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in this issue

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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.

Tennis Umpires Serve Up Lawsuit against USTA

While many tennis fans got to watch a much anticipated Djokovic-Nadal final at the 2011 U.S. Open, the most interesting draw at this year's tournament may have been between the United States Tennis Association (USTA) and its umpires. Prior to the start of the U.S. Open, 13 of the world's 26 top-rated umpires decided not to officiate at this year's tournament. The absentee umpires stayed home in protest of a 30% pay reduction by the USTA and what they considered to be generally inadequate compensation compared to other Grand Slam tournaments. The USTA-umpire saga took on an added intensity when umpires Steven Meyer, Marc Bell, Larry Mulligan-Gibbs, and Aimee Johnson went from the tennis court to federal court.

On September 8, the four umpires served up a complaint against the USTA in the Southern District of New York. The complaint alleges that the USTA violated the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL), Articles 6 and 19, respectively, by not providing overtime pay to umpires who worked at the U.S. Open. According to the complaint, U.S. Open umpires routinely worked more than 40 hours per week but were never given overtime pay. Instead, umpires were given a standard daily wage that was never adjusted when umpires worked more than 40 hours during a week. Both the NYLL and the FLSA require employers to pay time-and-a-half for any overtime worked when an employee works more than 40 hours during a week.

The complaint seeks back overtime pay not only for the named plaintiffs, but for all umpires affected by the USTA's alleged miscategorization of umpires as independent contractors. The complaint alleges that the USTA owes overtime pay plus interest to umpires who worked at the tournament as far back as 2005, with approximately 300 umpires working at the tournament annually.

On September 30, the USTA filed its answer to the complaint. The USTA argues that the umpires, who work at a tournament that is only three weeks long, are not employees entitled to mandatory overtime pay, but independent contractors. Under the FLSA and

NYLL, workers are not entitled to overtime pay unless they are in an employer-employee relationship. Independent contractors are not considered employees under the FLSA or NYLL, and therefore not entitled to mandatory overtime pay.

Although there is no clear-cut definition of what constitutes an employee for purposes of the FLSA or NYLL, courts typically look to a series of factors to determine whether a worker is an employee or independent contractor. Some factors that the court might use to answer this question include the degree of control that umpires have in performing their duties, the permanency of their working relationship with the USTA, the umpires' opportunities for profit and loss related to their work, and the extent to which the umpires' services are an integral part of the USTA's business.

Will the umpires be happy when this case is called? We will keep you posted.

Ultimate Fighting – It's Like "Swan Lake" – How Come You Can't SEE That?

Swan Lake, one of classical ballet's most beloved works, has men leaping around on a stage. So does mixed martial arts or "MMA."

Swan Lake has characters with weird names (Prince Siegfried, The Master of Batons). So does mixed martial arts. (The Dragon, The Thrashing Machine).

Swan Lake has drama and violence. So does mixed martial arts.

There's a difference between *Swan Lake* and MMA, though. *Swan Lake* is performed regularly on stages in New York State, but MMA is not. That's because mixed martial arts effectively is banned under New York Unconsol. Law § 8905-a(2), enacted into law in 1997. The law prohibits live matches of "combative sports," a term defined in such a way as to expressly carve out "boxing, wrestling and sparring," and certain specified forms of permitted martial arts. Remaining within the ban is any sport in which the "contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents."

In Jones, et al v. Schneiderman, No. 11-8215 (S.D.N.Y. filed Nov. 15, 2011), Zuffa LLC, d/b/a Ultimate Fighting, a major promoter of mixed martial arts, and a group of MMA fans, fighters, trainers and others involved in the sport are looking to overturn the statutory ban. The MMA lawsuit plaintiffs argue that MMA matches are "expressive activity" protected under the First Amendment of the U.S. Constitution. That's the same argument that the American Civil Liberties Union has made to protect the rights of pole dancers and erotic performance artists. Barry Friedman, a constitutional law professor at New York University who is one of the attorneys representing the plaintiffs, made the comparison to dancing explicit: MMA is "martial artistry…. The nature of martial arts is a lot like dancing."

The plaintiffs' complaint, a 105-page essay on the benefits of MMA to individuals and to the economy, makes numerous other legal arguments supporting the plaintiffs' position:

- The statutory ban on MMA is unconstitutionally overbroad and facially invalid, because it so broadly criminalizes conduct directed at promoting or profiting from "combative sports" that it sweeps in constitutionally protected activities;

- The ban is unconstitutionally vague, because it is impossible to determine precisely what "combative sports" activities are prohibited;
- The ban violates the plaintiffs' right to equal protection of the laws, because it is singled out and treated differently from other similar sports events and activities;
- The ban violates due process of law because it is irrational and arbitrary;
- The ban unconstitutionally restricts interstate commerce; and
- A component in the law added in 2001 to prohibit combative sports matches at venues that sell alcoholic beverages is unconstitutional as applied to live performances of MMA.

Perhaps the plaintiffs will succeed in convincing the federal courts that MMA is an expressive activity entitled to the same constitutional protection as a performance of *Swan Lake*. They are no doubt hoping for more success than MMA fighter Chuck Liddell had with a different set of judges and another kind of dancing.

We Are Reliably Informed…

Muhammad Ali Book Dispute Settled

In our September 2011 edition we reported on a lawsuit brought over alleged unauthorized use of boxing legend Muhammad Ali's "Float Like a Butterfly, Sting Like a Bee" quote in an advertisement. Attorneys for Ali reported to the court on November 8 that the matter had been settled in principle on undisclosed terms.

Supreme Court of Ohio Declines OSU Request to Submit to Mediation Dispute over Turnover of Correspondence on Player Suspension

In our September 2011 edition we reported on the ruling of the Ohio Supreme Court in ESPN v. Ohio State University, an action brought by the network to compel the school to release unredacted versions of internal correspondence relating to the suspension of several players. In a letter dated October 4, the court denied OSU's motion to submit the case to mediation and settle out of court. With the denial of this motion, the court proceeded with the calendar set in the September 21 court order, and evidence was submitted by the parties October 11 on the merits of the dispute.

"Super Bowl Shuffle" Dispute Settled

In our May 2011 edition we reported on a complaint filed by the wife of "Super Bowl Shuffle" co-writer Richard Meyer and her exclusive licensing agent, Renaissance Marketing Corporation against Random House for the unlicensed use of the 1985 hit song. The name of that tune is now "settled." According to court filings, on July 15, 2011, a stipulation of dismissal was entered. Terms of the settlement have not been disclosed.

Coca-Cola Gets Large Attorney Fee Award in World Cup Song Dispute

In our March 2011 edition we reported on the dispute between the Coca-Cola Company and the writer of the Spanish-language version of "Wavin' Flag," Coke's World Cup theme song. Following the court's summary judgment ruling in favor of Coca-Cola, the company sought an award of attorney fees. The magistrate's report recommending the award concluded that due to the "incontrovertible evidence and the binding law" of the circuit, the plaintiff should not have pursued the litigation after the evidence became

known to him during discovery. The magistrate's recommendation of an award of partial attorney's fees in the amount of $535,135.00 and partial costs in the amount of $43,011.99 was affirmed by the district court on August 8, 2011. This massive award incorporates a substantial reduction from the original amount Coke sought. The court justified this reduction by noting that Coca-Cola was entitled to reasonable attorney fees, not the fees that it paid for the services of a premium law firm that had staffed 19 attorneys on the case.

For more than 45 years, Proskauer has represented sports leagues and sports teams in all aspects of their operations.

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