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Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. 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.

### **Wrestlemania in Bedrock City**

Who would win in a fight between Superman and The Incredible Hulk? Or, between Spiderman and Batman? For those of you who have debated with friends over such intellectually challenging questions, you can now add the Flinstone's "Bamm-Bamm" vs Hulk Hogan to the list.

Although [Hulk Hogan](#) has certainly tasted his share of victories inside the ring, his most recent came in the legal arena when he took on [Post Foods](#), the food giant that makes the kids' cereal, Cocoa Pebbles. In May 2010, Hogan (whose real name is Terry Bollea) sued Post for allegedly misappropriating his image in a [television commercial](#) featuring Fred Flintstone and Barney Rubble duking it out against a wrestler named "Hulk Boulder" on a show called the "Cocoa Smashdown." The Hulk Boulder comic character, who had long blond hair and a Fu Manchu mustache very similar to Hogan's, defeats Fred and Barney but then gets beaten by Barney's son, Bamm-Bamm. The commercial ended with the slogan "little pieces...BIG TASTE."

Hogan's [complaint](#), which was filed in the United States District Court, Middle District of Florida, alleged claims under the Florida right of publicity law, common law invasion of privacy and the federal unfair competition provisions of the Lanham Act relating to false endorsement. More specifically, Hogan's complaint alleged three counts of infringement arising from the Cocoa Smashdown commercials.

First, the complaint alleged that Post publicly used for commercial and advertising purposes the name, portrait, photograph or other likeness of Hogan without written or oral consent, thereby causing him damages and injuries including denial of reasonable royalties and other compensation. Here, Hogan pointed out that he was called "Terry 'The Hulk' Boulder" in the initial stages of his wrestling career, and the character in the commercial is named "Hulk Boulder." Second, Post was accused of commercially misappropriating Hogan's name, likeness and identity for its benefit, which constitutes a common law invasion of privacy. Here, Hogan argued that the long blond hair and Fu Manchu mustache of Hulk Boulder were very similar to his signature looks. Lastly, the

complaint asserted that the commercial use of the Hulk Boulder character was likely to cause confusion or deceive viewers as to the connection between Post and Hogan, which constituted false endorsement and caused diminution of his endorsement value.

For those “Hulk-a-Philes” out there, the complaint also included the following interesting facts: 1) Hogan achieved early success in Japan, where fans nicknamed him “Ichiban” (which means “Number One”); 2) AT&T reported that his 900 number information line was the single biggest 900 number from 1991 to 1993 and 3) in 1995, Hogan released a music album titled “[Hulk Rules](#)” (though the complaint fails to mention that the album is currently listed at number 12,170 on the Amazon.com Bestsellers in Music ranking).

Post apparently cried uncle and [settled the case on undisclosed terms](#) after which, in September 2010, Hogan filed a notice of dismissal. The “Bamm Bamm” commercial subsequently disappeared from the air, if not from [YouTube](#).

A [similar case](#) of alleged infringement of the right of publicity by a cartoon character, this one involving celebrity Paris Hilton, also was settled in September 2010. In 2007, Hilton was on a reality TV show called “The Simple Life” where she incessantly used the phrase “that’s hot.” Hilton subsequently [trademarked the phrase](#). Thereafter, Hallmark came out with a [birthday card](#) titled “Paris’s First Day as a Waitress” featuring Hilton’s head on an animated body and her phrase “that’s hot” on the cover. Hilton sued Hallmark, alleging that the card violate her trademark, misappropriated her image and invaded her privacy. In August 2009, the U.S. Court of Appeals for the Ninth Circuit [reversed a lower court ruling](#) in favor of Hallmark and remanded for a trial on Hilton’s claims. The case [settled on undisclosed terms](#) prior to the scheduled December 2010 trial date.

The Hulk Hogan case, the Paris Hilton case and other [recent ones similar to them](#) should serve as a cautionary tale to advertisers and retailers considering using a celebrity likeness without permission. Celebrities are paying attention and seem more willing than ever to enforce their publicity rights, even against cartoon versions of themselves.

## **Tackle Football Players Beware**

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The widespread appeal of tackle football without equipment is obvious to anyone who strolls through a college campus or a public park on a bright fall day. There, you are likely to find any number of pick-up games being played by folks of all ages. But, the risk of serious injury from playing sandlot football without protective equipment is not so obvious, at least according to a ruling by the United States Court of Appeals for the Third Circuit in [Betts v. New Castle Youth Development Center](#).

The case kicked off in March 2007, when Eric Betts (“Betts”), who had been rendered a quadriplegic in a pick-up tackle football game played at a juvenile detention center, [filed suit](#) in the United States District Court for the Western District of Pennsylvania against the New Castle Youth Development Center (the “YDC”) and various YDC staff members. The game had been played with other residents of the detention center under the supervision of YDC staff members. In his suit, Betts alleged violations of his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments, pursuant to [42 U.S.C. § 1983](#).

In a victory for the YDC and its staff, the district court [granted](#) their motion for summary judgment on all claims. In doing so, the court held that the claims against the defendants

in their official capacities were barred under the Eleventh Amendment, and that the claims directed at them in their individual capacities failed on the merits.

With respect to Betts's Eighth Amendment claim, the district court held that there was insufficient evidence to raise a genuine issue of fact as to the existence of both a substantial risk of serious harm from playing tackle football without equipment and deliberate indifference to that risk on the part of staff members. Similarly, because the challenged behavior of the YDC staff did not "shock the conscience," the court found that there was no liability under the state-created danger doctrine and that Betts's Due Process claims failed. Not willing to give up his fight before the final whistle, Betts appealed the district court decision to the Third Circuit.

In affirming the district court's decision, the Third Circuit reasoned that in order to prevail under his Eighth Amendment claim (that the YDC's staff failed to ensure his reasonable safety), Betts was required to show that the YDC staff was "deliberately indifferent to a risk of serious harm." The question of the staff's deliberate indifference is a subjective inquiry, while risk of harm is evaluated objectively. With respect to the subjective inquiry, the Third Circuit held that Betts did not demonstrate that the YDC staff knowingly and unreasonably disregarded an objectively intolerable risk of harm by supervising and/or allowing the residents to play tackle football without pads.

The court further found that, regarding the objective component of an Eighth Amendment claim, under the test established by the Supreme Court in [Helling v. McKinney](#), Betts was required to establish: (1) the seriousness of the injury, (2) a sufficient likelihood that serious injury will result from playing tackle football without equipment, and (3) that risk associated with permitting youths to play tackle football without equipment violates contemporary standards of decency. The Third Circuit held that Betts easily met the first part, as no one would contend that being rendered a quadriplegic was not a serious injury, but failed on the remaining two.

On the second prong, the Third Circuit reasoned that the "mere possibility of an injury result[ing] from an activity does not mean there is a 'substantial risk' of that injury occurring." The court further held that "[i]f life is fraught with risk of serious harm and the sports world is no exception," but an Eighth Amendment violation "may not be predicated on exposure to *any* risk of serious harm; the risk must be substantial." The court also found that Betts failed on the third prong since the risks of injury posed by tackle football do not violate contemporary standards of decency as those risks are assumed daily by the "incarcerated and the free alike."

Finally, the court turned to Betts's Fourteenth Amendment substantive Due Process claim that the YDC staff was deliberately indifferent to his liberty interest in bodily integrity and that allowing him to play tackle football without equipment constituted a state-created danger. In affirming the district court ruling, the Third Circuit relied on the reluctance of the Supreme Court to expand the concept of substantive Due Process under the "more-specific-provision rule," which holds that if a constitutional claim is covered by a specific constitutional provision, such as the Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive Due Process. Because Betts did not cite any case law for the proposition that he might have both a substantive Due Process and Eighth Amendment claim challenging the same conduct, the Third Circuit held that because the allegations fit squarely within the Eighth Amendment's prohibition on cruel and unusual punishment, the more-specific-provision rule foreclosed Betts's substantive Due Process claim.

## This is Not Your Grandfather's Protective Padding

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As many of you are aware, the sports world recently has focused a significant amount of attention on the inherent dangers of playing football and other competitive sports, at both the [professional](#) and [amateur](#) levels. At the same time, the federal courts have been wrestling with an intellectual property dispute between Nike and specialty sports equipment designer and manufacturer, Stirling Mouldings Limited and McDavid Knee Guard, Inc., regarding padding designed to protect players from injury.

In an action filed in the Northern District of Illinois, Stirling and McDavid [charged](#) Nike with patent infringement and violation of federal and state unfair competition laws in connection with the manufacture, distribution and sale of protective gear used in high-contact sports. The plaintiffs alleged that, [in 2004](#), they had introduced a significant advance in protective gear technology under the “HexPad” trademark, to sports teams at various levels of competition. The [HexPad products](#) used individual, geometrically-shaped compression pads that were attached directly to a garment to provide both lightweight and flexible protection and, at least according to the plaintiffs, a better playing experience for athletes. While the [main product](#) initially was a pair of compression shorts worn under uniforms, primarily in basketball and soccer, the HexPad and related technologies rapidly expanded to arm and shin guards, as well as shirts integrating both chest and back pads.

According to their [amended complaint](#), the plaintiffs built the market for their HexPad products without major competitors until Nike blitzed them in early 2009 with its release of Nike’s “[Pro Combat](#)” line of protective equipment at the [NBA All-Star game](#). In addition to allegations of patent infringement, the plaintiffs contended that, in bringing the Pro Combat products to market, Nike had acted in an anti-competitive manner by convincing colleges and universities to sign exclusive supply agreements. In their motion preliminary relief, McDavid and Stirling cast themselves as the underdog to the Nike marketing juggernaut and alleged that Nike’s infringement of their intellectual property threatened immediate and irreparable harm to their business.

All the padding in the world could not cushion the blow to the plaintiffs when the district court denied their request for a preliminary injunction. Although plaintiffs had argued that Nike infringed its patents through both of its manufacturing processes, the [district court ruled](#) that the evidence presented by the plaintiffs regarding both Nike’s initial and current methods for manufacturing its “Pro Combat” products failed to satisfy plaintiffs’ burden of demonstrating likelihood of success on the merits. In making its ruling, the court found that it was apparent that there were any number of alternate methods to manufacture virtually the same products. The district court also concluded that the plaintiffs had not offered any credible evidence that their sales had suffered by virtue of Nike’s entry into the market or that, to the extent that sales suffered in a future date, damages after successful prosecution of their case would not provide an adequate remedy. Last fall, the Federal Circuit [summarily affirmed](#) the district court’s [ruling](#) denying any preliminary relief.

The second body blow to McDavid’s and Stirling’s claims came in July 2010, when the district court [dismissed](#) their non-patent unfair competition claims. With regard to the false advertising claims, the court held that the plaintiffs’ concession that there was ambiguity as to the “exclusive” nature of Nike’s supplier agreements had the effect of rendering those documents statements of opinion, not a false statement of fact, leaving plaintiffs unable to establish an element of their Lanham Act and Illinois Consumer Fraud Act claims. The court also held that the communications between Nike and the schools were not “[commercial advertising or promotion](#)” as that phrase had been interpreted by both

the federal and Illinois courts. Finally, the court found that Nike had only made [truthful statements that were non-actionable](#) and granted Nike summary judgment on the plaintiffs' tortious interference claims.

Perhaps emboldened by its Federal Circuit victory and the dismissal of the non-patent claims, Nike executed the next step in its game plan and filed a motion seeking summary judgment on the remaining patent claims on November 8, 2010. As of this writing, Nike's motion is still pending and, though battered by Nike in the courts thus far, plaintiffs may still be hoping that the protective padding in their products shield them from the final blow.

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This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

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