applying a good governance approach to stadium financing could be a helpful way forward. If stadiums are going to be built, regardless, then it is best to make those who build stadiums — governments and teams — accountable to the taxpayers and fans.

Good governance principles have been increasingly applied to the organization of sport — particularly the governance of international sporting organisations. While good governance can be defined in a myriad of ways, it is often broken down to particular principles. In examining stadium projects, I suggest that four principles should be considered: transparency, public participation, solidarity, and review. These principles closely track those used by the Sports Governance Observer.

One recent stadium project seems to have studiously avoided all of these principles entirely — in a way that demonstrates the need for these principles to be applied in the first place. This project took place in the Calgary Flames’ old home of Atlanta, USA.

In 2013, the Atlanta Braves announced that they were leaving their current stadium in downtown Atlanta. They weren’t moving to a new city, but were moving 32 kilometres north to the suburb of Cobb County. The reason for the move? A brand new, publicly-financed stadium. The Atlanta Braves had played at Turner Field since 1997. Not even twenty years later, the stadium, originally built as the centrepiece of the 1996 Summer Olympic Games, was deemed to be obsolete by the Braves. Enter Cobb County. To pay for a new stadium for the Braves, Cobb County issued $368 million in municipal bonds (originally estimated at $276 million). The Braves, in chasing public money, bucked the trend of teams moving closer to the city centre, as suburbs are not conducive to stadiums.

While the rationale and the dollar figure should raise some eyebrows, the process used to secure funding for the stadium should be deeply disturbing to fans of democratic processes. The deal itself was negotiated in secret between a single Cobb County commissioner, and the Atlanta Braves. The president of the Atlanta Braves, John Schuerholz, stated that if news of the deal “had leaked out, this deal would not have gotten done...If it had gotten out, more people would have started taking the position of, ‘We don’t want that to happen. We want to see how viable this was going to be.’” Eventually, the deal needed to be voted on by Cobb County commissioners. At the public vote held in May 2014, only twelve speaking slots were available to the public. Stadium supporters had lined up by 2pm for the 7pm meeting, and the Commissioners denied any additional speaking slots. The same Commissioners voted 5-0 to fund the stadium. Opponents of the stadium filed a suit in the Georgia courts, alleging that the bonds used to finance the new stadium violated the Georgia state constitution, and various state laws. However, the opponents were defeated in the courthouse, too, as the Georgia Supreme Court upheld the validity of the bonds as they provided at least some plausible public benefit. The stadium opened in 2017 to positive reviews from fans and ballpark enthusiasts.

In examining the Atlanta Braves new ballpark by applying principles of good governance, the results are discouraging. Transparency was almost non-existent throughout most of the process, as the deal was completed in secret, as admitted by the president of the team. Public participation was curtailed throughout the process, and most galling, at the eve of the final vote on the funding. There have been no solidarity benefits that have come to the forefront, although it should be noted that it is possible that money that was raised to pay for public parks was diverted to funding the stadium, which cuts against the idea of solidarity benefits. Finally, there will likely be no post facto review of the stadium and any attendant benefits it may claim. While there was review of the deal itself through the courts, the Georgia Supreme Court noted that “we do not discount the concerns Appellants have raised about the wisdom of the stadium project and the commitments Cobb County has made to entice the Braves to move there. But those concerns lie predominantly in the realm of public policy...”.

The Value of Good Governance Principles in the Stadium Debate

The case of Atlanta demonstrates the importance of good governance in the public financing of stadiums. Proponents, critics, and scholars can apply these principles to evaluate and engage in more thoughtful debates over the processes of public financing of stadiums. Since stadiums are likely to receive public funding, regardless of the merits, a better process should improve the benefits to the public, while constraining the costs.

Applying principles, as opposed to enacting legislation, may...
Hawks Name Leftwich Salary Cap VP

The Atlanta Hawks Basketball Club has hired veteran NBA executive Michelle Leftwich as Vice President of Salary Cap Administration, the team announced last month.

In this role, Leftwich will assist and advise Hawks General Manager and Head of Basketball Operations Travis Schlenk with all aspects of the league’s salary cap rules, as well as player contract planning matters.

“Michelle’s expertise and knowledge of the CBA and its complexities will be a great asset to the Hawks,” Schlenk said. “She is widely respected throughout the NBA and brings a tremendous amount of institutional knowledge that will benefit our organization.”

