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In this month's issue:

Edited by
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Welcome to Three Point Shot, a newsletter brought to you by the Sports Law Practice Group at Proskauer Rose LLP. In Three Point Shot, we will attempt to both inform and entertain you by highlighting three sports law-related items and providing you with links to related materials. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Clemens' Defamation Case Rocketed Out of Court

Whether you love him or hate him, you have to give Roger Clemens credit for his ability to stay on "his" message. With A-Rod recently hogging the steroid spotlight, many of you may have lost touch with the Clemens saga. For your benefit then, here is the legal update on Clemens, the only seven-time Cy Young Award winner in Major League Baseball history.

As you may recall, at the beginning of 2008, Clemens sued his former trainer, Brian McNamee, for defamation. In his complaint, Clemens alleged that McNamee falsely told federal investigators and former Senate Majority Leader George Mitchell, who as chairman of the Mitchell Commission was investigating steroid use in sports, that the pitcher took steroids and human growth hormone. As stated by U.S. District Judge Keith Ellison, the "lynchpin of the whole [defamation] case" was whether McNamee's statements to the Mitchell Commission could be considered privileged as part of the federal investigation.

For his part, McNamee in a Motion to Dismiss claimed, *inter alia*, that any statements made by him either to the federal investigators or to the Mitchell Commission were privileged under a deal that McNamee struck with the federal investigators. In his response to the motion to dismiss, Clemens argued that McNamee's defamatory remarks to the Mitchell Commission were not privileged since Mitchell was leading a *private* investigation out of a *private* law firm for a *private* client, and were therefore made independent from any federal investigation. In support of his position, Clemens' proffered a letter written by Senator Mitchell to the players of Major League Baseball in which Mitchell stated that "any allegation that the [United States Attorney's Office] is using me or my investigation to do their work for them, or to obtain information from me, is simply untrue."

In November 2008, Judge Ellison concluded that he was not prepared to step up to the plate and decide the issue of immunity, and that in fact he was "agonizing" over the matter. He

requested that McNamee present "additional evidence" to establish that his statements were made "in the course of a judicial proceeding" and that his communications were not voluntary.

McNamee met the extended December 18 deadline for submission of the additional evidence requested by Judge Ellison and presented three affidavits, including one from Assistant U.S. Attorney Matthew Parella. In his affidavit, Parella stated that he was assigned to a group investigating the distribution of anabolic steroids, human growth hormone and money laundering by Kirk Radomski when, as part of that investigation, he interviewed McNamee. According to Parella, he initially told McNamee that McNamee was not a target of the investigation, but that he could become a target if he failed to cooperate, and that his cooperation included speaking to the Mitchell Commission. McNamee was informed further that he could be prosecuted for any false statements made as part of his cooperation, including false statements made to the Mitchell Commission. Parella also stated that arrangements for the interviews with the Mitchell Commission were made by federal agents or assistant U.S. attorneys, who also participated in the interview. Parella's account was backed up by an affidavit from an attorney tasked to the Mitchell Commission, and by McNamee's own counsel.

Based on this additional evidence, on February 12, 2009, Judge Ellison determined that McNamee's statements to the Mitchell Commission were, in fact, made as part of an ongoing investigation and granted McNamee's motion to dismiss in part. The court, however, also denied in part McNamee's motion to dismiss with respect to alleged statements that McNamee had made to pitcher Andy Pettite outside of the investigation and gave Clemens thirty days to amend his suit to include only those outside statements and provide more details regarding the context in which such statements were made.

Even if Clemens chooses to amend his defamation claims against McNamee, win or lose, it seems that there is not much for him to gain. The next step would be discovery, including depositions, which, at least according to McNamee's lawyers, are likely to lead to more embarrassing disclosures about Clemens' private life. Most recently, news sources reported that tests linked DNA in syringes produced by McNamee to federal prosecutors to Clemens. And, win or lose, Clemens is unlikely to recover much from McNamee, whose lawyers took the case on a pro bono basis because their client is nearing bankruptcy. So, while Clemens routinely struck out his opponents on the baseball diamond, it appears that it will be much more difficult for him to achieve a similar outcome in either a court of law or, perhaps even more importantly, in the court of public perception.

I Pity the Fool: "The Natural" Loses Steel Cage Match with Promoter

When you are one of the "baddest" men walking the planet, you're probably not used to being taken to the mat. But, in 2008, that is what happened not once, but twice, to Randy "The Natural" Couture. The first was a legal takedown, when Couture unsuccessfully sought to get out of a four-fight, eighteen-month commitment he had made to Zuffa, LLC

("Zuffa"), the company that controls the Ultimate Fighting Championship ("UFC") series. The second came in November 2008 at UFC 91, when Couture suffered a second-round TKO at the hands of Brock Lesnar, a former (and, at the time, the youngest ever) World Wrestling Entertainment champion.

In March 2007, Couture, a former All-American wrestler at Oklahoma State and five-time UFC champion in two different weight divisions, stunned mixed martial arts ("MMA") fans when he returned to the Octagon at the age of 43 and defeated Tim Sylvia for his third heavyweight UFC title. After defending his UFC title once, Couture trained his sights on Russian champion Fedor Emelianenko. However, after the UFC failed to sign Emelianenko, Couture "tapped out" on October 11, 2007 when he announced his retirement and his severing of all ties with the UFC.

After his "retirement," Couture suggested publicly that he was simply waiting out the two agreements – one, an employment agreement, and the other, a promotional agreement – with Zuffa and that he remained interested in fighting Emelianenko. In response to Couture's public statements, Zuffa filed suit on January 14, 2008 in Clark County District Court in Nevada (Docket No. 08-A-555208-C). In its complaint, Zuffa alleged a number of intentional torts, including "injurious falsehood and trade disparagement," breach of contract resulting in "irreparable damage" and conspiracy based on statements Couture made during his retirement press conference. Zuffa also accused Couture of breaching a stipulation that prohibited him from engaging in "direct or indirect competition" with the UFC and sought an injunction preventing Couture from "participating in any way" with any of UFC's competitors.

Couture's battle with Zuffa soon turned into a tag-team match involving Dallas Mavericks owner Mark Cuban. With his own MMA promotional company – HDNet Fights, Inc. – Cuban apparently was interested in promoting a match-up between Couture and Emelianenko. So, HDNet Fights brought suit in Texas against Zuffa (and Couture) that sought a declaratory judgment concerning Couture's contractual status under his promotional agreement with Zuffa and to clarify the validity of the non-compete provisions of Couture's agreement with Zuffa. To establish standing for his suit against Zuffa, HDNet Fights entered into a conditional future contract with Couture that became "effective upon the termination of the Zuffa contract."

The Zuffa-Couture cage match got even more complex when, on March 7, 2008, Zuffa moved for an expedited arbitration in Nevada to clarify the terms of Couture's promotional agreement. Although both parties agreed that the agreement included a one-year non-compete clause, they disagreed regarding the application of the non-compete. Couture and HDNet Fights believed that Couture would be eligible to fight with any promotional company as of October 11, 2008, one year after he announced his retirement. Zuffa, however, contended that, since Couture was only two fights into his four-fight contract, he would owe the UFC two more fights in the event he came out of retirement, and that the promotional contract with Couture would not expire in July of 2008 as planned, but would instead be "tolled" for the duration of Couture's retirement and reviveg if and when Couture demonstrated his intent to fight again.

Unfortunately, for those of us still searching for answers in litigation, the primary legal issue in the case – that is, whether Couture's retirement "tolled" his promotional contract with Zuffa – was never decided. After a bunch of procedural wrestling in the HDNet action, Couture and Zuffa reached a settlement and Couture signed a new three-fight deal with the UFC.

However, after taking his lumps in the courtroom, the now 45-year-old Couture was game, but ultimately came up short in his defense of the heavyweight championship against newcomer Lesnar. For those of you interested in seeing Lesnar use his "hammerfists" on Couture, check out: http://mma.fanhouse.com/2008/11/16/ufc-91-video-brock-lesnars-hammer-fists-on-randy-couture/

The Writing Is on the Wall (and May Soon Be on the Jumbotron): Maryland Court Rules the Redskins Must Do More for Their Deaf and Hard of Hearing Fans

Football is king in America. The Super Bowl continues to be one of the most watched television events of the year, and most every NFL and major college stadium is sold out week in and week out. However, a recent court opinion in a lawsuit brought by three fans against Pro Football, Inc., owner and operator of the Washington Redskins, and WFI Stadium, Inc., owner and operator of FedEx Field, the Redskins home stadium, suggests that once inside those sold-out stadiums, the ability to equally access and fully enjoy this beloved sport is not the same for all fans.

In August 2006, a class action lawsuit was filed by the National Association of the Deaf (NAD) in the U.S. District Court for the District of Maryland. The suit was brought on behalf of three Redskins fans – Shane Feldman, Brian Kelly and Paul Singleton – who are deaf or hard of hearing and who regularly attended Redskins' home games. The complaint alleged that Pro Football and WFI violated Title III of the Americans with Disabilities Act (ADA), that they failed to provide deaf and hard of hearing fans equal access to the information and announcements broadcast over the FedEx Field public address system, and that they refused to provide auxiliary aids and services (in particular, captioning) to ensure that announcements made over the public address system are effectively communicated to deaf and hard of hearing fans.

Under Title III of the ADA and the applicable Department of Justice regulations implementing Title III, an individual cannot be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. Instead, a public accommodation (which explicitly includes a stadium) must take the necessary steps to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals due to the absence of auxiliary aids and services. In addition, the public accommodation must provide appropriate auxiliary aids and services where they are necessary to ensure effective communication with individuals who have disabilities.

Following initial filings in the case and after approximately a year of failed settlement negotiations, both sides returned to the line of scrimmage. Pro Football's and WFI's first play was to file a motion for summary judgment in which they argued, *inter alia,* that the actions taken by Pro Football and WFI following commencement of the lawsuit rendered the case moot, and that the ADA does not require that they provide captioning or other auxiliary aids and services to ensure that aural information broadcast at FedEx Field is effectively communicated to deaf and hard of hearing fans. Pro Football and WFI also argued that they already provided assistive listening devices, that those devices only need to caption material that is integral to the use of the stadium, and that all information that is integral to the use of the stadium could be gathered solely from watching the game. The Maryland district court rejected Pro Football's and WFI's arguments and found that, since the defendants could cease captioning at any time, the case was not moot and that the devices could not possibly ensure effective communication with the plaintiffs.

According to the court, Title III required that the team and venue provide "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" available at FedEx Field, and the team and venue provide more than just a football game; they also provide public address announcements, advertisements, music, and other aural information to hearing fans at FedEx Field, and this aural information is a good, service, facility, privilege, advantage or accommodation. Without some form of auxiliary aid or service, the court determined that the plaintiffs would not have the requisite equal access to such information. The court, however, did not declare that captioning, as opposed to other auxiliary aids or services, is an absolute requirement. The court also left open the issue of whether the defendants were required to include captioning on the Jumbotrons in order to provide effective communication to all fans. The plaintiff subsequently abandoned their claims relating to captioning, which paved the way for the entry of a final judgment in December.

This case is a landmark case with particular authority in Maryland. Teams, stadiums and venues located in other jurisdictions appear likely to face similar challenges in the future, so a careful review of the decision in this case would appear to be the prudent course.

Postscript - A Personal Foul

As some of you may recall, in the August 2008 edition of Three Point Shot (See "A Personal Foul"), we reported on the Eleventh's Circuit opinion in *Johnston v. Tampa Sports Authority*. On January 21, 2009, the U.S. Supreme Court denied the plaintiff's petition for a writ of certiorari to review the Eleventh Circuit ruling concluding that the plaintiff was not entitled to an injunction against pat-down searches of football fans entering Tampa Bay's Raymond James Stadium.

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