May-June 2017 ● Volume 2, Issue 1

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SPORTS FACILITIES and the LAW

How the law affects the sports facilities industry

Payne Class Action Suit Involving 'Baseball Rule' Is Dismissed

By Ed Edmonds

On November 16, 2016, United States District Court Judge Yvonne Gonzalez Rogers of the Northern District of California dismissed a class action lawsuit against Major League Baseball, the Office of the Commissioner of Baseball, and Commissioner Rob Manfred seeking additional screening extending from foul pole to foul pole and general safety improvements preventing fan injuries from foul balls, flying bats, broken pieces of bats, or thrown balls that enter the stands. For the past century, the majority of state courts have relied on a form of the "Baseball Rule" preventing fans from suing teams over injuries sustained at games so long as the area closest to home plate is properly screened.

The lead plaintiffs were Gail Payne, an Oakland A's fan of nearly fifty years, and Stephanie Smith, who suffered a serious injury when she was struck by a foul ball while attending the Sunday, June 7, 2015, game at Dodger Stadium against the St. Louis Cardinals. Payne and Smith asserted six specific claims: "(1) negligence; (2) fraudulent concealment; (3) violation of California's Unfair Competition Law . . . ; (4) violation of California Civil Code §§ 1750 . . . ; (5) violation of California Civil Code § 1668; and (6) personal injury." The final claim involved Smith's

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Cubs Take Unlicensed Vendors to Court

By Scott A. Andresen, Esq.

Though imitation may be the sincerest form of flattery, it can also be an actionable infringement of intellectual property rights. Hours before the Cubs would beat the St. Louis Cardinals on September 22nd to increase their record to 98-55 on their way to winning their first World Series title since Henry Ford developed the Model T, Major League Baseball Properties and the Chicago Cubs initiated Major League Baseball Properties, Inc. et al v. Stevens et al[1] in the United States District Court for the Northern District of Illinois against a number of named and "Doe" merchandise vendors. The first iteration of the Complaint[2] begins by stating, accurately in this die-hard Cubs fan's opinion, that "The Chicago Cubs are among the most famous and beloved clubs in all of baseball; indeed, in all of American sports." The Complaint then goes on to describe the Defendants as a group of vendors who are deliberately free riding on the success of the Cubs and trading- without a license or permission- on the substantial goodwill associated with the famous marks of the Cubs and Major League Baseball. Adding additional flavor to the allegations against the named Defendants were a number of photos of their infringing activities and merchandise. The Complaint sought relief under the Lanham (Trademark) Act

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THIS ISSUE

Welcome to Sports Facilities and the Law

Dear Readers,

Welcome to the first issue of Sport Facilities and the Law. Both of us are very excited about this opportunity to combine something we are very passionate about and which we feel we can help provide guidance to those who work in the sport facility law area, own/manage facilities, provide services to the facility industry, and those just interested in broader facility law issues. Our goal is that we want to inform and provide tools that can help those in our industry do their job more effectively and address possible legal issues. We hope to provide real value to assist those in our industry through summarizing cases, bringing relevant news stories, and providing quality research by advisory board members and others with insight to share.

Some of the areas we hope to cover include:

- Facility financing and construction law
- Tort law
- Contract law (leases, vendor contract, sponsor contracts, etc…)
- Safety issues (fan safety to terrorism prevention)
- Government regulations (ADA, tax exempt bonds, etc..)
- Employment law (OSHA, Workers' compensation, etc…)
- Zoning law
- Property/trespass law
- Constitutional law
- Tickets/ticketing issues
- Alcohol and Food/Beverage law
- Facility technology/social media issues
- Intellectual property law associated with facilities
- Insurance matters
- Crisis issues associated with facilities
- Criminal law issues
- Seating issues (luxury, secondary market issues, etc…)
- Facility marketing issues (ambush marketing protection)
- Event planning and execution issues
- Environmental stewardship and related legal issues
- Crowd management
- Taxation issues

While there will be significant focus on stadiums and arenas, we are not focused just on college and professional sport. We intend to examine the broader sport/fitness/recreational areas such as high school facilities, park and recreation departments, fitness facilities, ski resorts, obstacle course races, auto tracks, and road races on city streets. There are numerous types of sport related facilities and many issues transcend just one type of facility and we hope the lessons from various facilities can help a host of facilities operate more effectively.

We hope you enjoy and benefit from the newsletter.

SPORTS FACILITIES and the LAW

Sports Facilities and the Law is published bimonthly by Hackney Publications, P.O. Box 684611, Austin, TX 78768. Postmaster send changes to Sports Facilities and the Law. Hackney Publications, P.O. Box 684611, Austin, TX 78768.

Litigation Heats Up Between Fans, Teams and Software Companies over 'Listening Technologies'

The chief executive officer (CEO) of a software company has publicly challenged a lawsuit brought by class action plaintiffs on October 24, who allege that the company, an application developer, and the Indianapolis Colts "systematically and surreptitiously" intercepted their oral communications at football games in violation of the Electronic Communications Privacy Act (ECPA).