Leftwich joins the organization after 21 years at the league office, including the last 10 years as NBA Vice President and Assistant General Counsel, where she assisted Rick Buchanan, NBA General Counsel, and Dan Rube, NBA Deputy General Counsel, with a variety of legal matters. Her broad duties at the NBA involved salary cap and player contract matters, collective bargaining with the players’ union, player trade approvals, and operation of the CBA’s escrow and tax system.

Prior to joining the NBA in 1996, Leftwich worked for the New York law firm formerly known as Paul, Hastings, Janofsky & Walker. A native of Buffalo, N.Y., she received her Bachelors of Science degree in Accounting from Canisius College and her Juris Doctor degree from New York University School of Law.

Stadium Subsidies

Continued From Page 7

lead the reader to ask “can these principles be enforced?” In terms of traditional legal enforcement, namely recourse to a regulatory body or a court, a city would probably need to implement these terms into a Memorandum of Understanding with the team. For principles such as solidarity, particulars could be written into the final funding agreement. This has been done, for example, with the Community Benefits Agreement implemented between the City of Edmonton, and the Edmonton Oilers hockey team, for a publicly-subsidized stadium that opened in 2016.

However, even if the city itself refuses to implement these principles, they do provide a framework to hold decision-makers to account. In instances where the government has done wrong by the citizens, but there are no judicial remedies, the remedy is then to vote the government out. In establishing these principles, they then provide standards by which the government can be held to account, if not formally, then at least through the ballot box.

Baseball’s Economic System Now Favors the Owners

By Jordan Kobritz, Esq.

If you think this winter has been a cold one, it’s been even colder for a majority of MLB free agents. When the first training camps opened on February 13, more than 80 players, including five of the consensus top 10 free agents, remained unsigned, many of them wondering if they’ll have a job this season.

Whether owners have shied away from the free agent market or players have priced themselves out of work depends on whom you ask. A number of unscientific theories have been advanced to explain the stalemate, including: a less talented group of free agents this year; the loss of draft-picks as compensation for signing players who were offered one-year contracts by their prior teams; formerly free-spending clubs – the Dodgers and Yankees among them – sitting on the sidelines, hoarding their resources for the star-studded group of free agents anticipated next year; the financial benefits of staying under the competitive balance tax – also known as the luxury tax–this year; and the dreaded “C” word: collusion.

There were exceptions to the inactive market, most notably the six-year, $126 million contract given to Yu Darvish by the Cubs just days before camps opened. Because he was traded during the 2017 season, Darvish wasn’t subject to the compensation rules. Darvish’s contract fell short of the 7-year, $217 million deal to pay for quality, analytics show that in many cases younger players can provide as much, if not more, production as free agents at a much lower cost.

Not surprisingly, MLB Commissioner Rob Manfred favored the “free market” view. “Drawing lines in the sand based on a perception that your market value is something different than what the market is telling you your value is, that doesn’t make a lot of sense,” Manfred said. “It is a fact that markets dictate value. Values are not dictated by big, thick, three-ring binders and rhetoric about who’s better than whom. They’re dictated by markets. That’s the system we negotiated.” Manfred’s reference to “big, thick, three-ring binders and rhetoric” was a not-so-subtle jab at uber-agent Scott Boras who, as usual, represents a majority of the big names in this year’s free agent market.

The unrealistic nature of Hill’s comments are in sharp contrast to the realism exhibited by the Oakland Athletics’ Brandon Moss. In an interview with the MLB Network, Moss said the players’ union has to take responsibility for the balance of power that has obviously tilted greatly towards ownership. “It’s our own doing,” said Moss. “These past two collective bargaining agreements…I think that we have given the owners…who are very, very business savvy, a very good opportunity to take advantage of a system that we have created for ourselves…We have the right to bargain and set our price just like the owners have the right to meet that price.”

After Moss made his comments, and before spring training games got under way on February 23, there was a flurry of free agent signings, including two monster deals. The San Diego Padres signed first baseman Eric Hosmer to an eight-year, $144 million contract. That was followed by a five-year, $110 million contract agreed to between the Red Sox and J.D. Martinez, a deal that had been speculated to happen since free agency began in October. Despite those late moves, Moss couldn’t have said it better. The players have ceded the higher ground to the owners by allowing the balance of power to shift from the union to management.

