Proskauer

newsletter

Summer 2014
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.

Female Football Player Throws Flag at LFL over Bare Wages

The three-year championship run of the Los Angeles Temptation was snapped in 2013 when the upstart Chicago Bliss, led by the quarterback and two-time league MVP Heather Furr, won the Legends Cup with a resounding 38-14 win over the Philadelphia Passion. The Temptation? The Bliss? The Passion? You might be wondering whether we're talking about a soul record, steamy novel or professional sports league.

Welcome to the Legends Football League ("LFL"), a professional woman's football league boasting ten teams in the U.S., and companion leagues in Canada and Australia. The game is played on a 50-yard field with similar rules to indoor arena football, including no field goals or punting, and seven-on-seven action (e.g., the typical offense includes a quarterback, two running backs, one linewoman and three wide receivers). This is no genteel powder-puff game or scripted match – the players engage in full-on tackle football, earning the title of "Women of the Gridiron." However, there is a reason that the LFL was formerly called the Lingerie Football League (the name was changed in 2013): the women players wear helmets, shoulder pads, knee and elbow pads, and not much else…other than relatively skimpy "performance wear" that presumably is a big draw for male viewers.

The LFL was founded in 2009 and continues to try to expand and build its brand. Unlike the four major U.S. sports, this fledgling league's games are not broadcast on a major network (live games and highlights can be viewed on the league's YouTube channel), and as a result, stars and role players alike do not receive anything approaching lucrative professional sports contracts. Besides tossing around the pigskin during the spring-summer LFL season, players generally hold other full-time jobs. Apparently fed up with the hits, strains and scrapes from years of competitive LFL football for allegedly little more than the complementary Gatorade, one former player recently filed a putative class action lawsuit that claims that the league underpaid its players in violation of the California Labor Code.

The plaintiff Melissa Margulies alleges that the LFL attempted an end run around the law by designating the players as "independent contractors," even though the players purportedly lacked the requisite control and discretion over their job duties to deserve treatment as anything other than employees (See *Margulies v. Legends Football League LLC*, No. BC550244 (Cal. Super. filed June 27, 2014)). Margulies states that she was required to sign a standardized contract that classified players as independent contractors, mandated attendance at games and marketing events, prevented players from engaging in other dangerous activities and granted the league rights in the players' rights of publicity. Despite being labelled as an independent contractor, Margulies states in the complaint that it is "difficult to imagine how players in a team sports league could ever qualify as independent contractors," particularly since "team sports demands that players follow league and team rules or face discipline or termination."

In advancing various claims under the California Labor Code, the plaintiffs, among other things, allege that the LFL willfully misclassified the players as non-employees and failed to pay the players applicable minimum wage, overtime wages and wages earned and unpaid at the time of discharge. The complaint also asserts that the LFL failed to reimburse players for out-of-pocket expenses incurred as a condition of employment for such things as attending practices, games and promotional events. In lieu of any salary, the players were allegedly paid "an amount determined by the league" and based upon factors such as "ticket sales and whether the team won or lost" – in fact, plaintiff alleges that there were entire seasons where she received no income. The lawsuit seeks to recover all wages entitled under the law (including unreimbursed work-related expenses) and statutory penalties for the LFL's purported violations of California labor law.

The defendant LFL has yet to file an Answer, and it remains to be seen whether Margulies can sustain this class action drive or whether the LFL's defense smothers her claims at midfield. Regardless, outside of the courtroom, the Chicago Bliss, with a 40-12 romp over the L.A. Temptation, advanced to the championship game against the Atlanta Steam on September 6th, with Heather Furr and her teammates looking to hoist the Legends Cup for a second straight year.

New Balance Goes Toe-to-Toe with Karl Lagerfeld

The old saying "If the shoe fits..." suggests that if a remark or allegation applies to you, you should accept it. In a recent footwear dispute, one prominent fashion designer must hope that the shoe (or allegations) do not indeed fit ... and that a court does not find him liable for being sneaky.

