# Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

Vol.11 No.2, Summer 2002

## *SPORTING WORLD/LEGAL PROFESSION SUFFERS LOSS*

**BYRON R. WHITE,** former U.S.Supreme Court Justice, lived a life that sports attorneys, as well as anyone else who participates in sports and the legal profession, will always admire. The University of Colorado graduate made a name for hinself in the classrooom and on the football field. Known as "Whizzer", he fnished No. 1 at CU and Yale Law School, was a Rhodes Scholar, led the NFL twice in rushing, and in May 1961 lead federal marshals into Selma, Alabama, as an assistant attorney general protecting the civil rights of this country's citizens! Byron R. "Whizzer" White was a legend in the sports world and in the legal world. Having spent 31 years on the bench, this country lost not only one of its finest legal minds but one of its history's most courageous and admirable resources. A man for the ages! ...

## *In this Issue:*

# *CHAIRMAN'S REPORT*

## Intro

*"Rumor Has It"* that Yours Truly will be desposed by way of a Bloodless Coup d'Etat at Our Esteemed Annual Meeting. I've got just enough time to write an epitaph.[1]

## The Year of Living Dangerously

We Started Out With a Bang: Just like Bogie and Bacall in *"The Big Sleep",* Our Esteemed Eleventh Annual Entertainment Law Institute, *orchestrated by Mike Tolleson, "French Kissed"* the Exalted Austin Film Festival![2] With *"About 100"* in attendance, speakers from Los Angeles, New York and Austin *"Talked Shop"* about the Legal and Business Astects of Film and *"Tele".* Best of All: A Post-Party at Wild About Music *(with Live Entertainment)!* Suffice it to say that an *"Encore Performance"*[3] is *"In the Works".*

Meanwhile, Back at the Ranch: The www.EntertainmentSportsLaw SectionoftheStateBarofTexasRoyalWebsiteCommittee.org *(comprised entirely of Evan Fogelman and June Higgins Peng)* fastidiously developed Our *"Way Cool"* Website *(which will be making its debut in "Short Order").* And, of course, Sylvester Jaime and his "Crack Staff" *(comprised entirely of Steven Ellinger and Andrew Soloman)* delivered Our Fine Journal *"On Time and Under Budget".*

*Speaking of Fiscal Restraint:* The Council continued its ardent compliance with its self-imposed *"Kalis Caps" (instituted by Rob Carter, the unfortunate victim of a Bloodless Coup d'Etat at Our Last Esteemed Annual Meeting).*[4]

*In Short*: We had a better year than Enron. How Was This Possible? In the case of Yours Truly, by *"Sluffing Off"* until the afor-mentioned "volunteers" realized that Yours Truly was *"Just Another Pretty Face".*

## Our Esteemed Annual Meeting

We'll End With a Bang, Not a Whimper: In addition to the Bloodless Coup, Our Esteemed Annual Meeting will feature the Most Entertaining CLE Allowed by Law.

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[1]*Paraphrasing Arlo Guthrie "Mototcycle (Significance of the Pickle)".*

*I Know This May Not Be the Best Thing I've Ever Wrote,*
*But I Don't Have Time to Change It.*

[2]*In a "menage a trois" with the State Bar of Texas.*
[3]*Scheduled for October 10th and 11th in Austin.*
[4]*Of course, the eponymous party to the "Caps" has a rather convenient alibi.*

## Last Rites

See You at the Bloodless!

Yours Truly: **J. Edwin Martin**

# FOR THE LEGAL RECORD ...

**SPORTS:**

**ESPN SUED FOR MILLIONS!** The federal lawsuit filed in Philadelphia U.S. District Court, claimed $80 million dollars in hidden money. Boxing promoter Russell Peltz's claim is that he licensed his unique collection of 200 fight tapes in 1982, which were purchased by ESPN in 1998 from another promoter, William Clayton, who conspired to conceal the sale and cut Peltz out of the deal! ...

**RAIDERS STILL IN THE COURTROOM!** In its $1.1 billion lawsuit, the National Football League's Oakland Raiders claim Oakland fraudulently lured them back from L.A. in 1995. In the Sacramento County, California courthouse, the Raiders alleged, before the move, Oakland falsely claimed all the Oakland-Almeda County Coliseum seats were sold. Before trial, the judge ruled that the Raiders could not sue the city or the county (statute of limitaions problem). However, the judge allowed the Raiders to sue the non-existent Oakland-Alameda County Coliseum Corporation, which was the overseer for the move from L.A.! ...

**OWNERS BLAME LABOR!** Major League Baseball owners and players continue their labor negotiations. Owners want a luxury tax and increased revenue sharing. Their justification: increasing players' in revenue sharing is o.k. The union claims too much revenue sharing will drain high-revenue clubs and cut player salaries and a luxury tax will discourage higher spending teams from spending more money. So now the fans know the reason for $6 beers and the inability to take a family of 4 to a baseball game for less than $125 plus parking but can't understand a team like the New York Mets being valued at $450 million and the owners losing money? The Mets were appraised at $450 million when Nelson Doubleday elected to exercise his option to have co-owner Fred Wilpon buy Doubleday's 95% interest in the team! ...

**ENTERTAINMENT:**

**SONY PICTURES FINED BY CONNECTICUT!** A fine of $326,000 was imposed for Sony's use of fake movie reviews. In Enronesque fashion, Sony attributed reviews to the *Ridgefield Press,* a small weekly newspaper which existed only in the imagination of the studio writers. Sony agreed to stop fabricating movie reviews and TV ads for Sony films reviewed by critic David Manning, who not only did not see the movie he also did not even exist! ...

**PICTURES WORTH $20,000 BAIL!** Winona Ryder says she didn't do it! Beverly Hills Saks Fifth Avenue store employees' claims that Ryder used scissors to cut off merchandise tags. Ryder's lawyer, Mark Geragos counters with a false arrest defense and store security cameras which purportedly caught the actress carrying garment bags, stuffing clothes, entering a dressing room, but no scissors. The actress was charged with shoplifting and drug possession with bail set at $20,000. No comment was made re the drug charge! ...

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The Journal can be accessed on-line at www.stcl.edu...

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Sylvester R. Jaime - Editor

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## JOURNAL LOOKING FOR WRITERS

***The call is out for writers.***

The *Journal* is looking for writers in the areas of women's sports and entertainment. With the wealth of subject matter, anyone interested in writing may contact the Editor with articles or ideas for an article.

# "OH WORLD! WORLD! WORLD! THUS IS THE POOR AGENT DESPISED"[1]

## OPEN QUESTIONS CONCERNING THE "WHO", "WHAT" AND "WHEN" OF CALIFORNIA'S TALENT AGENCIES ACT

By Allen B. Grodsky and Eric M. George[2]

### 1. INTRODUCTION.

Passed by the Legislature in 1959, California's Talent Agencies Act (the "Act") took more than 40 years to attract a look by the California Supreme Court. Last year, in *Styne v. Stevens,*[3] the Court addressed the little known but powerful statute, frequently invoked by actors, musicians and other artists in an effort to invalidate contracts with their personal managers. And, in so doing, the Court spoke to a number of important issues relating to the application of the statute of limitations and exhaustion of administrative remedies under the Act.