Marvin Miller, the first executive director of the MLBPA, would be aghast at the direction the union has taken in recent times. Under Miller, the union was primarily focused on economic issues – salaries, pensions, arbitration and free agency. When Miller came on board in 1967, the average player salary was $19,000. Today, the average player salary was $19,000. Today,
Baseball's Economic System Now Favors the Owners

Continued From Page 9

it exceeds $4 million.

Don Fehr succeeded Miller and Michael Weiner assumed the reins of the union after Fehr retired in 2009. Tony Clark took over as executive director in 2013 after Weiner’s tragic death from brain cancer. Miller was an economist, Fehr and Weiner lawyers. Clark is a former player who enjoyed a 15-year career playing for six different teams. His economic, financial and legal background is limited to participating in union activities during his playing days. Clark vowed to represent the players’ wants and needs and today’s players value “personal comforts,” like off-days during the season, above economic issues. Or at least they did, until this off season.

In fairness to Clark, the players’ percentage of league revenue began shrinking before he negotiated his first CBA in 2016. Despite an increase in average player salary, their overall cut of MLB revenues shrunk significantly between 2002 and 2014, from a high of 56 percent in 2002 to 38 percent in 2014. Baseball players now receive the lowest percentage of industry revenues in the four major league team sports.

Where do the parties go from here? The current CBA doesn’t expire until after the 2021 season. While prior CBA’s have been renegotiated on a number of occasions, most notably to address areas related to drug testing and rule changes, it’s doubtful the owners, after years of watching the union outmaneuver them at the negotiating table, will be willing to reopen an agreement that currently gives them the upper hand in financial matters. Unless the rhetoric on both sides subsides, we could have a prickly relationship between the parties for the next four years followed by the possibility of a work stoppage for first time since the 1994 strike.

Jordan Kobritz is a former attorney, CPA, Minor League Baseball team owner and current investor in MiLB teams. He is a Professor in and Chair of the Sport Management Department at SUNY Cortland and maintains the blog: http://sportsbeyondthelines.com. The opinions contained in this column are the author’s. Jordan can be reached at jordan.kobritz@cortland.edu.

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Greenberg Glusker has announced that Douglas E. Mirell has joined the firm as a partner in the firm’s litigation group.

Mirell will continue his corporate and business litigation practice working with companies and individuals in media, entertainment and sports on First Amendment, invasion of privacy and defamation claims; publicity rights disputes; anti-SLAPP motions; copyright and trademark infringement actions; new and traditional media law issues; enforcement of civil rights statutes; voting rights litigation; freedom of information, public records and other government access statutes.

“We are proud to have an attorney of Doug’s stature and reputation join our firm,” said Greenberg Glusker’s Managing Partner Bob Baradaran. “We always welcome attorneys who are best in class in their fields as well as those who live the values of our firm by representing clients who uphold First Amendment values and who work to ensure equal access to justice.”

Mirell has held several leadership positions during many decades of service on the boards of directors of both the ACLU and ACLU Foundation of Southern California. From 2005-2011, he served as a City-appointed Commissioner of the Los Angeles Homeless Services Authority, including terms as its Chair and Vice-Chair. Mirell was a founder of the California-based Progressive Jewish Alliance and a founding board member of its national successor, Bend the Arc: A Jewish Partnership for Justice.

He has taught Constitutional Law (First Amendment) at the USC Gould School of Law and Legal Journalism at Loyola Law School. Mirell has also undertaken pro bono litigation on behalf of the ACLU Foundation of Southern California, Mexican American Legal Defense and Educational Fund, Asian Pacific American Legal Center of Southern California, Society of Professional Journalists, Jewish Family Service of Los Angeles, Bet Tzedek Legal Services and Public Counsel.

“I have long admired the attorneys at Greenberg Glusker, and consider many of them my friends,” said Mirell. “My practice and clients will feel at home here.”

Because of his prominence in the entertainment industry, Mirell was instrumental in providing the legal analysis that helped win passage of two important pieces of California legislation affecting the rights of celebrities in the entertainment community: Senate Bill 771 (2007), authored by former State Senator Sheila Kuehl, which clarified that the statutory post-mortem right of publicity applies to those celebrities who predeceased that law’s original effective date of Jan. 1, 1985; and Senate Bill 606 (2013), authored by State Senator Kevin de León, which significantly enhances the criminal penalties and creates a new civil remedy for the harassment of celebrity children under the age of 16 caused by the conduct of aggressive paparazzi.

