PROSKAUER ROSE LLP

Three Point Shot

Newsletter

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In this month's issue:

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Welcome to the inaugural issue of *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. We hope you enjoy this and future issues. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Tour de Fallout

As the 95th Tour de France approaches, many Americans may choose to ignore the year's premier cycling event in the wake of Lance Armstrong trading in his bike for running shoes and Floyd Landis trading in his yellow jersey for a two-year ban for doping. On the legal front, it may be more interesting to watch two of cycling's heavyweights, Greg LeMond and Trek Bicycle Corporation, go spoke-to-spoke in a battle arising out of a licensing arrangement first entered into over a decade ago.

In the summer of 1995, LeMond, three-time Tour de France champion and the first American to win the event, entered into the licensing agreement with Trek, creating biking's newest power couple. The most recognizable American cyclist in the world lent his name and brand to one of the most well-known bicycle manufacturers in the world. The partnership appears to have been successful until the chain came off in 2001 when LeMond began making public statements about doping in the sport of cycling.

In his complaint filed in March 2008 in Minnesota state court against Trek, LeMond alleges that Trek breached the licensing agreement by failing to use "best efforts" to promote the LeMond brand. LeMond seeks specific performance and an award of lost business revenue. Specifically and in great detail, the complaint alleges that commencing in 2001, Trek sought to suppress LeMond's comments about doping in cycling.

In April, Trek responded by filing its own complaint against LeMond Cycling in the Western District of Wisconsin. The Trek complaint asks the federal court to declare, among other things, that Trek had complied with the "best efforts" provision of its agreement with LeMond Cycling or, alternatively, that the "best efforts" provision is indefinite and therefore unenforceable, and that LeMond failed to render his services in a "professional and conscientious manner." According to Trek's complaint, LeMond breached that

obligation when he went public with his view that performance enhancing drugs were severely damaging the sport of cycling and made a number of publicly disparaging comments (repeated in 2004) regarding Trek's newest spokesperson and golden boy, Lance Armstrong, and implied a link between Armstrong and the use of such drugs.

The LeMond-Trek dispute will require the court to interpret the provision of the license agreement that requires LeMond to render his services in a "professional and conscientious" manner. The respective complaints place directly on the table the propriety of LeMond's public statements concerning doping in cyling in general and Lance Armstrong in particular. The LeMond Complaint suggests that it was LeMond's duty to speak out against doping in the sport and that, throughout the term of the agreement, LeMond was in full compliance with its terms. Conversely, Trek will seek to demonstrate that LeMond failed to act in the agreed upon manner because his comments about doping in the sport and his disparaging remarks about Armstrong adversely impacted the LeMond brand and the entire Trek image.

To support its perspective, Trek's Complaint includes a number of customer e-mails, including one in which a customer purportedly wrote:

> *I recently purchased a LeMond Bike and am having an unusual problem. When I place it in the garage next to my Specialized and Trek bicycles it begins to whine and complain that the other bikes are cheaters and that it is the only true American Champion. . . . Please have [LeMond apologize] publicly so I can bring the bike in to watch it on TV. I suppose this is not covered under warranty.*

It appears that the final stage of the once promising LeMond-Trek partnership is nigh. Over 20 years ago, LeMond inspired millions by winning the Tour de France with 37 shotgun pellets still remaining in his body from a hunting accident. His more recent attempt to separate himself from the pack of world-class cyclists who have been caught up in the doping scandal may, at least from a financial perspective, end less successfully.

She Wore an Itsy-Bitsy Teeny Weeny Fastkin® LZR Racer?? — Competitive Swimming Goes Hi-Tech

From the itsy-bitsy polka dot bikini to boardshorts and back, the world of swimwear is constantly evolving. And, in the world of competitive swimming, where hundredths of a second often separate the winners from the losers, leading manufacturers of swimwear are increasingly turning to rocket scientists for their latest designs. With the help of NASA high-tech friction-testing facilities, the Speedo swimwear company developed the recently introduced LZR Racer, a full-body racing suit that the company claims is the "most revolutionary performance swimming suit ever made." Since February of this year, swimmers wearing the LZR Racer have broken more than 35 world records, leading to claims of "techno-doping." The harshest critics of the LZR Racer and similar racing suits

have actually decried the records as meaningless. But, to at least one competitor of Speedo, its claims of superior performance of its swimwear are the bigger issue.