But apart from the *Styne* case and a handful of applicable Court of Appeal decisions, much of the Act continues to leave entertainment lawyers scratching their heads when confronted by the various critical "open" issues affecting their manager and talent clients.

This article explores this terra incognita, specifically addressing the "who" (does it apply to), "what" (conduct does it reach), and "when" (its penalties apply) underlying the Act. We discuss below what the Labor Commissioner has had to say about some of these undetermined issues and examine whether Courts, when they ultimately address the issues, should follow those paths.

### 2. OVERVIEW OF THE ACT.

The Act provides that any "person" who procures, offers, promises, or attempts to procure employment or engagements for an artist – i.e., a musician, actor, director, etc. – is deemed a talent agency.[4] The Act then prohibits any such persons from "engag[ing] in or carry[ing] on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."[5] In its roundabout way, then, the Act prohibits the procurement of employment for an artist without a talent agency license. Nor is there any need to show a pattern of procurement; even incidental procurement violates the Act.[6]

Significantly, there are two exceptions to the Act's prohibition:

- an unlicensed person may procure a recording contract for a musician;[7] and
- an unlicensed person may "act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract."[8]

Violations of the Act carry draconian penalties: any contract between an unlicensed agent and the artist is void.[9] Therefore, a manager who has procured employment for a client can be prohibited from recovering unpaid commissions, even on theories other than breach of contract, such as quantum meruit, fraud, accounting, etc.[10] Furthermore, an unlicensed agent can be ordered to disgorge previously paid commissions.[11]

A one year statute of limitations governs claims brought under the Act.[12] But the filing of a lawsuit by an unlicensed agent to recover commissions from an artist is considered a new violation of the Act and starts anew the running of the statute.[13] Furthermore, the statute of limitations never bars an artist from raising the Act as a defense.[14]

Procedurally, the Act carries with it an administrative remedy, requiring that colorable claims or defenses under the Act first be decided by the Labor Commissioner.[15] Thus, if an unlicensed manager files a superior court action to recover commissions, and the artist raises the Act as a defense or in a cross-complaint, the court must stay the case, and refer it for a decision first by the Labor Commissioner.[16] Then, the decision of the Labor Commissioner can be appealed *de novo* to the superior court.[17]

That's what we know about the Act. But eluding the Court of Appeal or Supreme Court decisions addressing the Act are the following interesting, unresolved issues:

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### 3. TO WHOM DOES THE ACT APPLY . . . ARECALIFORNIA'S ATTORNEYS WITHIN ITS SCOPE?

The application of the Act to California lawyers is a question awaiting resolution by the courts. Many entertainment lawyers simply assume they are not covered by the Act and are free to procure employment for their clients. And why shouldn't they? They have already had to obtain a far more difficult license (the license to practice law).

To date, the Labor Commissioner has danced around the issue, but, to our knowledge, not yet confronted it directly. In *Pryor v. Franklin,* Richard Pryor's manager argued that he was not bound by the Act because he was a lawyer.[18] Seizing upon the fact that lawyer Franklin was not licensed to practice law in California, the Labor Commissioner rejected his contention, while expressly leaving undecided whether Franklin's conduct would have required an agent's license even if he had he been licensed to practice law in California.

Again, recently, the Labor Commissioner approached this issue without deciding it. In *Kilcher v. Vainshtein,*[19] the singer Jewel accused her manager of improperly procuring employment, seeking to void their written agreement and disgorge the hundreds of thousands of dollars the manager had been paid in commissions. Jewel's manager argued that any procurement activity on her part was undertaken in conjunction with Jewel's transactional attorney and, thus, exempted by Labor Code section 1700.44(d) (not unlawful "to act in conjunction with and at the request of a licensed talent agency in the negotiation of an employment contract"). The Labor Commissioner found the exemption inapplicable, noting that "[a]n attorney is not specified in 1700.44(d), or for that matter anywhere else within the Act that could be construed to extend the exemption to licensed California attorneys."[20]

What does this all mean? With this heavy dictum, the Labor Commissioner seems to be forecasting a decision that California lawyers cannot procure employment for their talent clients. Too bad indeed. Subject as they are to: the most exacting of fiduciary duties under penalty of liability; oversight and discipline by the State Bar; regulation of their financial arrangements through California's Rules of Professional Conduct; and the forces of competition at work in the marketplace, it is conjecture at best to suggest that California's active bar members are less fit than licensed talent agents to assist in procuring an artist client's employment.

### 4. WHAT CONDUCT DOES THE ACT REACH?

#### A. Does the Act Prohibit Unlicensed Procurement of Music Publishing Deals?

As a general rule, licensed talent agents do not procure music publishing deals. That task frequently falls to an artist's lawyer or personal manager. Yet it may well be that such procurement is a violation of the Act.

The Labor Commissioner recently held in *Kilcher* that procurement of a music publishing agreement can violate the Act. Noting that some music publishing agreements are really no more than collection devices (whereby an artist contracts with a publisher, in essence, to collect publishing royalties on his or her behalf on compositions already written), the Labor Commissioner held that those agreements that do not contemplate future services by the artist do not constitute employment within the meaning of Labor Code § 1700.4(a)[21].

But many publishing agreements do contemplate future services requiring the songwriter to write and deliver new compositions. And so, in *Kilcher*, the Labor Commissioner expressly reserved its right to determine that certain music publishing agreements would indeed contemplate the rendition of services by the artist and constitute employment.[22] In such circumstances, then, an unlicensed manager's procurement of a publishing deal would violate the Act and subject the manager to the Act's harsh remedies.

#### B. Does the Act Apply to Procurement of Employment by Production Companies for Their Own Employees?

It is a very common for musicians to be signed to production deals with managers. Such arrangements have drawn challenges under the Act, with the musician attempting to void the deal by claiming the manager ought to have been licensed as a talent agent.

The touchstone of these disputes has been whether the arrangement involved the "procurement of employment" with a third party. In *Chinn v. Tobin,* a personal manager signed a client to management, recording and publishing agreements. Giving the Act a sensible – though perhaps not strictly textual – reading, the Commissioner held that

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"a person or entity who employs an artist does not 'procure employment' for that artist, within the meaning of Labor Code section 1700.44(a), *by directly engaging the services of that artist.*" Instead, the Commissioner held that the "activity of procuring employment" under the Talent Agencies Act contemplated the role an agent plays "when acting as an intermediary between the artist whom the agent represents and the third-party employer who seeks to engage the artist's services."

This distinction frequently is, in reality, a murky one. Where an artist works for a production company that itself engages in work with third parties, has employment been procured for the artist within the meaning of the Act? In *Nixon v. Mo Swang Productions, Inc.*[23], this article's writers argued – successfully – to the contrary. There, Nixon, a keyboardist, had a producer agreement with Mo Swang Productions, Inc., which offered producing, songwriting, and mastering services for musical entertainers, record companies and others. Sometimes Mo Swang's clients would seek a song from one of Mo Swang's writers; sometimes they would request a specific producer to arrange a recording. Endeavoring to invalidate his agreement, Nixon urged the Labor Commissioner to dismiss as fictitious the arrangement with Mo Swang, and hold that the parties had in fact procured third-party employment for Nixon outside the strictures of the Act.