Before co-founding Harder Mirell & Abrams LLP in January 2013, Mirell was an attorney with the international law firm of Loeb & Loeb LLP for 32 years, and a partner in the litigation department of its Los Angeles office since 1987.

About the Firm’s Work in the Sports Industry

Greenberg Glusker’s Sports Group represents professional sports franchises, athletes and sports-related businesses. The Group is comprised of skilled attorneys from multiple practice groups within the firm, including: Bankruptcy, Corporate, Entertainment, Emerging Technology & New Media, Employment, Intellectual Property, Litigation, Real Estate, Taxation, and Trusts & Estates. The firm has particular expertise in handling the financing and construction of new stadiums and sports arenas.

Representative engagements for Greenberg Glusker’s Sports Industry Group include the following:

• Serve as lead counsel on the $2 billion sale of the Los Angeles Clippers professional basketball franchise to Steve Ballmer
• Represent the Oakland Athletics professional baseball franchise in the acquisition and development of approximately 140 acres of land for a new baseball stadium and entertainment and residential project to be located in Fremont, California
• Represent Tyus Edney, 14-year NBA and international professional basketball player, starting point guard for 1995 NCAA basketball champion UCLA Bruins, UCLA Athletics Hall of Fame and PAC-12 Hall of Honor Member and current Director of UCLA Basketball Operations
• Represented the Los Angeles Kings professional hockey franchise in various business matters
• Represented Wayne Gretzky in connection with the Phoenix Coyotes professional hockey franchise Chapter 11 bankruptcy case
• Advise San Jose Earthquakes professional soccer franchise in the construction of their $90 million stadium
• Represented Chicago Fire professional soccer franchise in connection with the design and construction of its VIP club
• Served as special counsel to the Los Angeles Coliseum Commission as to CEQA and related regulatory matters in its negotiations with the National Football League
• Represented Wayne Gretzky in connection with a consumer goods joint venture, including negotiation of joint venture agreements, secured financing agreements and license/endorsement agreements
• Represented professional baseball player Alex Rodriguez in various busi-

See GREENBERG on Page 12
Study Finds Inebriation at Sporting Events Is Growing

In many western countries, public concern about violence and other problems at sporting events has increased. Alcohol is often involved.

Research shows that approximately 40 percent of the spectators drink alcohol while attending U.S. baseball and football games, especially when alcohol is served within the arenas themselves. Alcohol-related problems can be compounded at large sport stadiums that hold tens of thousands of spectators. This study examined occurrences of overserving at licensed premises both inside and outside the arenas, and allowing entry of obviously intoxicated spectators into the arenas.

To determine the level of overserving and inappropriate entry, trained professional actors portraying individuals who were “obviously” intoxicated visited licensed premises inside and outside sporting arenas, and attempted to gain entrance to the arenas. The settings were three arenas hosting matches in the Swedish Premier Football League that were held in the largest and second-largest cities in Sweden. The scenarios were developed by an expert panel, and each attempt was monitored by observers who assessed the rate of denied alcohol service and denied entry to the arenas.

Overserving and allowing entry of “obviously” intoxicated spectators were frequent at these sporting events. The rates of denied alcohol service were only 66.9 percent at licensed premises outside the arenas (101 of 151 attempts), and 24.9 percent at premises inside the arenas (59 of 237 attempts). The rate of denied entry to the arenas was only 10.8 percent (11 of 102 attempts). The authors noted that the variation in server-intervention rates could reflect a lack of training in responsible beverage service among serving staff at licensed premises inside the arenas as well as entrance staff. This lack of training could contribute to unacceptably high intoxication levels among spectators and contribute to increased alcohol-involved problems within the arenas in Sweden. These findings have implications for alcohol consumption at sporting events in other countries as well, including the United States.