In a suit filed in New York, New Balance Athletic Shoe, Inc. sued renowned fashion designer Karl Lagerfeld for selling shoes through a U.S. distributor with a block capital "K" design that New Balance alleges are confusingly similar to New Balance's well-known block "N" mark and sneaker design (never mind the $200 price difference between the shoes). New Balance asserts various claims, including willful trademark and trade dress infringement, and dilution. (*New Balance Athletic Shoe, Inc. v. Lagerfeld*, No. 14-3943 (S.D.N.Y. filed June 3, 2014)).

In its 38-page complaint, New Balance principally argues that three of its trademarks were infringed upon and diluted: the block capital letter "N" used on New Balance's shoes, the placing and angle of the "N" on the shoes and the block capital letter "N" with a "saddle device." Interestingly, New Balance also argues that Mr. Lagerfeld, due to his

"leading position in luxury goods," creates products that routinely are counterfeited. Thus, according to New Balance, Mr. Lagerfeld "has a correspondingly unique ability to damage New Balance in the marketplace" by creating a product that many consumers will confuse as New Balance shoes. New Balance seeks an award of profits and/or compensatory damages, the destruction of the infringing goods and an order recalling all of the infringing Lagerfeld footwear.

If you are wondering what a "saddle device" is, you are not a lonely soul. New Balance describes the saddle device as the piece of leather that the block capital letter "N" sits on. The company says it has exclusively used the "Block N" with the saddle device mark (together, the "Block N Mark") for over thirty years and have sold hundreds of millions of pairs of shoes bearing the Block N mark. To boot, New Balance notes that these marks are "famous" and "embody an enormous amount of goodwill, which is a valuable asset of the company."

We're usually not inclined to say a picture is worth a thousand words, but in this case it may be illustrative.

Many readers may be wondering what an athletic shoemaker and a world famous fashion designer of high-end goods have in common. New Balance, as most know, is hardly a sole proprietorship: it is one of the largest athletic shoe companies in the world, with over $2 billion in sales worldwide in 2013. Despite its success in a competitive industry, however, for a long time New Balance shoes were hardly considered fashionable.

In the complaint, New Balance admits as much, saying it refused to follow the growing trend of making fashionable athletic footwear in the 1980's, and instead kept its focus on "technical fit and authenticity." While the company claims it has long valued "substance over fashion," New Balance notes that many consumers changed their view of them with the introduction of the 576 shoe. Famous fashion designers featured the shoe on runways and it landed on the cover of the French edition of fashion magazine *Elle*.

The shoe's success spurred New Balance to sell more casual shoes catering to the "athletic-minded, but less technically demanding consumer" to take advantage of the rise of popularity of the "fashion sneaker." Over the years, celebrities including Rihanna, Pharrell, Seth Rogen and Will Ferrell have been seen wearing New Balance shoes.

Lagerfeld's shoe design quickly caught the attention of fashion bloggers, many of whom thought they looked quite similar to New Balance sneakers. In their complaint, New Balance lists several internet sources that take note of the similarities between the two shoes. Despite New Balance's contention that its shoes have become trendy, some bloggers don't agree.

Will all this tongue wagging over sneaker design lead to some settlement or licensing deal? Apparently so. On September 2nd, New Balance filed a Notice of Dismissal with the court, voluntarily dropping its claims. While we could not find any press release or statement on the web regarding the resolution of the lawsuit, the online listing for the disputed Lagerfeld "K" sneaker on one luxury fashion retailer was telling: "This item has sold out and is not expected to become available again."

Barca's Defense Against Tax Charges Related to Neymar Signing Heads into Extra Time

When FC Barcelona struck a deal to acquire Brazilian football sensation Neymar Santos Jr. last summer, it was believed he would become the future of their world famous offense. Ironically, the same transfer that brought Brazil's #10 over from Brazilian football club Santos FC has pushed the team into a defensive position.

When Sandro Rosell, then president of FC Barcelona, first announced the €57.1 million acquisition of Neymar, it was hailed as a "golazo" – a brilliant goal – for the La Liga side. The particulars of the transfer, however, initially were shrouded in mystery, as Rosell invoked confidentiality obligations when asked for a breakdown of the finances. Rosell's evasiveness, coupled with the relative bargain at which they acquired Neymar, led many observers to believe that Barca's *golazo* may have been offside.