The Commissioner declined to do so. In upholding Nixon's and Mo Swang's as a bona fide employment relationship, the Commissioner utilized California's jurisprudence governing the "independent contractor" versus "employee" analysis, and applied the multi-factor test ascertaining: whether the person performing the services is engaged in a business or occupation distinct from that of the principal; whether the principal or worker supplies the instrumentalities or tools, and the place in which the work is performed; whether the person providing the service has the opportunity for profit or loss based on managerial skill; the degree of permanence of the working relationship; whether the services require special training and skills characteristic of licensed contractors; and whether the parties believe they are creating an employer-employee relationship.[24] The Commissioner concluded that Nixon, as bona fide employee of Mo Swang, had not had employment procured for him with third parties.

## 5. WHEN DO THE ACT'S PENALTIES APPLY: ARE THERE EXCEPTIONS TO HARSH RULES FOR VIOLATION OF THE ACT?

As noted above, the penalty for violation of the Act is that the contract between the manager and the artist is deemed illegal and is thus void.[25] But is this a rule that bridges no exceptions? While illegal contracts are generally void, that is not always the case. As Witkin puts it: "In situations in which no strong objections of public policy are present, a party to the illegal agreement may be permitted to enforce it."[26]

Courts may enforce an illegal contract when, among other things, the adverse party would be unjustly enriched if enforcement were denied, and the forfeiture would be disproportionately harsh in proportion to the extent of the illegality.[27] Thus the Court of Appeal has stated:

The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound . . . . But the courts should not . . . blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered where by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.[28]

And there is no valid reason that these standards should not apply as well to a Talent Agencies Act case. The unlicensed talent agent can be ordered to disgorge previously paid commissions.[29] The question then becomes whether disgorgement is mandatory. Does the Court have any discretion?

The Labor Commissioner recently held in *Kilcher* that disgorgement is not required.[30] "[T]he contract between the parties is void *ab initio*, but in recognition of Vainshtein's minimal illegal activity, the lack of mal intent, and the benefit conferred upon Kilcher, it would be inequitable and a windfall for Kilcher to require disgorgement." This is a sound holding, that resonates with California law and that should likely be adopted in future Talent Agencies Act cases that reach the courts.

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## 6. CONCLUSION.

The unexplored ground in California's Talent Agencies Act contains many a trap to ensnare the unwary. Until more light is shed by California's courts and Labor Commissioner, practitioners are advised to at least know the unknown. Apprehending the open questions governing the who, what and when of the Act is the best precaution to drafting enforceable agreements with talent clients, and to avoiding an involuntary appearance as a respondent party before the Labor Commissioner.

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1. W. Shakespeare Troilus & Cressida, Act V, Scene x.
2. Allen B. Grodsky of Law Offices of Allen B. Grodsky and Eric M. George of Browne & Woods LLP focus on business litigation, including all aspects of entertainment litigation.
3. 26 Cal.4th 42 (2001).
4. Labor Code § 1700.4(a)
5. Labor Code § 1700.5
6. Park v. Deftones, 71 Cal.App.4th 1465, 1469-70 (1999).
7. Labor Code § 1700.4(a).
8. Labor Code § 1700.44
9. Buchwald v. Superior Court, 254 Cal.App.2d 347, 351 (1967).
10. Waisbren v. Peppercorn Productions, Inc., 41 Cal.App.4th 246 (1996).
11. Baker v. BNB Associates, TAC 12-96 (1996).
12. Labor Code § 1700.44(c).
13. Park v. Deftones, 71 Cal.App.4th 1465, 1468-69 (1999).
14. Styne, 26 Cal.4th at 51.
15. Id. at 58-59.
16. Id. at 54-55.
17. Labor Code § 1700.44(a).
18. TAC 17 MP 114(1982)
19. TAC 02-99 (2001)
20. Id. at p. 25.
21. Kilcher v. Vainshtein, TAC 02-99 (2001), at pp. 21-24.
22. Id.
23. TAC 30-00 (2001).
24. Borello & Sons v. Dept. of Industrial Relations, 48 Cal.3d 341 (1989)
25. Buchwald v. Superior Court, 254 Cal.App.2d 347, 351 (1967).
26. Witkin Summary of California Law -- Contracts § 451.
27. Id.
28. Norwood v. Judd, 93 Cal.App.2d 276, 288-89 (1949).
29. Baker v. BNB Associates, TAC 12-96 (1996).
30. TAC 02-99 (2001).

## 2002-2003 OFFICER AND COUNCIL NOMINATIONS

In conformance with the By-Laws of the Entertainment and Sports Law Section of the State Bar of Texas, the following individuals have been nominated for the respective positions noted:

**Nominees for 2002-2003 are:**

Chair-Elect/Treasurer: June Higgins Peng, Houston, Texas

Secretary: Yocel Alonso, Houston, Texas

Board of Directors/Council Members:

Term Expiring 2003

- Robert R. Carter, Jr., Austin, Texas
- Janiece Longoria, Houston, Texas

Term Expiring 2005

- Wendy K. B. Buskop, Houston, Texas
- Kenneth Pajak, Austin, Texas
- Tamera H. Bennett, Dallas, Texas

Section members will be asked to vote on the nominees at the next regularly scheduled general Section meeting to be held June 14, 2002, commencing at approximately 2:00.p.m. at the Wyndham Anatole Hotel in Dallas, Texas. Section members may nominate other persons at the general Section meeting.

The next regularly scheduled meeting of the Section is scheduled for 2:00 p.m. to 3:30 p.m. The election of officers and Council members will be conducted at the general meeting.

# THE BLOTTER

**NASCAR FINES:**

**$1,500** at Talladega's Superspeedway to **Kyle Petty's** crew chief for a non-conforming rear spoiler and an illegal fuel cell container;

**$1,000** at Talladega's Superspeedway to **Richy Rudd's** crew chief;

**$500** at Talledega's Superspeedway to **Bret Bodine's** crew chief;

**$250** at Talledega's Superspeedway to **Casey Atwood's** crew chief;

**$250** at Talladega's Superspeedway to **Hank Parker Jr.'s** crew chief;

**$500** at California Speedway to **Ricky Craven's** crew chief for failing to return the car's impact data recorder.

**IAAF FOUND LIABLE:**

**$690,000** for lost income against the International Amateur Athletic Federation. A Munich, Germany, court held for Katrin Krabbe. The world champion sprinter's award stem's from the track's governing body being found to have improperly imposed a 2-year extension of a one-year doping ban against Krabbe.

**JUDGE BANNED FOR 3 YEARS:**

**FRENCH JUDGE,** Marie Reine Le Gougne, was suspended until 2005. The International Skating Union ruled that Le Gougne voted for the Russians pairs skaters "although in her own opinion the pair . . . from Canada presented a better performance." French federation chief Didier Gailhaguet was also suspended for pressuring Le Gougne into voting for the Russian skaters at the Sal Lake City Olympic Games. Le Gougne vowed to appeal. Jon Jackson, an attorney and skating judge who testified, claimed that "A three-year sentence is a very light sentence." ...

**CU FOOTBALL PLAYERS CHARGED:**

**DISTRICT ATTORNEY** refused to present grand jury charges against four University of Colorado football players for allegations of rape. However, the players, Marques Harris, Corey Alexander, Ron Monteihl II, and Joseph Allen Mackey Jr., were shortly thereafter arrested on alcohol and marijuana charges. ...