Greenberg Glusker Hire of Sports Law Attorney Mirell

Continued From Page 11

ness matters

- Represented the World Boxing Council in various business matters
- Represented Major League Baseball player Pete Rose in various business matters
- Represented professional tennis stars Pete Sampras and Lindsay Davenport in various business dealings
- Represented Olympic gold medalist and World Champion boxer Oscar De La Hoya, as well as his boxing company Golden Boy Promotions, in a variety of matters including business acquisitions, strategic alliances and grants of equity interests to boxers and key executives
- Represented All American Heavyweights/King Sports Worldwide in connection with multimillion-dollar offering to pursue boxing promotion business and related corporate, employment and real estate activities
- Represented OPI Products in connection with its sports-related lines of products and endorsements, including professional athletes Serena Williams and Danica Patrick
- Represented sports clubs in raising capital and counsel for an online athletic recruiting platform on capital raising
- Represent players in connection with tax advice regarding foreign real estate investments
- Represented an Olympic gold medal figure skater in connection with his involvement in the production and staging of a professional figure skating touring company
- Represent numerous professional athletes in connection with estate plans, premarital agreements and wealth transfer planning
- Represented Fox Sports regional sports network in complex litigation against TBS and Time Warner arising out of breach of non-compete agreement with respect to the cable distribution of regional sports programming in the Southeast region of the country
- Represent Total Golf Adventures for intellectual property counsel and endorsement/sponsorship deals
- Represent OnDeck Digital, a media company owned by a former professional baseball pitcher
- Represented one of the largest golf course owners in the United States in the disposition of a portfolio of golf courses in South Carolina for a purchase price in excess of $50 million
- Arranged sponsorship deals for motorsports events
- Advised companies and executives in the martial arts business
- Served as real estate counsel to Antonio Esfandari, one of the world’s top poker players
- Represented The Sports Club/LA in a series of credit facilities, totaling approximately $80 million, in connection with the refinancing of its health clubs in Southern California and eventually in its sale to Equinox
Examining the Legal Consequences of a Research Study that Shows CFL Players Hiding Concussion Symptoms

By Jon Heshka, Associate Professor at Thompson Rivers University (British Columbia, Canada)

The legal challenges facing former Canadian Football League (CFL) players in their lawsuits may have got even more formidable.

In a study published in January 2018, it was found that nearly eight in 10 football players who competed in the CFL in 2015 believed they had suffered a concussion and did not seek medical attention. Eighty-six of the 309 (27.8 percent) respondents who had played in the CFL during the 2015 season believed they had suffered a concussion during that season and 79.1 percent (68/86) did not seek medical attention during a game or practice.

The study was done by the McGill University Health Centre and endorsed by the Canadian Football League and the Canadian Football League Players’ Association. The study involved a questionnaire being sent to all nine teams and distributed to players by each team’s head trainer/therapist. There were 512 players on the CFL’s 2015 opening-day rosters and, due to player turnover, 662 players participated in at least one game over the course of the 2015 season. Four hundred and fifty-four respondents who had played in the CFL in 2015 believed they had suffered a concussion and did not seek medical attention.

The most common (48.8 percent) reason cited for “hiding” a concussion was that the player did not feel the concussion was serious/severe and felt he could continue playing with little danger to himself. Some 41.9 percent said they felt that they would be removed from the game by medical staff and didn’t wish for that to happen, 39.5 percent were fearful that being diagnosed with a concussion would result in missing future games or practices, 33.7 percent were fearful that being diagnosed with a concussion would affect their standing with their current team or future teams and 20.9 percent were fearful that being diagnosed and labeled with a concussion could affect their financial income now or in the future.

These results have the potential to diminish the veracity of the claims of retired CFL players who allege that they didn’t know about concussions or appreciate their risks.

It doesn’t take away, though, from other elements of the claims in various lawsuits wherein retired players allege that the CFL knew of the long-term harmful effects of concussions and actively concealed these facts, that the league breached its duty to take all reasonable and prudent steps to protect players’ health concerning concussions and failed to warn players of the long-term medical risks associated with repetitive head impacts, and that the league negligently misrepresented the science respecting concussions in order to induce players to play football.

It does, however, call into question the extent to which the teams and league are in a position to protect players who do not wish their protection. Without players honestly disclosing signs and symptoms to team medical staff, the team’s capacity to diagnose and treat brain injury is compromised.

Whereas current established practices in the NFL (CFL concussion protocols are not as robust) include unaffiliated neurotrauma consultants, spotters, team physicians, the blue injury assessment tents, and modified versions of the Maddocks questions and Sport Concussion Assessment Tool (SCAT 5), the starting point in concussion diagnosis and treatment is arguably in the players honestly self-reporting how they’re feeling after a hit (suspicious or otherwise) and suspected concussion.

Neurologists and physicians are trained and qualified to ascertain whether or not a player suspected of sustaining a concussion actually has one, but concussions need not be triggered by a violent blow to the head. Instead, there are myriad reasons why a less severe hit may result in a concussion, including the brain not having fully recovered from a previous concussion or the cumulative effect of many prior sub-concussive hits. So, it is difficult, if not impossible, for it to always be detected and therefore treated unless it is first self-reported.