Rodney Williams, the CEO of Lisnr, said last month that the application, developed by co-defendant Yinzcam, does not record conversations, as alleged, but instead offers an interactive experience, delivering scores, news, and other information to fans attending the game.

Lead Plaintiff Alan Rackemann claimed in a lawsuit that the application uses beacon technology, "a novel method to track consumers and how they interact with marketing and advertisements. ... (The software) allows the Colts to target specific customers and send them tailored content, promotions, or advertisements based on their location."

The plaintiffs further alleged that the application "determines a consumer's precise location by secretly activating (his or her) smartphone's built-in microphone and listening for nearby Lisnr audio beacons. With the microphone activated, the application listens to and records all audio within range — including consumer conversations."

They added that because the industry considers beacon technology "inherently invasive," consumers must opt-in to the use of the technology. The plaintiffs contend that "Lisnr involuntarily enlists thousands of sports fans that have downloaded and installed apps from their favorite teams.

"Unfortunately for consumers, defendants never inform them that their smartphones are being turned into listening devices, nor do they ever seek consent," according to the lawsuit. In sum, they allege that consumers were not given adequate notice of, or opportunity to opt-out of the functionality.

The plaintiffs are seeking to prevent the continued "listening and recording" as well as "statutory and punitive damages" for violation of the ECPA.

Take Away

Technology is the future of sport facilities. Whether RFID, scanners, loyalty cards, geo tracking or numerous other approaches-fans and customers are being tracked. This could lead to several legal issues such as invasion of privacy, who owns the rights to

TECHNOLOGY

the data, where the data is used/sold, and if fans are charged for data usage without their knowledge. Care should be taken to communicate how data is used in any fan club or related agreement where terms can be specifically mentioned and rights waived.

Lawyers Examine Litigation Involving Warriors

Preceding the Law suit involving the Colts was a similar lawsuit involving the Golden State Warriors

Kimberly Buffington and Carolyn S. Toto, attorneys at Pillsbury Winthrop Shaw Pittman LLP, examined the lawsuit which pits LaTisha Satchell against the Golden State Warriors, the first NBA franchise employing such an app; Signal360, the licensor of the relevant technology; and the aforementioned Yinzcam.

The attorneys summarize the allegations as follows:

- "In 2014, in furtherance of its desire to remain a technological leader among NBA organizations, Golden State partnered with Defendant Signal360 to integrate Signal360's beacon technology. Beacons are a novel method to track consumers and how they interact with marketing and advertisements. For instance, with beacons, advertisers might be able to discern when a consumer is looking at a specific billboard—something previously unprecedented. With the App, Signal360's software allows Golden State to target specific consumers and send them tailored content, promotions, or advertisements based on their location.
- The App determines a consumer's precise location by listening for nearby Signal 360 audio beacons by (secretly) activating a consumer's smartphone's built-in microphone ("Microphone"). With the Microphone activated, the App listens to and records all audio within range—including consumer conversations. If the App "hears" one of Signal360's beacons it may display an ad to the consumer or simply send that information to Signal360.
- Even more disconcerting, the App turns on the Microphone (listening in and recording) any time the App is running. No matter if a consumer is actively using the App or if it is merely running in the background: The App is listening."

In their analysis, they wrote:

"The Satchell case remains in the pleading stages and as such it is still too early to evaluate the merits of this complaint. If, however, the intercepting and recording of oral communications allegations without consent are proven to be true, such actions would constitute serious violations of the ECPA. In addition to the legal implications, it will be interesting to see how fans react to this news. Some may care enough to stop using the app. However, one-click purchasing and the camaraderie of sharing on social media seems to have forever raised the tolerance for what consumers are willing to disclose with their mobile devices; for many, the allure of convenience and community outweigh privacy concerns."

Former Student Sues School District over Bleacher Collapse

A former student in the Sun Prairie Area School District (SPASD) has sued the district after she was injured when bleachers collapsed during a game at the football stadium. Plaintiff Shannon Mathews alleged that she was watching a game on Aug. 22, 2014, when the bleacher she stood on collapsed, causing "significant physical injuries, pain and suffering and economic damages (loss of earning capacity), which are likely to be permanent," according to the lawsuit filed on Aug. 1, 2016. Mathews claims that SPASD officials knew or should have known about the existence of the hazardous condition on their premises. Engineers had recommended in a Dec. 4, 2013 report that repairs be made at the facility. In their answer on Oct. 7, 2016, school district attorneys countered that Mathews' injuries may have been caused by her own negligence.

As In-Stadium Content Expands, So Does Captioning and the Effort to Comply with ADA

LNS Captioning, a Portland-based company that specializes in working with sporting venues to provides captioning for the hearing-impaired, is expanding its scope with Monumental Sports & Entertainment, owner of several professional sports teams in the Beltway and the Verizon Center and other venues. The expansion is coming as Monument follows through on its plans to distribute more content to patrons through Amazon Web Services (AMS). It is a requirement that all content uploaded from AMS come with captions. "That's a big deal," said Carol Studenmund, the owner and president of LNS (http://lnscaptioning.com/). "By comparison, anybody can upload anything to YouTube, right? AMS is saying they want to be another YouTube-like portal. But if you want to upload, you bring your content already captioned."