**PENN STATE PLAYERS ACQUITTED:**

**JURORS** deadlocked and then acquitted two Penn State football players of assault charges. The two players, Thurgood Cosby and Robert Luke, were charged with throwing another man through a window at a fraternity house.

**TEXAS STAR CHARGED:**

**HIGHLY ACCLAIMED** University of Texas football player Cedric Benson was charged with misdemeanor drug and alcohol violations after he and a female were arrested in response to complaints of loud music from a Midland, Texas, apartment. Midland police claim that marijuana, drug paraphernalia and alcohol were found inside the apartment leased by the female, Melanie Robinson. Austin attorney, John Carsey, and Midland attorney, Brian Carney, represent Benson, who was released from the Midland County Central Detention Center after posting bond. ...

**FEMALE SETTLES AND MALES HIRED:**

**CLEMSON UNIVERSITY** settled its lawsuit with the school's former women's basketball coach, Sherry Carter. Carter claimed that she was discriminated against on the basis of sex because she did not receive equal pay to men's basketball coach Larry Davis. Clemson argued that Carter received less because of an NCAA violation against the team and the female players did not perform well in the classroom. After the settlement, Clemson, a private school, hired Sam Dixon, its first black head coach, as its women's basketball coach.

**TITLE IX** received a new leader when President George W. Bush appointed former regulatory layer Gerald Reynolds as assistant secretary of education for the Office of Civil Rights. The Office enforces the Title IX Education Amendments of 1972. The 38-year old Reynolds is an African American with a history of opposing affirmative action and institutional advantages for minorities and women. Although Senator Edward Kennedy, D-Mass., was against the appointment, Jocelyn Samuels, a vice president of the National Women's Law Center and Donna Lopiano, executive director of the Women's Sports Foundation, were taking a cautious route to the appointment. Ms. Lopiano stated "The Women's Sports Foundation is confident (Reynolds) will take a careful look at the significant support of the voting public for a strong Title IX, and the fact that we are still a long way from achieving equality in school and college sports."

Sylvester R. Jaime - Editor

# *LIMITED LIABILITY for SPORTS OFFICIALS*

By
Steven Ellinger[1]

*The author who prepared this article was selected for his knowledge and experience in the subject area. Readers should assure themselves that the material contained in this article is still current and applicable at the time it is being read. Neither the Entertainment and Sports Law Section Journal nor the author can warrant that the material will continue to be accurate, nor do they warrant it to be completely free from errors when published. Readers should verify statements before relying on them. If you become aware of inaccuracies in this article, learn of new legislation, or learn of changes in existing legislation discussed in this article, please contact the author at ellinger@ghg.net.*

**INTRODUCTION**

Sports officials who officiate youth and amateur sports sometimes find themselves in court facing lawsuits arising out of their officiating avocation. They may oftentimes incur tort liability as a result of their actions or inactions on the playing field. The mere threat of a lawsuit is sometimes enough to deter people from pursuing officiating as an avocation and thus directly affects the ability of schools and municipalities to provide interscholastic and amateur athletic programs. Once considered frivolous, lawsuits alleging negligence by a sports official are prevalent today. Injured athletes are increasingly looking toward sports officials for damages. When athletic competition breeds litigation, sports officials often become unwitting participants in the lawsuit.

**NEGLIGENCE CLAIMS**

There are two areas in which suits against sports officials have been filed. The first is for personal injuries in which the sports official is sued for negligence. Negligence claims can arise based on an official's failure to inspect the playing field, an official's failure to control the game, an official's failure to keep the playing area free of equipment and spectators, an official's failure to stop a game because of inclement weather conditions, an official's failure to inspect equipment, an official's failure to protect and warn participants, and an official's failure to properly enforce playing rules. The second area in which suits against officials have been filed is the judicial review of a sports official's decision on the playing field.

In the area of personal injuries, a sports official may be sued for negligence. One negligence claim may be for failure to inspect the playing field or court. For example, an injured player may contend that a referee should have inspected the playing field for holes or other dangerous field conditions. High school football officials have been sued for permitting a game to be played on a field that was in an unsafe and unplayable condition, resulting in a player becoming paralyzed following an injury sustained during the game.[2] The case was dismissed against the officials and settled with the other defendants.

Another negligence claim may occur when the sports official fails to keep the playing area free of equipment and/or spectators. Did you ever see a player trip, fall and be injured by a ball or bat left on a baseball field?

Bubba Smith, an All-Pro and former NFL Lineman-of-the Year, sued the head linesman and one of the down marker attendants, along with the Tampa Bay Sports Authority and the NFL for $2.5 million.[3] Smith alleged that a collision he had with the down marker caused a serious injury that ended his career. He claimed that the collision was a result of neglect on the part of the defendants, including the failure of the head linesman to properly supervise and move the markers and the use of dangerous equipment. The jury in the case's second trial found no liability on the part of the defendants, after an earlier mistrial because the jury was unable to reach a verdict.

With respect to spectators, an injured spectator might claim that the sports official should have stopped play on the field and warned the spectators to move away from the playing area. A player who is injured running into a spectator might claim that the sports official should have moved the spectators farther away from the playing area.

The third area for potential negligence claims involves weather conditions. The injured player may contend that sports official should not have started the game because of inclement weather conditions or that the game should have been stopped.

The fourth area for potential negligence claims involves equipment which causes injury to a player. The claim here is that the sports official has a responsibility to prevent a player from participating in a contest if the player's equipment is obviously ill-fitting or poses an unreasonable risk of injury to other players. One area that might result in successful litigation is when a sports official fails to enforce a safety rule, especially a safety rule such as the rule which prohibits a player from wearing jewelry in basketball.

What about when a player does not wear protective equipment, even when the wearing of such equipment is not mandated by rule? A catcher in a slo-pitch softball recreational game sustained an injury when he was struck in the eye by a softball while catching without wearing a protective mask, even though the playing rules did not require him to wear a mask.[4] The player sued the umpire, alleging that the umpire should have given him his mask and then umpired from behind the pitching mound instead rather than behind home plate. The case was settled prior to trial with the plaintiff receiving $24,000.00.

The final area for potential negligence claims is a claim that the sports official did not properly enforce the playing rules. An

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example of this type of claim would be when an injured player alleges that a basketball referee failed to control the game by not calling fouls or technical fouls, leading to a much rougher game, and resulting in the player's injuries. A New Jersey high school wrestling referee was sued for allegedly allowing a wrestler to continue an illegal hold on his opponent, resulting in a paralyzing injury.[5] The case was settled prior to trial.

Historically, courts have found that lawsuits against officials arising from an injured party's participation in a sporting event are only actionable if the injured party demonstrates recklessness, willfulness, intentional conduct, malice, or wanton conduct on behalf of the official. Athletes who engage in recreational or sports activities are generally deemed to assume the ordinary risks of the activity, and cannot recover for any injury unless it can be shown that the official's conduct was reckless or intentional.

**JUDICIAL REVIEW of SPORTS OFFICIALS' PLAYING FIELD DECISIONS**

The area of judicial review of a sports official's playing field decisions, whether they be judgmental errors or the misapplication of a rule, are infrequently litigated. Plaintiffs generally have not been successful in this area, and courts will most likely continue to be reluctant in becoming involved in decisions on the playing field unless there is some proof of fraud, bad faith, or corruption.