The reasons cited for injured players not reporting that they’d been concussed (fear of being taken out of the game, fear of missing future games, fear of loss of current or future income) is, in a sense, understandable in leagues where non-guaranteed contracts motivate and incentivize players to squeeze everything they can out of their contracts and consequently play hurt. This can only be addressed through collective bargaining between the league and the players’ association.

There has been tremendous progress made and light shone on concussion prevention, diagnosis, treatment and return to play protocols in collision sports like football and hockey. Advancements in technology and rule changes have reduced the severity and frequency of sports concussions.

The McGill University research which clearly shows the extent to which players hide concussions also shows professional football is not out of the dark yet.

It bears repeating that this study was specific to players competing in the Canadian Football League. In 2017 the Court of Appeal for British Columbia in et al. 2017 BCCA 186 upheld a judgment of the Supreme Court of British Columbia which dismissed a CFL concussion lawsuit holding that the disputes raised by Bruce arose from the 2014 Collective Agreement and can only be resolved through the grievance and arbitration process. The courts declined to look at the merits of the case. Bruce has filed an application for leave to appeal to the Supreme Court of Canada.

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Revisiting Intersection of Pro Football and Class Actions

By Scott P. Jang of Jackson Lewis PC

First, Deflategate. Now, “Ticket-gate?” Stirring in the United States District Court, Northern District of Ohio, a putative class action takes aim at an unsafe football field, a cancelled preseason game, and over a million dollars in alleged consumer class damages. The case is Herrick v. National Football League, et al. (N.D. Ohio, Case No. 5:17-cv-00472-CAB).

The Allegations
The 2016 Pro Football Hall of Fame preseason game between the Green Bay Packers and Indianapolis Colts was scheduled to take place on August 7, 2016. But due to compromised painting of logos and other markings on the turf, the field was deemed unsafe and unplayable. That call, and the related call to scrap the game entirely, was made, according to filings in the case, at 5:00 p.m. on the day of the game. Fans attending the game, however, were allegedly intentionally kept in the dark and were not informed of the game’s cancellation until three hours later. In the meantime, fans purportedly were ushered into the stadium and encouraged to buy food, drinks, and merchandise. Plaintiff, on behalf of himself and “thousands” of putative class members, now seeks to recover not only the cost of the tickets, but also related out-of-pocket inciden-tals, such as travel and lodging expenses.

Class Certification
On January 15, 2018, Plaintiff moved for class certification. As framed in the motion, the question of liability on the sole claim for breach of contract might not be the main hurdle; rather, the central issue will be whether the class can proceed as a damages class under Federal Rule of Civil Procedure 23(b)(3). Under the U.S. Supreme Court’s decision in Comcast Corp. v. Behrend, 569 U.S. 27 (2013), to proceed as a damages class under Rule 23(b)(3), while a plaintiff’s class damages model may be an approximation, it still must be firmly tethered to the theory of injury. Id. at 35.

So how does Plaintiff’s damages model purport to do so? According to Plaintiff’s expert, Dr. Justine Hastings, it’s all in available records. Ticket damages? According to Dr. Hastings, Defendant’s revenue data and secondary market statistics can approximate ticket costs. Traveling expenses? According to Dr. Hastings, ticket holders’ zip codes can predict the likely mode of travel and associated travel costs for individuals. And lodging expenses? According to Dr. Hastings, ticket holders’ zip codes and the average hotel rate in the area ($289/night) can be used to quantify lodging expenses.

Time will tell whether this secures certification of a damages class under Rule 23(b)(3).
Appeals Court Dismisses Ex-Coach’s Defamation Suit Against Attorney

Continued From Page 1

Litigation Alert three years ago.

Turner commenced the defamation action in 2015 against Wells in the United States District Court, Southern District of Florida. The suit also named prominent law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP, where Wells is a partner, as a defendant.

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

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

Notably, the Wells report determined that the assistant trainer, an Asian-American, was repeatedly the target of racial slurs and other derogatory language. The unnamed offensive lineman — referred to as Player “A” in the report — was found to have been the victim of frequent homophobic name-calling. Martin, an African-American, was said to have been ridiculed with racial insults, as well as sexually explicit remarks about his mother and sister.