The first half of what has become known as "Neymar-gate" kicked off when FC Barcelona club member Jordi Cases accused Rosell of misappropriating €40 million in connection with the deal (Reader's Note: FC Barcelona is owned by more than 160,000 members who elect a president and governing board). To avoid scoring a devastating own goal against his own club, Cases made certain to clarify that the suit was brought personally against Rosell and not Barcelona. Rosell denied the accusations and remained adamant about the price: "The cost was €57.1m, *y punto*" (€57.1m, nothing more). However, it was later revealed that €40 million was paid as a "penalty" to N&N, a company owned by Neymar's father that held the player's economic rights. The penalty was triggered by a clause in a 2011 agreement between FC Barcelona and N&N because Barca signed Neymar one year earlier than the previously agreed time.

Soon after, a Madrid public prosecutor drew up a report saying that there were grounds to suspect "simulated contracts." The prosecutor also expressed doubts about the amount received by Santos and requested that all paperwork related to the transaction be handed over. Barca quickly complied with the prosecutor's request and with the world's attention trained on his dealings, Rosell subbed himself off the field – resigning from his post as president of FC Barcleona and elevating Josep Maria Bartomeu to his position. In his parting shot, Rosell defended his actions and claimed that the allegations were rooted in "despair and envy in some of [Barcelona's] adversaries." A day after Rosell's resignation, his successor Bartomeu admitted that the club actually paid €86.2 million to secure Neymar (more if you include Neymar's five-year, €44m salary), and released a breakdown of the costs for the transfer, signing fees, commission, payment to

N&N, operating and marketing costs, Brazilian scouting deals and a performance bonus. The club, however, maintained that only €57.1 million of that amount was for the "transfer itself."

In light of Barca's clarification and Rosell's resignation, Cases dropped the suit against Rosell. The Spanish prosecutor's office was not mollified quite as easily, petitioning Spain's High Court to name FC Barcelona as a suspect in the Neymar case, based on its contention that €9.1 million in taxes is owed on the "penalty" payments made to N&N as part of the transaction. Judge Pablo Ruz accepted that the payment "could correspond, in its true nature, to a big remuneration to the player," which would therefore make it subject to Spanish income tax, and issued a yellow card, charging FC Barcelona with infringement against the tax authority.

In response, FC Barcelona released a statement maintaining that all aspects of the complex transfer were by the book, and expressed their willingness to cooperate with authorities. Barca followed up this proactive stance by paying a "complimentary" €13.5 million to the Spanish treasury to cover any "eventual interpretations that could come out of the contracts signed relating to the transfer."

Judge Pablo Ruz now has called for club representatives and former president Sandro Rosell to "quantify the amount withheld by FC Barcelona for the income payable in relation to the professional athlete Neymar Da Silva Santos for Income Tax of Non-Residents (IRNR) and (regular) income tax," according to a court order. The judge also has issued a summons for Neymar's father to appear in court and turn over contracts and documents related to his son's signing with Barca.

Like a goalie defending against penalty kicks, Rosell must come up with the right response to the barrage of questions Spanish officials will direct his way. Barca fans must now hope that their club, whose motto is *Més que un clube* ("More than a club"), plays much better defense than Brazil's national team at this year's World Cup.

Stopper or Informer? Closer Accused of Giving False Testimony to Stay in the Game

When people talk about Cincinnati Reds' closer Aroldis Chapman, you most often hear him described as "hard throwing," a "flamethrower," or a "fireballing left-hander." Chapman regularly clocks 100 mph or more on the radar gun, holds the current record for the fastest recorded pitch at about 105 mph and boasts an impressive 2.41 ERA over the past five years. Indeed, Chapman is known as one of the best at his position.

Chapman heralds from Cuba, a country well-known for its prodigious baseball talent and the mystery that often surrounds the arrival of its baseball players into the United States. Though Cuba recently permitted its baseball players to play and earn a salary in professional leagues outside the country, because of the United States trade embargo with Cuba, the only way these players are able to take the field in the United States is if they defect. And, lured by lucrative contracts, many players have done so via Mexican or Dominican safe houses and smugglers, who may charge hefty "finder's fees." Not surprisingly, the Cuban government is not a big fan of defectors or those who help them. Those who are caught are often subject to serious prison time under charges of human trafficking, which can carry terms of seven to fifteen years.

According to a lawsuit initially filed in May 2012 in the Southern District of Florida, Aroldis Chapman's journey to the United States allegedly colors a part of this dark terrain. In the suit, two men, Danilo Curbelo Garcia ("Curbelo"), an expatriated Cuban citizen, and Carlos Rafael Mena Perdomo ("Perdomo"), a resident of the Dominican Republic, as well as Curbelo's wife and daughter, allege that Chapman and his father conspired with Cuba's Department of State Security to falsely accuse Curbelo and Perdomo of enticing Chapman to defect. Such accusations, they claim, led to their arrest, prolonged detention and torture. Curbelo's wife and daughter make additional claims of loss of consortium, loss of parental consortium, and emotional distress under state law. The suit was filed under the little-known Alien Tort Claims Act and the Torture Victims Protection Act of 1991, which allow redress in United States courts for acts committed against persons in foreign countries including, in this case, certain human rights violations. The plaintiffs seek $24 million in damages.

The plaintiffs claim that Chapman's false testimony was given for the purpose of minimizing any punishment for an earlier attempt by him to defect and to regain a spot on the Cuban national team. As set forth in the lengthy complaint, Chapman allegedly attempted to escape from Cuba in 2008, at a time when he was a prized star on the Cuban national baseball team. Historically, if caught, such actions were met with harsh reprimand by the Castro-run Cuban government; in the case of baseball players, this could mean anywhere from a two-year to a lifetime ban from the sport. In Chapman's case, however, his attempted defection allegedly resulted in a meeting with Raul Castro and a seat on the bench during the Cuban national series and the 2008 Beijing Olympics – a "miraculous" reprieve, in the eyes of the plaintiffs. A year later, the plaintiffs allege that Chapman served as a witness in cases against Curbelo and Perdomo, in which he accused the two of separately encouraging him to defect and helping him with a plan to do so.

While Curbelo and Perdomo each present different stories in the complaint, both claim that Chapman's false testimony, in each case corroborated by Chapman's father, led to their lengthy prison sentences. According to the complaint, Chapman testified that Curbelo and another acquaintance had developed a plan to help him leave the country with the promise that he would be paid handsomely if he did so, but that Chapman had shook off their signs and refused the offer. In Perdomo's case, according to the complaint, Chapman testified that, while he had never met Perdomo, he believed Perdomo had sent an intermediary to offer to smuggle him out of Cuba to play in the Dominican Republic.

While Curbelo does not deny speaking with Chapman about his plans to leave Cuba, he claims the conversation never went beyond the equivalent of a quickly-quashed mound conference. Perdomo claims he has never met Chapman, but happened to have done frequent business in the neighborhood in which Chapman was allegedly approached by Curbelo to defect. According to the complaint, Chapman's testimony, as corroborated by his father, was the only evidence presented against Curbelo and Perdomo at their respective trials in Cuba.

Ultimately, of course, Chapman did defect when he traveled with the Cuban national team to the Netherlands in July 2009. A true free agent for the first time, Chapman signed his first Major League contract in 2010, which was worth approximately $30 million.

Where exactly the truth lies in this convoluted story may never be known. After a plethora of hearings and motions and multiple trial delays, in part to allow Curbelo to

serve out his sentence in Cuba, the suit is currently set for trial in November 2014. How these serious allegations will affect Chapman's otherwise bright future remain to be seen. For now, the term "high heat" may have a whole new meaning for this rising star, but as Crash Davis told Nuke LaLoosh in *Bull Durham* – "Write this down: 'We gotta play it one day at a time.'"

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

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