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Be a Contributor

We're always on the lookup for articles pertaining to the sports-facilicites industry.

If you'd like to contribute, please email *info@hackneypublications.com* for details.

NFL Player's Lawsuit Puts Focus on Quality of Old Playing Surface at NRG Stadium

Days before the National Football League staged its prized possession, the Super Bowl, at NRG Stadium in Houston, controversy was brewing over the quality of the playing surface on which the New England Patriots and Atlanta Falcons played.

The controversy arose from an Oct. 14, 2016 lawsuit brought by former NFL linebacker Demeco Ryans over allegedly poor field conditions at NRG Stadium. Ryans has named the Texans, the NFL, the Harris County Convention and Sports Corporation, and StrathAyr Turf System Pty Ltd. as defendants in the litigation.

Ryans, who was a member of the Philadelphia Eagles playing a game against the Texans on Nov. 2, 2014, suffered a torn Achilles tendon that day, which allegedly ended his career.

"Defendants knew that using the patchwork modules caused continuity problems that include gaps, seams, indentations and lifted areas that can cause players to land awkwardly, trip, stumble, or have toes or feet caught in the turf," the petition alleges. "Despite such knowledge, defendants continued to place NFL players in danger by using and improperly maintain the modules of which it consisted until their ultimate prize player, Jadeveon Clowney (Houston Texans' top draft choice and the No. 1 overall pick in the 2014 NFL draft), was injured. Then, and only then, was it time for defendants to fix the problem."

StrathAyr wasted little time challenging the lawsuit, arguing in a Dec. 9, 2016 filing that the plaintiff failed to serve it in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

"Plaintiff alleges that service was made pursuant to the Hague Convention," the company said. "However, despite plaintiff's assertion, plaintiff has failed to adduce evidence demonstrating that service was made by letter of request to Australia's Central Authority or any other designated Australian authority."

The NFL has also gone on the offensive, arguing that the claim is preempted by the league's collective bargaining agreement with the players, pursuant to the federal Labor-Management Relations Act. Ryans' attorneys, Robert E. Ammons and Sydney Meriwether of The Ammons Law Firm LLP in Houston, have countered that his premises liability claims are independent of the CBA, because they focus on the duty the Texans, as a lessee of the stadium, have to invitees to warn of and prevent dangerous conditions.

TORT LAW

Current Litigation Follows Separate 2012 Lawsuit

Ryans is not the first to sue about an injury suffered on the field.

In 2012, Sports Litigation Alert reported that former Texans punter Brett Hartmann filed a lawsuit in the State District Court of Harris County, Texas against Harris County Convention & Sports Corporation, the owners of Reliant Stadium, and SMG, the management corporation that operates the stadium.

That complaint centered on injuries he suffered in a Dec. 4, 2011 game between the Texans and the Atlanta Falcons. Specifically, that complaint contained three causes of action against the owners of Reliant Stadium and the stadium's management corporation: negligence, negligence under the Texas Tort Claims Act, and vicarious liability.

The complaint alleged that the stadium's poor field conditions caused him to tear his ACL and fracture his fibula jeopardizing his career in the National Football League. During that game, Hartmann caught his foot in the seam of the grass turf while playing against the Atlanta Falcons. According to the complaint, the grass trays used to comprise the grass field in Reliant Stadium had uneven seams creating an unreasonable hazard. It was the uneven seams in the grass trays in which Hartmann caught his foot causing his fall and subsequent knee injuries. The complaint alleged that Hartmann's injury was "severe and career-threatening" noting that knee injuries are rare among punters in the NFL.

The complaint noted that other stadiums in the National Football League use a single tray eliminating any risk that the players on the field will trip or injure themselves on seams. Hartmann alleged that he was an invitee to the stadium and that the defendants had a legal duty to eliminate any unreasonable hazards on the premises. In sum, Hartmann alleged that the defendants had a duty to maintain the field in a reasonably safe condition and their failure to do so caused his knee injuries.

That suit was settled out of court in April of 2015.

Where the Two Cases Differ

Eugene Egdorf of Houston-based Shrader & Associates gave his analysis to Sports Litigation Alert, contrasting the two cases.

"This case is different in many respects to Hartmann, some good and some not so much for Ryans. First, Ryans has sued the Texans (we could not because of worker's compensation bar). The contracts at issue squarely place responsibility for the filed on SMG, not the Texans, so I believe that will be a difficult claim. Ryans has also sued the NFL. This claim has good factual appeal because the NFL by this time (though not when Hartmann was injured) was inspecting every field before every game and certifying it ready for play. However, the CBA is likely a solid defense for the NFL. Moreover, SMG will argue

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EPA Status Report Fuels Frustration of Synthetic Turf Makers

When the Environmental Protection Agency (EPA) released a status report on December 30 about its ongoing efforts to evaluate the safety of recycled crumb rubber used in athletic fields and playgrounds — stating that more research needed to be done, enough was enough as far as the makers of synthetic turf were concerned.

On the heels of that announcement, the Safe Fields Alliance (SFA), "a coalition dedicated to educating stakeholders around the safety of synthetic turf fields using recycled rubber," and the Synthetic Turf Council (STC), "a non-profit trade association dedicated to serving as a resource for trustworthy information about synthetic turf," rushed forward with its own statement:

"Playing sports on synthetic turf fields with rubber granulate is safe."

That conclusion is at odds with the report of the EPA, as well as the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry (CDC/ATSDR) and the Consumer Product Safety Commission (CPSC), which are also part of the joint initiative.

"A major question that remains unanswered is whether exposure to the myriad of potential toxins found in recycled tires may unduly expose children playing on the fields and hence negatively impact children's health," according to experts at The Mount Sinai Children's Environmental Health Center. "There is a potential for these toxins to be inhaled, absorbed through the skin and even ingested. These exposures do not remain on the field alone. Children then track the rubber pellets found in the surface into their homes where young children may also be exposed. More recently, lead, a toxin with well-studied health concerns, was found in the plastic, green blades of fake grass that top the fields."

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The above statement may be seven years old. But little has changed.

"Studies to date have not shown an elevated health risk from playing on fields with tire crumb rubber, but these studies have limitations and do not comprehensively evaluate the concerns about health risks from exposure," according to the EPA report, which includes the final appraisal of peer-reviewed literature and data gaps analysis report, covering some 90 references.

More results are expected before the end of 2017.

A CPSC playground study is also ongoing. That is not soon enough, according to the turf makers.

"We understand that last Friday's announcement marks incremental progress by the EPA on its Federal Research Action Plan," they said. "However, we cannot overstate the pressing need for the Agency to share clear and concise findings as soon as possible in 2017 in order to provide answers and eliminate uncertainty for parents and policymakers."

Further, "after nearly a year of study, the cloud of uncertainty is hurting businesses as well as jobs. The science is evident, and it is time for the EPA and other regulatory agencies to bring clarity to the situation."

Until that clarity arrives, The Mount Sinai Children's Environmental Health Center recommends that "citizens and school boards should question the wisdom of installing synthetic turf until a credible independent study has been conducted and published."

Take Away

The issue with synthetic turf has drawn on for too long. It shows where science can be used and abused. Results did not prove what some scientists or organizations wanted so they have demanded more testing. I feel for the manufacturers and other innovators in our space as the development process often takes too long and government or oversight organizations can play politics. Yes, it would be great to obtain approval from everyone, but similar to herding cats, that is almost impossible and put everyone at risk of litigation from parties on all sides. GF

NFL Player's Lawsuit Puts Focus on Quality of Old Playing Surface

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that the NFL certification relieves it of responsibility. While multiple targets can have its advantages, sometimes fighting all the fronts loses the war.

"On the positive side, as this occurred after Welker, Hartmann, and others, the Defendants certainly had notice of the problems with the turf at NRG Stadium. The turf looked particularly bad on the day of Ryans' injury–in fact as I arrived at the stadium I texted a media colleague about the field condition specifying the area where Ryans sustained his injury. A wrong was certainly done, and with serious consequences. If anyone will be held accountable remains to be seen."

Take Away

Various leagues at different times have cancelled events due to playing surface concerns. One strategy is to have officials (whether facility management, team officials, or league officials) certify at the start of a game/event that the facility was inspected and whether any concerns were identified. This would provide multi perspectives and if undertaken far enough in advance can help prevent having to cancel a game/event or allow enough time to identify and correct any issues. GF

CURRENT ISSUES

An Almost Failing Grade

The American Society of Civil Engineers highlighted in a recent analysis over $2 trillion dollars' worth of infrastructure needs just for United States' roads. This comes on top of $870 million needed for schools. Of this needed amount, around half has been funded by various bond or tax bills. One item on the list that sparked my interest was the $114 billion required to bring our park and recreation facilities and land to a safe standard. Of this total, only a small fraction has been funded. This means that for years to come our park and recreation facilities will continue to slide down in quality, but more importantly safety. Our parks, including national parks, received a D+ grade in the annual infrastructure report card and the report also highlighted over $11.9 billion in deferred maintenance with the National Park Services. This represents a major liability concern, as tax dollars will not be available to make necessary improvements. This means either more park and recreation facilities will close (or become overrun) or more people will be injured on dilapidated equipment and unsafe areas. In discovery, an attorney can try to find any recent analysis of publicly owned/operated lands and determine what was identified as unsafe and to try to find out why safety measured were not undertaken. Another strategy might be future modification of recreational user statutes. http://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Parks-Final.pdf GF

Green is Good?

I applaud what the National Resources Defense Council, Sport and Sustainability International, Green Sport Alliance, and Allen Hershkovitz are doing. The greener the better in my opinion. The world would be a much better place if we all do our share to make the world better, and that includes sport facilities. Whether using LED lightbulbs or using water saving technologies these strategies are great. Others might not be as good. The cost to recycle has risen significantly and the price recyclers are obtaining per ton has been cut almost in half over the past six years. One additional area that concerns me is rooftop and related gardens. I have a small farm and know how much work is required to grow food. Similarly, and weekend garden warrior knows the same challenge. Whether it is watering, fertilizer, pests, or diseases there are numerous challenges. Thus, are these side/rooftop gardens good? Some facilities use the food and are willing to accept the challenges. One major professional sport facility is not as enthusiastic. They have a garden, but give all the food away to employees rather than use the food in dishes served at the park. The major concessionaire at the facility does not want to serve the food for liability reasons. In the wake of the E.coli and related health issues at Chipotle, local suppliers and their safety standards are coming under very strict scrutiny. Yes, buying/growing local is great, but many growers do not have the same safety testing and protocols as major growers. A facility using locally sourced food needs to take extra steps to make sure they are buying uncontaminated food and this could be done through more stringent inspections and having contracts with all suppliers shifting liability to the suppliers if any products turn out to have problems. GF

The Manchester Bombing and Its Impact on the Sports Industry

On May 22nd, a suicide bomber detonated a bomb filled with shrapnel (nuts, bolts, etc…) as a primarily young crowd streamed out of the Manchester concert hall, killing 22 people, including an 8-year-old girl, and injuring 59 others. The Manchester Arena was used for the 2002 Commonwealth Games and was situated partly above Manchester Victoria Station. Victoria Station serves almost 8 million travelers a year.

While the investigation on this terror attack is still ongoing, the perpetrator detonated himself outside the Arena's doors in a foyer between the Arena and the Station. Fans were leaving right at the end of an Ariana Grande concert (at 10:33 p.m.) in a facility can hold 21,000.

What set this incident apart from so many other attempted or actual stadium bombings- such as the 2009 attempt in Liverpool that was stopped or the 2015 Stade de France stadium bombing in Paris, is that those attempts involved terrorist trying to get into a facility. The Manchester attack purposefully was set outside the Arena when fans were leaving. This creates a new potential safety and liability challenge. I am accustomed to the concentric circles of security deployed in Israel. Various security steps are already taken outside stadiums and arenas, but those practices will have to be improved and enhanced. This can pose significant difficulty for facilities that are located in urban areas. Detached facilities such as Gillette Stadium can more easily be secured with concentric security and fencing. This just means that urban facilities need to pursue different strategies, especially near public transportation areas. One concern I have is parking lots and tailgate areas. Attacks at stadium/arena parking exits can cause a chain reaction of gas tank exploding. Tailgating presents other challenges with recreational vehicles not being inspected and they can contain numerous issues of concern. One solution is to use vapor wake dogs in their parking lots and tailgating areas. These dogs are trained to detect body worn explosives on a moving target. While it might be that physical inspection of RV will be around the corner, vapor wake dogs and more security personnel are a good step for now. GF

Payne Class Action Suit Involving 'Baseball Rule' Is Dismissed

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injury at Dodger Stadium. In particular, Payne's unscreened seats in section 211, where she claimed that she was required to duck and weave to avoid being hit, became the focus of the court's analysis. Section 211 is on the first base side in the plaza infield section of the second level at O.co Oakland Coliseum. Smith sustained her injury while sitting in field box 35 in Dodger Stadium, located beyond third base down the left field line, when she was hit in the stomach by a line drive foul ball. As a result of her injuries, she experienced a 10-15% collapsed lung, continual pain in her ribs, and significant medical expenses.

In their original complaint filed on July 13, 2015, Payne and other class members requested "injunctive relief requiring Defendants . . . to adopt corrective measures regarding . . . the implementation of (1) a rule requiring all existing major league and minor league . . . ballparks to be retrofitted to extend protective netting from foul pole to foul pole . . . ; (2) a rule requiring any newly constructed ballpark . . . to include at a minimum this amount of netting; (3) a program to study injuries . . . in an effort to continually reevaluate whether additional measures should be taken . . . ." To support their assertions, Payne's counsel, Steve Berman and Anthea Grivas of Hagens Berman Sobol Shapiro LLP in Seattle, Washington, relied heavily on David Glovin's September 2014 Bloomberg article noting that 1,750 baseball fans annually suffer injuries at Major League Baseball games. Payne's attorneys also cited the work of Robert Gorman and David Weeks who published Death at the Ballpark: A Comprehensive Study of Game-Related Fatalities, 1862-2007 (2009). In fact, Gorman was added to the plaintiff class after the initial complaint was filed before he dropped out. Gorman offered many personal memories of foul ball incidents including his own injury at a Charlotte Knights minor league game and one sustained by his wife during a college baseball game.

In a preliminary action on April 8, 2016, Judge Gonzalez Rogers granted Major League Baseball's request to dismiss all the Out-of-State teams for lack of personal jurisdiction but allowed the case to proceed to jurisdictional discovery on standing against the California-based teams. As noted by Judge Gonzalez Rogers in her November decision, that discovery addressed "'the probability that a given individual, seated in plaintiffs' specific sections at the two California stadiums in question, [would] be hit by a stray ball or bat in the course of a given game or season.'" This narrow focus for the statistical inquiry was a significant factor in the

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Payne Class Action Against MLB Involving 'Baseball Rule' Dismissed

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jurist's determination that neither plaintiff had standing because the statistical analysis produced a very limited chance of being hit by a ball while sitting in the specific sections Payne and Smith occupied.

In determining if Payne and Smith established standing to proceed, the court considered a three-part test established by the 1992 United States Supreme Court decision in Lujan v. Defenders of Wildlife: "(1) injury in fact . . . which is (a) concrete and particularized . . . ; (2) causation . . . ; and (3) redressability . . . ." The Office of the Commissioner and MLB responded that the class lacked standing because "their risk of future injury is speculative and not sufficiently immediate." Judge Gonzalez Rogers ultimately concluded that MLB's evidence produced no "credible or immediate threat" that Payne would be hit by a foul ball or bat and she failed to show that standing was independently established due to "deprivation of her ability to enjoy the game." As to Smith, the judge found that MLB's data demonstrated that "her risk of injury is very small at 0.018%," and unlikely to reoccur particularly because the Washington native does not plan to return to Dodger Stadium to attend a game as a result of her fear of a similar injury. As such, Smith failed to meet the "requisite threshold" for standing. Smith was also unsuccessful in her personal injury claim because of improper venue. Because Los Angeles is in the Central District of California and not the Northern District, Smith was directed to file her action there.

Ultimately, the case was unsuccessful in forcing Major League Baseball to retreat from its reliance on the "Baseball Rule" limiting liability based on the doctrine of assumption of risk serving as a complete bar to a plaintiff's ability to sue a stadium owner for injuries as long as a properly maintained screened area is provided for as many fans as might reasonably request such seating. In recent years, however, the Idaho Supreme Court and appellate courts in Indiana and Georgia have declined to follow the "Baseball Rule." Recent incidents, including the well-publicized injuries to Tonya Carpenter at Boston's Fenway Park and Wendy Camlin at Pittsburgh's PNC Park, have increased requests from fans as well as players to increase screening at ballparks. As a response, Baseball Commissioner Rob Manfred issued a series of recommendations in December 2015 that reinforced the basic norm that major league stadiums provide screening that covers the area between the home plate sides of each dugout. A number of teams responded by actually increasing screening prior to the beginning of the 2016 season including in some cases areas beyond the home plate side of the dugouts. The recommendations specifically noted the need to balance fan safety with the desire of fans to catch foul and thrown balls and obtain autographs from players.

In seeking screening extending from foul pole to foul pole, the Payne litigation demanded a substantial change to the basic configuration at professional baseball stadiums requiring alterations that far exceed Commissioner Manfred's recommendations. However, many fans sitting in rows just behind the dugouts or close to the bases remain vulnerable to line drive shots that provide minimal reaction time and frequently produce substantial injuries. The Payne litigation's narrow discovery focus and the facts involving plaintiffs Payne and Smith provided Justice Gonzalez Rogers a direct path towards determining a lack of standing. Although a number of major league teams did increase screening for certain high exposure areas, the current situation will not prevent some fans from being injured in similar incidents that left Tonya Carpenter and Wendy Camlin with life-altering experiences.

Edmonds is Associate Dean for Library and Information Technology and Professor of Law at Notre Dame Law School, and recognized baseball law expert.

Take Away

I am a bit biased on this topic as I have handled a number of foul ball cases, primarily on the plaintiff side. I support the limited duty rule. My contention is that stadiums need to protect the most dangerous parts of a ballpark and that can only be determined through research and analyzing where it is most likely for foul balls to land and in which areas is it most likely to cause injuries. Then those areas should be screened. If stadiums did that then I would support that they have protected the most dangerous parts of the stadium. GF

Chicago Cubs Take Unlicensed Vendors to Court

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for counterfeiting (§1116(d)), trademark infringement (§1114), unfair competition (§1125(a)) and trademark dilution (§1125(c)). The Complaint also sought relief under Illinois state law for trademark infringement, trademark dilution, unfair and deceptive trade practices, as well as common law trademark infringement and unfair competition.

By one account, Major League Baseball has filed 56 trademark-related federal court cases since 1987.[3] The Lanham (Trademark) Act provides a vital tool to MLB as it looks to protect its approximately $3 Billion (in 2015) in annual merchandise sales,[4] and is particularly important when it is in connection with a Chicago Cubs postseason run complete with a long-suffering fan base that has been saving its World Series merchandise money for 108 years.

A key component of the Plaintiffs' proactive enforcement regimen for the 2016 MLB postseason was Section 1116(d) of the Lanham Act.[5] Section 1116(d) allows for an ex parte application to a federal court for an order allowing the seizure of counterfeit merchandise—rather than waiting to seek redress for infringements after the harm has been completed. To that end, the Court entered under seal an Ex Parte Temporary Restraining Order and Seizure and Impoundment Order that was converted to a preliminary injunction on October 6, 2016 based on a finding that the Plaintiffs established that they were likely to succeed on the merits of their claims, that they would suffer irreparable harm, that the balance of equities tipped decidedly in their favor, and that the requested relief was in the public interest. The Court further found that injunctive relief was appropriate as the Plaintiffs would have no other adequate remedy at law and would suffer immediate and irreparable harm in the form of counterfeiting and infringement of the Plaintiffs' trademarks, injury to the Plaintiffs' reputation and property rights, harm to the goodwill associated with the Plaintiffs' trademarks, loss of quality control over the trademarks and brands of the Plaintiffs, and decreased sales of licensed merchandise.

As part of the Court's Order of October 6th, the Court further stated that:

- The Defendants were preliminarily enjoined from manufacturing, distributing, offering for sale, selling, and/or advertising any articles of merchandise bearing the Plaintiffs' marks, or any substantially indistinguishable or substantially similar imitations thereof;
- The Defendants were to deliver to Plaintiffs' counsel for impoundment all signs, products, packaging, promotional material, advertising material any other item that bears, contains or incorporates any of the Plaintiffs' marks or colorable imitations thereof;
- Agents of any duly-authorized law enforcement agency, along with Plaintiffs' representatives, were authorized to seize and impound any counterfeit goods that any Defendants attempted to manufacture or sell, including any containers in which the counterfeit goods were stored, carried, displayed, or transported, or any devices used to produce such counterfeit goods, including silk screens, molds, printers or heat transfers, in the possession, custody or control of Defendants; and
- Seizures and impoundments were to take place at all locations within a 5-mile radius of Wrigley Field, along any parade route established for a victory parade or celebration, or within a 1-mile radius of the United Center, Soldier Field and U.S. Cellular Field where counterfeit goods were sold, offered for sale, distributed, transported, manufactured and/or stored for the period commencing on October 6 and terminating on November 10, 2016.

INTELLECTUAL PROPERTY

While it would seem logical that the legal "shot across the bow" undertaken by Major League Baseball and the Chicago Cubs would have prevented any subsequent infringing activities by unlicensed vendors during the postseason, such was not the case. On November 4th, the Court granted the Plaintiffs' request to issue 60 additional summonses, taking the total number of "Doe" summonses to 90—a substantial number of which were utilized for Defendants subsequently named in the sixth and seventh amended complaints filed by the Plaintiffs. Apparently, Albert Einstein's quote that "three great forces rule the world: stupidity, fear and greed" was only two-thirds correct as fear of litigation was noticeably absent or rendered irrelevant by the other two forces.

So, what's next? Based on the law of litigation averages (as determined solely from anecdotal evidence gathered by the author), one can expect two primary paths for the Defendants. The first group of Defendants will likely choose the Ostrich Approach and bury their heads in the sand and/or attempt to hide from the litigation- likely resulting in the entering of default judgments and subsequent enforcement and collection measures by the deep-pocketed Plaintiffs. The second group of Defendants will take the more advisable approach and seek prompt settlement complete with prostrating mea culpas. Regardless of any defenses that some of the Defendants may believe are available to them, the costs in time, expense and emotional energy associated with litigation frequently make settlement a far less bitter pill to swallow even in situations far more favorable to a defendant than is seen here.

In conclusion, the lesson to be learned by unlicensed vendors in Chicago is one that should have been gleaned from the experiences of the San Francisco Giants, Los Angeles Dodgers and Cleveland Indians: its unwise to tangle with the Chicago Cubs.

See Chicago Cubs on Page 11

Fitness Member's Claim Will Continue After Appeal Court Overturns Based on Language Impediment

Sacramento resident, Etelvina Jimenez, was injured in 2011 at a local 24 Hour Fitness. She was running on a treadmill when she fell and hit her head against equipment behind the treadmill. She sustained significant head injuries including memory loss, which prevents her from engaging in activities such as riving. Her accident reconstruction expert measured the distance from the treadmill to other equipment as 3 feet 10 inches. The treadmill's assembly guide provides in one of the installation requirement that: "The minimum space requirement needed for user safety and proper maintenance is 3 feet wide by 6 feet deep directly behind the running belt." Such a guideline would be used by an expert witness to show the facility might not have met industry standards.

The gym initially had the case thrown out based on a signed waiver. However, the appellate court overturned that decision because the Plaintiff could not read or speak English. The waiver would also not allow the gym to escape the gross negligence claim. The plaintiff was seeking $3.8 million. The case was to go to trial in February 2017. http://www.kcra.com/article/woman-sues-sacramento-gym-over-treadmill-injury/6430251

FITNESS FACILITIES

Take Away

Having enough space around equipment is critical for any facility. Every sport participant needs some buffer zone. While there might be significant debate as to how much space is needed, if a manufacturer recommends a certain amount of space then failure to comply with those suggestions will immediate set-off an alarm with an attorney or expert witness. GF

Chicago Cubs Take Unlicensed Vendors to Court

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For more on Andresen, visit his bio here: http://www.andresenlawfirm.com/our-founder

Take Away

Stadiums have turned into destination locations where there are numerous vendors. Care needs to be taken to make sure vendors in that area have appropriate licenses and products. Fans might assume that these vendors are vetted or approved by the stadium/tenant. Signs could be posted that identify who are official vendors and fans can be warned that unofficial vendors might have lower quality, dangerous, or unclean food. GF

Endnotes

1. Case No. 1:16-cv-09140 (Filed September 22, 2016)
2. On December 8, 2016, MLBP and the Chicago Cubs filed a motion for leave to file a Seventh Amended Complaint
3. See Cubs, MLB Suit Up to Catch Unauthorized Vendors (Chicago Tribune, September 23, 2016) (http://www.chicagotribune.com/business/ct-cubs-mlb-trademark-suit-0924-biz-20160923-story.html)
4. See MLB Sees Record Revenues For 2015, Up $500 Million And Approaching $9.5 Billion(Forbes/Sports Money, December 4, 2015) (http://www.forbes.com/sites/maurybrown/2015/12/04/mlb-sees-record-revenues-for-2015-up-500-million-and-approaching-9-5-billion/#1c18891c2307)
5. 15 U.S.C. §1116(d)

Diamondbacks Claim County Failed to Maintain Chase Field

The Arizona Diamondbacks have filed a lawsuit, seeking relief from a contract that it has with the Maricopa County Stadium District, which prevents the Major League Baseball (MLB) franchise from looking at other ballpark options if the county fails to properly maintain the facility.

At issue is renovation work that the team claims needs to be done at the 19-year-old facility, which is called Chase Field, to keep it "state-of-the-art" and "in good repair."

The team seeks the removal of a clause, which prevents the Diamondbacks from seeking alternative stadium options until 2024.

In a statement, the team's managing general partner, Ken Kendrick, said it was "extremely unfortunate" that the team has been forced to take legal action.

"We have made a promise to our fans, who have been partners with us on the building of this stadium and our franchise, to provide the best experience in all of baseball in a safe and welcoming environment," he said. "The inability of the Maricopa County Stadium District to fulfill its commitments has left us with no other option.

"We have spent more than four years suggesting alternative solutions that would help the Maricopa County Stadium District hold up its end of our agreement, including multiple offers for us to assume all of the financial responsibilities they currently hold. All of our offers have been denied."

CONTRACT LAW

The county said the Diamondbacks are essentially "suing their fans who helped build Chase Field. The team simply wants out of the contract that makes them stay and play through the 2028 season. Saying the facility is in disrepair is outrageous.

"The Maricopa County Stadium District has spent millions during the off-season on concrete and steel work that keeps the stadium safe and looking great for each baseball season."

The plaintiffs disagreed, noting that the county has not managed the facility as profitably as it could have.

"Absent a dramatic and unprecedented increase in bookings by the District, there is no foreseeable increase in revenues that would cause the facility reserve accounts to grow to an amount that would be adequate to pay for the capital repairs needed over the remaining term of the agreements," according to the complaint.

Take Away

Clarity in contracts is critical. Terms such as "state-of-the-art" and "in good repair" are very subjective. Each side can have their own interpretation of the term and it will be costly to bring in experts to try and clarify what the terms mean. It reminds me of the suit dismissed in 2003 where the municipality sued the Cincinnati Bengals for breach of their lease contract for failing to field a "competitive" NFL team. The case was ultimately dismissed, but there were numerous discussions at the time as to what constituted a competitive team. No facility would want jurors trying to interpret what two parties meant by a vague term in a contract. GF

City of St Louis Sues NFL over Move to LA

With the St. Louis Rams moving to Los Angeles, the City of St. Louis has sued the National Football League (NFL) asserting the league did not follow its own mandate to effectively attempt to stay in St. Louis. The City alleges that the NFL's relocation policy requires that "teams must work with diligence and in good faith to remain in their home community and cannot relocate unless the Policy is satisfied."

The policy was adopted in 1984 after the Ninth Circuit Court of Appeals ruled the NFL violated federal antitrust statutes in dealing with the Oakland Raiders move to Los Angeles. St. Louis is asking for damages as highlighted by the demand below:

According to The City of St. Louis has lost an estimated $1.85–$3.5 million each year in amusement and ticket tax collections. It has lost approximately $7.5 million in property tax. It has lost approximately $1.4 million in sales tax. It has lost millions in earnings taxes. The City of St. Louis will have lost over $100 million in net proceeds due to the improper conduct described above. The County of St. Louis has lost hotel and property tax revenue, as well as sales tax revenue. The failure to approve the new stadium cost approximately 2,750 jobs in construction and more than 600 jobs per year in the City of St. Louis. The average annual state revenue impact exceeds $15 million.

FACILITY LITIGATION

http://blogs.findlaw.com/tarnished_twenty/2017/04/st-louis-sues-nfl-over-rams-move-to-la.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+TarnishedTwenty+%28Tarnished+Twenty%29&DCMP=NWL-cons_sportslaw#sthash.YYJU2HTZ.dpuf

Take Away

When a team is considering a possible move, every communication should be documented to provide a record of what happened. This might also be required to comply with Freedom of Information Act requirements, but can also be used to show either good faith or a lack thereof in the negotiation process. GF