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

During the 2012 holiday season, Turner gave the offensive linemen Christmas stockings, all of which were stuffed with inflatable dolls. All of the players received female dolls, except Player “A,” who received a male doll. Up to that point, the young

See APPEALS COURT on Page 16
offensive lineman was often referred to as a homosexual by the other players, although he was a heterosexual. During his interview for the investigation, Turner stated that he “could not remember” whether he purchased a male doll for Player “A,” according to the report, despite corroboration from multiple players.

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

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

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

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

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

Turner’s complaint contains numerous attempts to explain or clarify his uncontro-
Appeals Court Dismisses Ex-Coach’s Defamation Suit Against Attorney
Continued From Page 16

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

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

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

When a claim of defamation is asserted by a public figure, it must be shown that the statement was made with “actual malice”; that is, “with knowledge that it was false or with reckless disregard of whether it was false or not.” New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964). “Reckless disregard” requires that the defendant “in fact entertained serious doubts as to the truth of his publication.” St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

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

Turner will therefore be facing an arduous task in proving defamation as against

See APPEALS COURT on Page 18
Appeals Court Dismisses Defamation Suit

Continued From Page 17

Wells. He was arguably a limited purpose public figure in light of his involvement in what was a national story at the time. This would impose a requirement that he prove that Wells had “actual malice,” which does not appear to exist. Even if Turner were to avoid a public figure designation, there are strong indications that the statements and conclusions set forth in the Wells report were not false.

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

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

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

Red Sox Extend Safety Netting at Spring Facility

The Boston Red Sox have extended the netting at JetBlue Park, the facility it uses for spring training.

Reportedly, the netting will extend past both dugouts, cover the infield areas of play and approach the outfield. Installation will be completed before the team opens its spring training season with an exhibition doubleheader against Northeastern and Boston College on Feb. 22.

The nets will rise 12 feet, 8 inches above the field, and be painted “field green” to minimize the impact to sightlines. In a press release, the Red Sox noted that they would be willing to move season ticket holders who are displeased with the development.

“We have notified season ticket holders of the netting extension and attempted to design and engineer a system that offers optimal visibility for the viewing experience,” said Katie Haas, Red Sox Vice President of Florida Business Operations.

Talk about Jenner & Block

Legal 500 US – Top Tier Copyright Practice in United States
Recognized as one of only five firms garnering Tier 1 recognition in the nationwide Copyright category in 2017; the firm was also ranked in the nationwide Media and Entertainment and Telecoms and Broadcast categories

Chambers USA – Leading Media & Entertainment Practice
Twice named the No. 1 media and entertainment law firm in the United States with 9 partners recognized in 2017 among the country’s best practitioners, and practice rankings in California, Illinois, New York and Washington, DC

Law360 – Practice Group of the Year; Media & Entertainment

Variety – Legal Impact Report
4 different partners named to Variety’s “Legal Impact Report” in 2017

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all rushed to Fowler’s aid along the right field line. Girardi signaled for the cart to take Fowler from the field. He was taken to Rush University Medical Center where White Sox team physician Dr. Charles A. Bush-Joseph performed the operation to successfully repair the player’s ruptured patellar tendon. Fowler’s season was over before he even had a chance to bat at the beginning of the next inning.

Girardi was obviously shaken by the incident – “I was in tears, actually . . . I’m still in disbelief. I’m in tears for the kid. I know he’ll fight and get back here, but he’s out for a while and he has to go through a long, grueling rehab. It just doesn’t seem fair.”

Fowler, one of the Yankees top prospects, was upbeat after the surgery: “Everything is as good as it can be right now,” Fowler told the . “The surgery went well. That’s always a plus. I’m just going to take it day to day right now. It ruptured, but they were able to put it back in place and there wasn’t any other issues, so they said it’s going to be a pretty positive recovery. They said I’d be out for about four or five months and then be ready for the spring.” The Yankees, however, in search for additional pitching strength as they battled for a playoff position during the second half of the season, traded Fowler and minor leaguers James Kaprielian and Jorge Mateo on July 31, barely a month after the injury, to the Oakland Athletics for Sonny Gray and international bonus slot money.

After reflecting on the circumstances surrounding his unfortunate injury, Fowler ultimately decided to file a negligence lawsuit against the Illinois Sports Facilities Authority, the state governmental agency that is responsible for Guaranteed Rate Field, and the Chicago White Sox. The complaint was filed on December 15, 2017, in Cook County Circuit Court. Fowler is represented by John Bailly of Bailly & McMillan, LLP, in White Plains, New York, and Michael J. Sorich of the Cavanagh Law Group in Chicago (Local Rule 707 Counsel).