The Georgia Supreme Court has ruled that it does not possess authority to review the decision of a high school referee.[6] The referee admitted that he made an error in not awarding an automatic first down on a roughing-the-kicker penalty, which might have been determinative of the final outcome of the game. The trial court had overturned the referee's ruling based on the school's property right in the football game being played according to the rules. The trial court ordered the game to be replayed from the point of the referee's error. The Georgia Supreme Court reversed, stating: "We now go further and hold that courts of equity in this state are without authority to review decisions of football referees because those decisions do not present judicial controversies."

A New York court declined to substitute its decision for the ringside decision of a boxing referee and a ringside judge.[7] The New York Athletic Commission had ordered that the voting card of the judge, who they suspected was involved in an illegal gambling scheme, be changed. The court recognized that the Commission had the authority to change the decision of the referee and the judges, but pointed out that such authority could not be exercised in an arbitrary, unrestricted, or unsupported fashion. The court stated that judges and referees possess specialized skills and experience which are essential, because the scoring of a prize fight is not a routine or mathematical process, but instead one which is influenced by numerous factors. In light of these factors, the court held that the Commission's allegation that one of the judges had failed to follow the proper standards was so vague as to be meaningless. The court overruled the Commission and held that the suspicion of illegality was not sufficient grounds for the court to intercede in the decision and substitute its decision for that of the assigned judge.

In Missouri, a school district filed suit against the Missouri State High School Activities Association, claiming that the official scorer in a state tournament basketball game had made a scoring mistake which ultimately led to the plaintiff's team losing the contest.[8] The court dismissed the case for failure to state a claim. In a companion case, three student-athletes filed suit claiming that the referee was negligent in not following the proper procedures in the game, thus affecting their opportunity to secure college athletic scholarships.[9] The players' dropped their suit following the dismissal of the companion suit.

Jim Bain, a Big Ten Conference basketball referee made a controversial call late in the Big Ten Conference basketball championship game between the University of Iowa and Purdue University that allowed a Purdue player to make a free throw that gave Purdue a last-minute victory. Some fans of the University of Iowa team blamed Bain for their team's loss, claiming that the foul call was clearly in error. John and Karen Gillespie operated a novelty store in Iowa City specializing in University of Iowa sporting goods and souvenirs. The store was known as Hawkeye John's Trading Post and had no association with the University of Iowa or its sports program.

A few days after the controversial game, the Gillespies sold t-shirts showing a man with a rope around his neck with the caption "Jim Bain Fan Club". Bain filed suit against the Gillespies for monetary damages as well as for a court order prohibiting the Gillespies from selling the t-shirts with Bain's likeness.[10] The Gillespies countersued, alleging that Bain's conduct in officiating the game was below the standard of competence required of a professional referee. The Gillespies claimed that Bain's malpractice caused Purdue to eliminate Iowa from the championship of the Big Ten Conference, thereby destroying a potential market for the Gillespie's memorabilia touting Iowa as the Big Ten champion. The Gillespies further claimed that Bain's actions caused them loss of earnings and business advantage, emotional distress and anxiety, loss of good will, and expectancy of profits. The court granted Bain's request and issued an order prohibiting the Gillespies from selling the t-shirts with Bain's likeness.

"It is beyond credulity that Bain, while refereeing a game, must make his calls at all times perceiving that a wrong call will injure (the) Gillespies' business.....and subject him to liability," the court ruled. The court then went on to say that referees were in the business of applying rules in athletic contests, not in creating a marketplace for people like the Gillespies. "Heaven knows what uncharted morass the court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling".

**PROTECTION FROM LITIGATION**

Sports officials can protect themselves from possible litigation by following the checklist below:

1. Inspecting the playing surface and adjacent areas for hazards prior to the game.
2. Determining if weather conditions are appropriate for beginning or continuing the game.

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*Continued from Page 10*

3. Inspecting game equipment prior to and during the game.
4. Inspecting players' equipment for safety and compliance with game rules prior to the game.
5. Controlling the game and properly enforcing playing rules.

Limiting the personal liability of youth and amateur sports officials is becoming more important in today's litigious society. Players will get injured in games and fans will continue to be upset when their teams lose. Sports officials, however, should not be held accountable unless their actions are grossly negligent.

The National Association of Sports Officials (NASO), an organization whose mission is to serve as the leading source of officiating information, programs, and services, recognizes that it is important to encourage people to become youth and amateur sports officials. In an effort to protect sports officials from personal liability, NASO has drafted model legislation which would provide sports officials liability protection by granting them immunity or limited immunity from lawsuits arising out of their officiating pursuits unless the official is found to have intentionally injured a person or acted in a grossly negligent manner. With the necessity of qualified officials to officiate youth sports events, it is extremely important that officials have some form of protection from personal liability.

## MODEL LEGISLATION

### Limited Civil Liability for Sports Officials

Section 1. Sports officials who officiate athletic contests at any level of competition in this State shall not be liable to any person or entity in any civil action for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

Section 2. Spots officials are defined as those individuals who serve as referees, umpires, linesmen, and those who serve in similar capacities but may be known by other titles and are duly registered or members of a local, state, regional, or national organization which is engaged in providing education and training to sports officials.

Section 3. Nothing in this law shall be deemed to grant the protection set forth to sports officials who cause injury or damage to a person or entity by actions or inactions which are intentional, willful, wanton, reckless, malicious, or grossly negligent.

Section 4. This law shall take effect immediately, and shall apply to all lawsuits filed after the effective date of this law, including those which allege actions or inactions of sports officials which occurred prior to the effective date of this law.

## STATES WHICH HAVE ADOPTED LIMITED LIABILITY LEGISLATION

### Arkansas

This legislation, signed into law by Governor William Clinton in 1987, was the first such legislation passed in the United States. It provides that athletic officials, during the officiating of any amateur athletic contest being conducted under the auspices of a nonprofit or governmental entity shall not be held personally liable for damages to a player, participant, or spectator as a result of acts of commission or omission arising out of officiating duties and activities. The athletic official shall only be liable in damages to player, participant, or spectator if the sports official acts in a malicious, willful, wanton, or grossly negligent manner.[11]

### Delaware

This statute exempts uncompensated umpires and referees who render services as a member of a qualified staff of a nonprofit sports program from liability for negligent acts or omissions which occur in the performance of their officiating duties. This exemption from liability applies to the extent that the injured person's damages exceed either existing liability insurance coverage applicable to the negligent act or omission or the minimum liability insurance coverage required by law if no coverage for the negligent act or omission exists.[12]

### Georgia

This statute exempts sports officials from liability to any person for damages arising out of action or inaction related to officiating duties which occur within the confines of the athletic facility at which the athletic contest is played. For an official to receive the protection of this statute, the official must be registered with or a member of a local, state, regional, or national organization which is engaged in part in providing education and training to sports officials. Officials who intentionally, willfully, wantonly, recklessly, maliciously, or in a grossly negligent manner cause injury or damage to a person are excluded from protection under this statute.[13]

### Illinois

This statute exempts persons who officiate without compensation, or who receive a "modest honorarium" for their officiating services in a sports program of a nonprofit association, from damages as a result of any acts or omissions committed while officiating, unless the official's conduct "falls substantially below the standards generally practiced...in like circumstances by similar persons rendering such services".[14]

### Indiana

This statute, originally enacted in 1987, and repealed in 1998, granted immunity from liability to volunteers for civil damages caused by a negligent act or omission in the course of a sports or leisure activity. As this statute related to sports officials, officials were allowed to receive a "per diem payment" not to exceed $50.00 for their officiating services. This statue did not grant immunity from civil liability for intentional, willful, wanton, or reckless conduct.[15]

*Continued on Page 12*

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**Louisiana**

This statute exempts volunteer officials for loss or damage caused by an official's negligent act or omission. In order to receive the protection under this statute, the official must have participated in a safety orientation and training program established by the league or association, but participation in the safety program may be waived upon proof of the official's proficiency in first aid and safety. An official who has been tested, trained, sanctioned, or admitted by a recognized league or association is deemed to be in compliance with the statute.[16]

**Maryland**

This statute provides limited immunity for sports officials who work in "community recreation programs" and in "an interscholastic, intercollegiate, or any other amateur athletic contest conducted by a non-profit or governmental body." The law does not exempt sports officials from charges stemming from their willful, wanton, or grossly negligent acts or omissions.[17]

**Massachusetts**

This statute provides that a volunteer who renders services as an umpire or referee in a sports program of a nonprofit association is not liable for injuries or damages sustained by another person as a result of the official's act or failure to act in rendering such officiating services. The immunity conferred by this statute does not extend to intentional or grossly negligent acts committed by the official. While the statute also applies to volunteer coaches and managers who serve without compensation, referees and umpires are allowed to receive a "modest honorarium" for their services and still receive protection under the statute.[18]

**Minnesota**

This statute, adopted in 1994, grants immunity from liability to volunteer athletic coaches and officials for sports teams organized under a nonprofit charter, community-based sports teams, or nonprofit athletic association teams, for money damages to a player, participant, or spectator as a result of (the official's) act or omission in providing officiating services. This immunity does not apply to the extent that the official's acts or omissions are covered under an insurance policy issued to the entity for whom the official serves. It also does not apply to officials who act in a willful, wanton, or reckless manner. Interestingly, the immunity from liability does not apply to officials who provide officiating services as part of a public or private educational institution's athletic program.[19]

**Mississippi**

This statute mirrors the NASO model legislation and exempts from liability "duly registered" sports officials who officiate athletic contests at any level of competition for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the game is being played. Actions which are intentional, willful, wanton, reckless, malicious, or grossly negligent are not protected under the statute.[20]

**Nevada**

This statute grants immunity to a sports official at any level of competition, amateur or professional, for unintended acts or omissions not amounting to gross negligence arising out of the official's duties, provided that the act or omission occurs within the facility where the sporting event takes place.[21]

**New Jersey**

This statute provides that sports officials cannot be liable for damages sustained by any person in a game played under the jurisdiction of the New Jersey State Interscholastic Athletic Association or for a public entity unless the official acts in a willful, wanton, or grossly negligent manner. In order to receive the protection of this statute, the official must be accredited as a sports official by a voluntary association.[22]

**North Dakota**

This statute provides immunity from liability to a player or participant for officials who officiate free of charge for a sports team which is organized pursuant to a nonprofit charter. In order to receive the protection of the statute, the official must have participated in a safety orientation and training program established by the league. The statute does not cover officials who officiate in a public or private educational institution's athletic program.[23]

**Ohio**

This statute, repealed in 2001, provided qualified limited immunity from liability to an uncompensated official for injury or loss sustained by a player or participant as long as the act or omission on the part of the official was not willful, wanton, or intentional. In order to have qualified for protection under this statute, the official must have completed a six-hour safety orientation and safety program.[24]

**Pennsylvania**

This statute provides immunity from liability for volunteer officials who officiate in a sports program of a nonprofit association unless the official's conduct falls substantially below the standards generally practiced by other officials.[25]

**Rhode Island**

This statute grants an exemption from liability to volunteer sports officials in a youth sports program organized or conducted by a nonprofit corporation, unless he official's acts are in willful, wanton, or reckless disregard for the safety of the participants in the youth sports program. The statute also covers officials who officiate in an interscholastic or intramural sports program organized and conducted in accordance with and subject to the rules, regulations and jurisdiction of the Rhode Island Interscholastic League. [26]

**Tennessee**

This statute grants a sports official immunity from liability

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for damages to a player, participant, or spectator as a result of the official's act or omission arising out of the official's duties. The statute does not grant immunity for intentional or grossly negligent acts. The official must be registered as a member of a local, state, regional, or national organization which provides training and education to officials in order to receive protection under this statute.[27]

**Texas**

This statute, the Charitable Immunity and Liability Act, does not specifically mention immunizing sports officials from liability. It includes as a charitable organization a "youth sports and youth recreational, or educational organization...organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community." A "volunteer" is described as "a person rendering services for or on behalf of a charitable organization who does not receive compensation in excess of reimbursement for expenses incurred..." The Act grants the volunteer immunity from civil liability for any act or omission resulting in death, damage, or injury if the volunteer acts in good faith and in the course and scope of his duties or functions with the organization. Arguably, a sports official could fit into one of these definitions, provided the sports official is not compensated for his or her services other than expense reimbursement.[28]

**Federal**

This statute protects volunteers from liability in the performance of services for a non-profit organization or governmental entity. This statute is designed to protect persons who serve on boards of directors of non-profit organizations, and unlikely would protect officials from liability for claims made which arise out of an official's duties.[29]

**Summary**

There is a general judicial reluctance to interfere with the outcome of sports events unless there is a showing of bad faith, fraud, or corruption. This same line of reasoning has been followed in not holding sports officials personally liable for monetary damages resulting from officiating mistakes. Both of these positions are based on the belief that a sports official's immediate reactions and decisions warrant more credence than the remote observations of a court.

As the trial court stated in *Bain:* "Heaven knows what uncharted morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind-boggling." Fortunately for officials, this court recognized that "there is no tortious doctrine of athletic official's malpractice...".

Sports officials should be held liable for their actions only if they act recklessly or with gross negligence. Limited liability legislation can stem the growing number of lawsuits filed against sports officials. While such lawsuits will still likely be filed by injured players, in states which have adopted this type of legislation, the higher burden of proof required in order for a player to prevail should cause that number to decrease.

Insurance coverage should not be depended upon for protection of officials from the threat of litigation. Limited liability legislation, if properly drafted, will give sports officials the protection they need from the threat of litigation and frivolous lawsuits.

Most states give some form of limited liability to school districts, coaches, athletic directors, and municipalities. The goal behind the model legislation is to extend this liability protection to sports officials, many of whom have a real concern about being taken to court for incidents arising out of their officiating activities.

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[2] *Cap v. Bound Brook Board of Education,* N.J. Sup. Ct., Cape May Co., Somerset City (1984).

[3] *Smith v. National Football League,* 593 U.S. F.2d 1173 (D.C. Cir. 1976), *aff'g* 420 F. Supp. 738 (D.D.C. 1976).

[4] *Nash v. Borough of Wildwood Crest,* N.J. Sup. Ct., Cape May Co., Docket No. 1-6624-77 (1983).

[5] *Pantalowe v. Lenape Valley Regional High School,* N.J. Sup. Ct., Sussex Co., Docket No. L-40828-26 (1976).

[6] *Georgia High School Ass'n. v. Waddell,* 285 S.E. 2d 7 (Ga. Sup. Ct. 1981).

[7] *Tilelli v. Christenbery,* 1 Misc. 139, 120 N.Y.S. 2d 697 (Sup. Ct. 1953).

[8] *Wellsville-Middleton School District v. Miles* (Mo. Cir. Ct., 1982; unreported).

[9] *Wellsville-Middleton School District v. Miles,* Docket No. 406570 (Mo. Cir. Ct., 1982).

[10] *Bain v. Gillespie,* 357 N.W. 2d 47 (Iowa App. 1984).

[11] Ark. Stat. Ann. Sec. 16-120-102(b).

[12] Del. Code Ann. 16-6835 and 6836.

[13] Ga. Code Ann. 51-1-41.

[14] S.H.A. 745 ILCS 80/1.

[15] West's A.I.C. 34-4-11.8

[16] LSA-R.S. 9:2798.

[17] Ann. Code of Maryland Sec. 5-802,

[18] M.G.L.A. c. 231, Sec. 85V.

[19] Minn. Stat. Chap. 604A.11.

[20] Miss. Code Ann. Sec. 95-9-3.

[21] NRS 41.630.

[22] N.J.S.A. 2A:62A:6.

[23] N.D. Cent. Code Sec. 32-03-46.

[24] Anderson's Ohio Revised Code Sec. 2305.381.

[25] 42 Pa. C.S.A. Sec. 8332.1.

[26] R.I. Gen. Laws Sec. 9-1-48

[27] Tennessee Code Annotated Sec. 62-50-201, *et. seq.*

[28] Tex. Civ. Prac. & Rem. Code Ann. Sec. 84.001, *et. seq.*

[29] 42 U.S.C.A. Sec. 14501.

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# Student Writing Contest

The editors of the TEXAS ENTERTAINMENT AND SPORTS LAW JOURNAL ("Journal") are soliciting articles for the best article on a sports or entertainment law topic for the fifth annual writing contest for students currently enrolled in Texas law schools.

The winning student's article will be published in the Journal. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the Journal. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than May 15, 2002.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½" x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the Journal, please call Andrew T. Solomon, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-646-2905.

**Notice:**

**The Journal will provide space for attorneys who are willing to provide their services, such as contract review or consulting, to entertainers, artists, athletes, etc., free or at a reduced fee. Space is limited and we will endeavor to include as many insertions as space permits. The Journal assumes no responsibility or liability for the services provided nor makes any representation concerning the persons providing the legal services.**

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Although we endeavor to be current, we apologize if there is a lag from the time the Journal is published and the Journal is updated on-line.

# *RECENT CASES OF INTEREST IN MINNESOTA*

Prepared by the South Texas College of Law Students
South Texas College of Sports Law & Entertainment Society

## Minnesota Court Says No To Contraction: Minnesota Twins Must Play the 2002 Season

The Minnesota Court of Appeals recently heard a case concerning the power of the courts to issue a temporary injunction forcing a Major League Baseball team to play at a public stadium pursuant to a use agreement. *Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership*. 638 N.W.2d 214 (Minn Ct. App. 2001).

The Twins play in Hubert H. Humphrey Metrodome (Metrodome), which is operated by the Metropolitan Sports Facilities Commission (Commission). The Twins have played there under various agreements that have been signed and modified. In 1998, the Twins signed a use agreement that provided for the Twins to use the Metrodome for the 1998-2000 baseball seasons. The agreement provided the Twins with the option of exercising three one-year extensions following the fixed-term period. In September 2001, the Twins exercised the option for the 2002 season.

This controversy stems from Major League Baseball's decision to contract (eliminate) two teams from competition. There were several reasons for this contraction, including a diluted pool of qualified players and the financial problems facing several teams. The Minnesota Twins were one of the teams named for possible elimination prior to the 2002 season.

The Commission brought this suit to ensure that the Twins would play the 2002 season in the Metrodome in accordance with its contractual obligations. On November 16, 2001, a Minnesota state district court granted the Commission's motion for a temporary injunction and ordered the Twins to play at the Metrodome during the 2002 baseball season. The Minnesota Supreme Court ordered the Court of Appeals to hear the case to decide whether the district court abused its discretion when it temporarily enjoined the Twins from breaching the one-year use agreement with the Commission.

In finding that the district court had not abused its discretion, the Court of Appeals noted that: (1) the injunction correctly maintained the status quo, (2) the agreement specifically authorized the use of specific performance as a remedy, (3) the team's failure to play its games could not be fully compensable by money damages, and (4) public policy supported the team honoring its commitment to play in the publicly financed and operated stadium.

One of the major factors involved was the unique use agreement between the Twins and the Commission. The Twins were not required to pay rent for use of the stadium during home games nor were they charged use of locker and office space on a year-round basis. The Commission's only financial benefit gained came from a percentage of the concession and advertising sales. Thus, the benefit of the bargain for the Commission was the Twins' promise to play its home games at the Metrodome. Furthermore, the agreement included a specific provision entitled "injunctive relief and orders for specific performance requiring the Team to play its home games at the Stadium." This provision explicitly authorized the Commission's request for specific performance, having the Twins "unwillingly" play at the Metrodome, as a remedy for a breach of contract.

The court also found that forcing the Twins to honor the agreement to play in the Metrodome would further

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public policy because local professional sports franchises are an important community asset and should be made to fulfill their contractual obligations. This is especially true considering that the Metrodome was publicly built, financed, and operated for the public. See Minn. Stat. § 473.552 (1978). The court also noted that many legal commentators had recognized that money damages were not sufficient to compensate a community for the harm caused with the loss of a professional team.

The Twins attempted to show that the financial damage to the team created by the injunction outweighed the harm caused to the community. The team claimed it had lost nearly $4 million during the previous season and would continue to lose money if forced to play. However, the Twins had not presented this information to the district court and the Court of Appeals would not consider it.

Lastly, the court found that the Commision would likely prevail on the merits. The Twins had already exercised their option to lease the Metrodome for the 2002 baseball season. The 2002 season schedule had already been published and season tickets had already been sold. These facts indicated that the elimination of the Twins franchise would result in a breach of the use agreement, and was enough to convince the Court of Appeals that there was a substantial likelihood that the Commission would prevail on the merits. This likelihood justified the district court's issuance of a temporary injunction.

Thus, the Court of Appeals found that the agreement itself, the public interest, and the inadequacy of money damages justified the issuance of a temporary injunction. The Minnesota Supreme Court decided against reviewing the decision, effectively making major league baseball's contraction impossible for the 2002 season. The Twins are currently in second place in the AL Central Division title. The Montreal Expos, another team mentioned for possible elimination, are currently in first place in the NL Eastern Division. Thanks to the Minnesota courts and the excellent on-field performance by the two teams, a Twins-Expos World Series is still a possibility.

By: Brandon Yancey

## *MUSIC BUSINESS AND LAW-RELATED WEB SITES*

ascap.com - American Society of composers, Authors and Publishers. Performing Rights Organization web site.

billboard.com - Billboard Magazine's web site. Includes trade articles and charts.

bmi.com - Broadcast Music, Inc. (BMI) Performing Rights Organization web site.

copyright.net - contains news and informatin on copyright, intellectual property issues, and service providers.

futureofmusic.org - The Future of Music Organization's web site contains articles, news stories, and a calendar of events.

governor.state.tx.us/music - the Texas Music Office's web site includes useful information on copyright, and resources available for the music industry, including links to talent, press,a dn radio stations.

grammy.com - the official web site of the National Academy of Recording Arts and Sciences.

ipmag.com - Intellectual Property Magazne contains law related articles and links.

lcweb.loc.gov./copyright - U.S. Copyright office home page.

mi2n.com - Music Industry Network. Contains news and information relating to the music business.

nmpa.org - National Music Publishers Association (Harry Fox Agency)

sesac.com - Performing Rights Organization web site.

southwestwhole.com - the Distributor's web site includes overall "Best Seller," charts and also by music genre.

ubl.com - general music web site also contains top stories and headlines from trade papers and magazines.

uspto.gov - U.S. Patent & Trademark Office.

velvetrope.com - The Velvet Rope. Music industry gossip.

yahoo.com/government/law/entertainment - links to entertainment law web sites.

# RECENT SPORTS AND ENTERTAINMENT LAW PUBLICATIONS

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## Sports Bibiliography:

### ADA

Christopher E. Tierney. Comment. *Casey Martin, Ford Olinger and the Struggle to Define the Limits of the Americans with Disabilities Act in Professional Golf*, 51 CATH. U. L. REV. 335 (2001).

Andrew I. Warden. Comment. *Driving the Green: The Impact of PGA Tour, Inc. v. Martin on Disabled Athletes and the Future of Competitive Sports*. (PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 2001.) 80 N.C. L. REV. 643 (2002).

### AMATEUR SPORTS

Vicki J. Limas. *Casey and the Little Leaguers*, 37 TULSA L. REV. 81 (2001).

### ANTITRUST

Stephen F. Ross. *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133 (2001).

### ARBITRATION

Richard H. Mclaren. *Introducing the Court of Arbitration for Sport: the Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515 (2001).

### INTERNATIONAL

James George. Watson v. British Boxing Board of Control: *Negligent Rule-Making in the Court of Appeal*, 65 MOD. L. REV. 106 (2002).

### PROFESSIONAL SPORTS

Mark M. Rabuano. Comment. *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439 (2002).

### RACE

Ilyana M. Kuziemko & Geoffrey C. Rapp. *Customer Racial Discrimination in Major League Baseball: Is There No Hope for Equal Pay?* 7 TEX. HISPANIC J. L. & POL'Y 119 (2001)

### SYMPOSIA

*Symposium: Sports Law: A Law Faculty's Individual And Collective Perspectives*, 12 MARQ. SPORTS L. REV. 1 (2001).

*Symposium: The Fifth Annual Symposium on Legal Issues in Professional Sports*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 289 (2002).

### TORTS

Stephen Boyd. *Does English Law Recognise the Concept of an "Image" or Personality Right? Is the Current Position Satisfactory in the Light of Modern Sports Marketing Practice and the Comparative Legal Position in Competitive Overseas' Markets?* 13 ENT. L. REV., Jan. 2002 at 1.

## *Entertainment Bibliography:*

### ART

Emily A. Maples. Comment. *Holocaust Art: It Isn't Always "Finders Keepers, Losers Weepers": A Look At Art Stolen During The Third Reich*. 8 - 9 TULSA J. COMP. & INT'L L. 355 (2001).

David Rudenstine. *A Tale of Three Documents: Lord Elgin and the Missing, Historic 1801 Ottoman Document*, 22 CARDOZO L. REV. 1853 (2001).

Clare Sellars. Comment. *Directive on Re-Sale Rights for Artists*, 13 ENT. L. REV., Jan. 2002 at 24.

## COPYRIGHT

Raymond Shih Ray Ku. *The Creative Destruction of Copyright:* Napster ***a****nd the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263 (2002).

Hisanari Harry Tanaka. *Post*-Napster*: Peer-To-Peer File Sharing Systems: Current And Future Issues On Secondary Liability Under Copyright Laws In The United States And Japan*, 22 Loy. L.A. Ent. L. Rev. 37 (2001).

## INTERNATIONAL

*European Convention on the Protection of the Archaeological Heritage (Valletta Convention)*, 6 Art Antiquity L. 293 (2001).

Bettina C. Goldmann. *Victory for Songwriters in WTO Music-Royalties Dispute Between U.S. and EU—Background of the Conflict over the Extension of Copyright Homestyle Exemption*, 32 IIC 412 (2001).

David Rudenstine. *Lord Elgin And The Ottomans: The Question Of Permission*, 23 Cardozo L. Rev. 449 (2002).

Carla J. Shapreau. *Extension of Express Abandonment Standard for Sovereign Shipwrecks in Sea Hunt, Inc. et al, Raises Troublesome Issues Regarding Protection of Underwater Cultural Property*, 10 Int'l J. Cultural Prop. (2001).

## MOTION PICTURES

Christian John Pantages. Comment. *Avast Ye, Hollywood! Digital Motion Picture Piracy Comes of Age*, 15 Transnat'l Law. 155 (2002).

## MUSIC

Joshua P. Binder. Student article. *Current Developments Of Public Performance Rights For Sound Recordings Transmitted Online: You Push Play, But Who Gets Paid?* 22 Loy. L.A. Ent. L. Rev. 1 (2001).

John Faust. Comment. *Digital Music: Educational Issues*, 2001 BYU Educ. & L.J. 367.

Benjamin Gemperle. Note. *Can't Get No Satisfaction: How* ABKCO v. LaVere *Bowed To Pressure From The Music Industry*. (ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 9th Cir. 2000.) 22 Loy. L.A. Ent. L. Rev. 85 (2001).

Mary Lafrance. *Authorship and Termination Rights in Sound Recordings*, 75 S. Cal. L. Rev. 375 (2002).

L. Kevin Levine. Note. *Digital Music Distribution Via The Internet: Is it a "Platinum" Idea or a "One Hit Wonder?"* 104 W. Va. L. Rev. 209 (2001).

Sue Ann Mota. Napster: *Facilitation of Sharing, or Contributory and Vicarious Copyright Infringement?* 2 Minn. Intell. Prop. Rev. 61 (2001).

Leslie Sindelar. Comment. *Not So Fair After All—International Aspect of the Fairness In Music Licensing Act of 1998*, 14 Transnat'l Law. 435 (2001).

Artur Wandtkel and Oliver Schäfer. *Music On Demand—A New Type Of Use On The Internet?* 32 IIC 285 (2001).

## TELEVISION

Roger L. Armstrong & Mark S. Lee. *Documentaries, Docudramas, and Dramatic License: Crossing the Legal Minefield*, 8 Sw. J.L. & Trade Am. 21 (2001-2002).

## THEATRE

Richard Amada. Note. *Elvis Karaoke Shakespeare and the Search for a Copyrightable Stage Direction*, 43 Ariz. L. Rev. 677 (2001).

## TORTS

Luke Ellis. Note. *Talking About My Generation: Assumption of Risk and the Rights of Injured Concert Fans in the Twenty-First Century*, 80 Tex. L. Rev. 607 (2002).

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