On May 12, 2008, TYR Sport, manufacturer of Tracer Light™ swimwear, filed a complaint in the Central District of California against Warnaco Swimwear, Speedo's parent company, USA Swimming, and Mark Schubert, coach of the U.S. swim team, among others, alleging that the defendants had conspired to disperse false and misleading advertising material in an effort to sink the products of Speedo's competitors, including TYR, so that Speedo could raise prices and limit competition in relevant markets in violation of anti-trust laws. According to TYR, the relevant markets include swimwear, goggles, and swim caps sold to competitive, professional, collegiate, high school and club ranks swimmers in the U.S. TYR also alleges that Eric Vendt, a named defendant and Olympic Silver medalist swimmer, anticipatorily breached his TYR endorsement contract when his representative sent a letter to TYR stating that Vendt would wear a Speedo suit at the Grand Prix swimming competition. Finally, TYR asserts that Schubert abused his position as the U.S. swim coach by advocating that Speedo's products were superior to its competitors' products and "recommending" that swimmers breach their endorsement contracts. The complaint seeks damages and injunctive relief.

On the legal side of the ledger, TYR faces the difficult task of demonstrating both that Speedo's advertising and promotions included false and misleading statements and that such statements had the tendency to deceive and influence consumers' purchasing decisions. That this is an Olympics year makes this case all the more intriguing. Soon all eyes will turn to Beijing, and what suits the winning racers wear is likely to have a significant impact on future sales.

Off-Sides: Can Nationally Mandated Efforts to Develop Talent Run Afoul of EU Anti-Discrimination Laws?

For those of you concerned about discrimination in any form, this next item will be of particular interest .... The President of the Fédération Internationale de Football Association (FIFA), Joseph S. Blatter, has for many years argued that member teams should favor domestic over foreign players to foster the development of homegrown talent. Recently, Gerry Sutcliffe, England's Sports Minister, joined the fray suggesting that the English Premier League would be better off if it implemented a rule mandating the employment of English players in the league. The professed logic for such measures is that, if the domestic leagues and teams cultivated local talent, national teams from such locales would be stronger and more popular. This, in turn, would lead to greater competition and more interest in events involving country versus country.

The latest salvo on this issue has come from FIFA, which recently floated what has been called the "six plus five" proposal. Pursuant to the "six plus five" rule, each FIFA club would be required to start a majority of players – i.e., six players – eligible to play for the national team of the country in which the club is located in each soccer match. The other

five players could be foreigners. FIFA's congress has endorsed the "six plus five" proposal and plans to implement the rule by the 2012-13 season.

The "six plus five" proposal, however, appears likely to face significant opposition on the grounds that it would violate the European Union's anti-discrimination laws. The President of the European Commission, Hans-Gert Pöttering, announced that he will not support it and in May the EU Parliament voted overwhelmingly to reject it. Thus, the proposal appears to be on a collision course with the EU. If so, it would not be the first time that quotas in soccer have been challenged. In 1995, in Union Royale Belge des Societes de Football Association v. Bosman, the European Court of Justice struck down player limits on the grounds that they violated worker employment rights under the EEC Treaty. That ruling was cited by EU authorities when they rejected the "six plus five" proposal.

This head-butting regarding the employment of domestic players in domestic leagues and teams seems likely to continue for some time with FIFA apparently committed to implementing the "six plus five" rule, and EU authorities equally committed to their view that any such rules would be discriminatory, although EU Commission President Pöttering has said that he will continue dialogue with Blatter on the subject.

Sports Law Group

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