Fowler’s counsel asserted in the complaint that “the exposed box was positioned at a hazardous location between the padded right field wall and the padded rail, at the player’s knee level” creating “an extremely hazardous condition hidden from the player’s view.” This was particularly significant in Fowler’s situation because Guaranteed Rate Field is not his home ballpark. As a rookie in his first game at the stadium, he had a limited opportunity to discover any unusual aspects of the playing field. The complaint does not specifically discuss any changes in normal playing condition based upon the rain that delayed the start of the game and an analysis of the video of the incident and the commentary of the announcers does not indicate that Fowler’s injury was impacted by a slippery surface.

Fowler’s minor league career presents another interesting factual scenario surrounding his injury – Fowler’s minor league experience during the 2016 and 2017 season was primarily as a center fielder. Fowler played 70 games for the Scranton/Wilkes-Barre RailRiders before his promotion to the Yankees on June 29, the day of his injury, in a number of roster moves by the Yankees. Fowler primarily played center field (40 games) for the RailRiders, but he did play 14 games each in both left and right field. He played 119 of his 132 games for Trenton in 2016 in centerfield. Thus, Fowler’s chief concern involved the center field wall behind his normal playing condition and not the possibility of running into any obstructions in foul territory as he was sprinting towards a line drive in foul territory. As with the conditions of the field, counsel did not raise these factors in the complaint.

Ultimately Fowler’s counsel claimed that “as a result of the negligent, grossly negligent, reckless, willful and wanton conduct of the Defendants” Fowler “sustained past lost earnings and potential future lost earnings, pain and suffering and medical expenses.” The complaint does not quantify the amount of the lost earnings or medical expenses endured by Fowler. Typically, when a major league baseball player is injured during the course of a game, the medical expenses for surgery and the cost of rehabilitation are covered by the team. Fowler was placed on the 10-day disabled list on June 30. The following day, he was transferred to the 60-day disabled list. In both instances, he was listed as a center fielder. Fowler accumulated 0.095 years of service time over the course of the remainder of the 2017 season.

In paragraphs 25 and 33 of the complaint, Fowler’s attorneys listed six factors that contributed to either negligence, gross negligence, or recklessness by the Illinois Sports Facilities Authority and the Chicago White Sox. The most telling of the six assertions appears to be the final one – “(f) In failing to pad, guard, cover and/or protect the exposed box in any way, with knowledge that it was foreseeable that persons such as Plaintiff would come into contact with the walls at high rates of speed,” the two defendants “engaged in a course of action indicating an utter indifference to or conscious disregard for the safety of the Plaintiff.”

A similar case involving the Yankees and White Sox took place on June 13, 1975. Center fielder Elliott Maddox injured his right knee while fielding ball and attempting to throw the ball back to the infield. Unlike this case, the incident happened in New York instead of Chicago, but Maddox’s injury, like Fowler, cost him the remainder of the 1975 and much of the following season. The Yankees were playing in the Shea Stadium, their temporary home park, while Yankee Stadium was being renovated. The previous night’s game had been cancelled due to rain and standing water. The wet conditions still existed, and Maddox mentioned this to his
Fowler Sues White Sox, Sports Facilities Authority Over Injury

Continued From Page 19

manager and the ground crew, but he still agreed to play in the game.

Maddox sued the City of New York and the Thomas Crimmins Contracting Company in New York state courts. Thus, the case was tried in New York and not Illinois, so it is not a precedent with much authority in Fowler’s lawsuit. Over a decade later in 1985, the Court of Appeals of New York determined that Maddox assumed the risk as a matter of law by playing on the wet surface and the case against the defendants should have been dismissed on a summary judgment motion. The Court of Appeals rendered its opinion despite the enactment of N.Y.C.P.L.R. § 1411, a comparative fault statute, nearly a decade earlier. Like many states, New York still recognizes express assumption of risk.

While Fowler waits to see the result of his lawsuit, he has returned to play for the Athletics. On Sunday, February 25, Fowler participated in his first game since his injury at Guaranteed Rate Field. He batted leadoff and played center field in a Cactus League game against the Kansas City Royals with the hope of making the starting lineup on Opening Day. In his first game since the injury, Fowler grounded out in his first at-bat but walked and singled before leaving the game. He even fouled a ball off of his reconstructed right knee with no ill effect.

Sources: