Proskauer

Three Point Shot

September 2009

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.

Sudden Death Avoided: Ban on NHL Canadian Charter Flights Slapped Away

If government intervention was an Olympic sport, some might argue that certain agencies in the Obama administration should win the gold “meddle.” In response to a recent United States Department of Transportation (DOT) ruling, a foreign airline company criticized the agency’s newly adopted protectionist policy and slapped a shot back in the form of a lawsuit to stop enforcement of the ruling.

Air Canada, a unit of ACE Aviation Holdings Inc., with its Jetz fleet, provides charter air service to six Canadian National Hockey League teams, along with several U.S.-based teams in the NHL and NBA. Under existing U.S. law, foreign airline carriers cannot make more than one stop in the United States without first returning to their home country. In the airline industry, this ban on a foreign airline moving passengers between domestic cities is referred to as “cabotage.” However, under the previous administration, in light of the nature of their business an exemption to this law was granted to sports teams and touring musicians. The exemption froze enforcement of the cabotage restriction and allowed Air Canada to fly hockey teams between U.S. cities; the Obama administration, however, had other ideas.

According to the DOT, its decision to strictly enforce the cabotage law was justified at least in part because Air Canada skated around the rules of the exemption that bar picking up regular fare-paying passengers at American airports. Allegedly, the DOT discovered several instances where passengers who did not make the initial cross-border flight would later join the domestic parts of the trip. For instance, injured players or team owners came and went without sticking around for the entire journey. Air Canada argued that this penalty was completely unwarranted given that the DOT took unilateral action without consultation or a hearing the would enable them to defend against these accusations.

Air Canada's power play was to file suit against U.S. Transportation Secretary Ray LaHood in the District of Columbia federal district court. In its complaint, Air Canada sought an injunction to lift the DOT ruling, which it called "arbitrary, capricious, and contrary to law." Air Canada also claimed that U.S. transportation officials repeatedly approved their services, and that the sudden regulatory clampdown was a result of political pressure by the US Airline Pilots Association and angry U.S. airline competitors which wanted the Canadian carrier iced out of their home market. Furthermore, Air Canada disputed any cabotage violation, saying their season-long itinerary should be treated as a single journey with multiple stopovers, rather than multiple separate flights within the country.

As a hearing loomed and a decision was up in the air, the airline found some supporters in high places. If these foreign carriers were prohibited from making multiple stops in the U.S., NHL Deputy Commissioner Bill Daly suggested, it would "wreak havoc" on the upcoming hockey season. Canadian Transportation Minister John Baird called the DOT ruling "an unprecedented interference in the operations of the marketplace" and warned of retaliation by closing Canadian skies to U.S. sports team charters.

With the NHL schedule, and potentially even U.S.-Canadian relations, on thin ice, it should come as no surprise that both sides got cold feet and reached a deal. Under the deal, Air Canada can continue to fly between U.S. cities, but only if their passengers are affiliated with the contracted teams and so long as the same passengers are flown inside and outside the country. Additionally, Air Canada must name an official to monitor its compliance and submit monthly reports to the DOT. Therefore, fans eager to see the gloves come off and cross-border transportation officials to really bloody each other up will have to wait for another season.

There's No Crying in Baseball – Even If You Get Hit by a Loose Bat

Baseball and Brooklyn have long shared a nexus – from the Dodgers to Nathan's hot dogs. Continuing the tradition, in 2001, Sterling Equities brought the Brooklyn Cyclones, the "short A" ball club of the New York Mets, to Coney Island. And, similar to a ride on the world famous Cyclone roller-coaster, attending a Cyclones baseball game is not for the risk averse.   At least one fan found this out the hard way when a bat swung by a player found his nose rather than the ball, leaving him with a fractured nose and little legal recourse.

On June 3, 2003, the fan, Gerard Elie, threw the opening pitch in Kings County Supreme Court in New York against the entire roster of potential defendants, including, among others, the Cyclones, the St. Louis and New Jersey Cardinals, and even the City of New York. Elie asserted that Joey Vandever, outfielder for the visiting Cardinals, propelled his bat at Elie while either warming up or "horsing around" during pregame warm-ups. Elie argued that Vandever's negligence or recklessness proximately caused his injury, and that the Cardinals organization, as Vandever's employer, was liable for its employee's negligence. Elie further asserted that it was not commonplace for a player to horse around with a bat "during no organized batting activity, either during the game or practice beforehand." The Cards moved for summary judgment, asserting that a spectator occupying an unshielded area of the Cyclone's home stadium, Keyspan Park, assumed the risk of being struck by a loose baseball bat and, as a result, the Cards did not breach a duty of care to Elie.

Judge Mark Partnow was behind the plate for this showdown.

On May 26, 2009, both parties finally got their turn at bat during oral arguments, after which Elie, in response to the court's invitation for limited supplemental responses, brought in his closer, friend Barry Braune. Braune had sat next to Elie during the game. Braune threw a curveball by submitting an affidavit in which he asserted that Vandever "intentionally and recklessly" (as apposed to "negligently or recklessly" as asserted in the original complaint) threw the bat that injured Elie into the stands. However, Judge Partnow threw out Braune's affidavit on a technicality; according to the court, the contention that it was submitted to support – i.e., that Vandever intentionally threw the bat into the stands – could not be considered because it was first submitted in Elie's reply papers.

Partnow ended the game by granting the Cardinals' motion for summary judgment and dismissing the complaint. In doing so, Judge Partnow noted that "here, a plaintiff, a seasoned spectator of baseball, assumed the risk of many dangers, including the danger of being struck by a loose bat." He continued that "[u]nder the doctrine of primary assumption of risk, as applied to spectators attending sporting events, a spectator at a sporting event is deemed to have consented to those risks commonly appreciated which are inherent in and arise out of the nature of the event … and [a]mong the dangers to which a baseball spectator has consented to is the danger that a loose baseball bat will strike a spectator and cause injury."

Relying in part on Pira v. Sterling Equities, Inc., a case involving former New York Mets relief pitcher Dennis Cook, the court found that Elie's contention that primary assumption of risk applies only during certain distinct times while attending a baseball game lacks merit. In Pira, the Third Department found that a ball intentionally thrown by Cook to fans that struck and injured the plaintiff constituted a "pre-game warm-up" and, as such, falls within the assumption of risk doctrine.

Partnow's decision ended Elie's case against the Cards, but he may yet pull out a late inning comeback if he continues to pursue his tort claims against the remainder of the lineup of defendants.

Olympic-Sized Considerations: Federal Court Grants Trademark Infringer a Reprieve

Most would agree that wholesale medical, janitorial and industrial supplies and airport retail stores have very little, if anything, in common with high-level international athletic competitions, and, apparently, the United States Olympic Committee (USOC) would like to keep it that way.

On February 25, 2008, the USOC filed a lawsuit in the U.S. District Court for the District of Maryland against Olympic Supply, Inc., doing business as Olympic News (Olympic Supply): *United States Olympic Committee v. Olympic Supply, Inc. et al*. (08-CV-00496-DKC). The USOC claimed that Olympic Supply's use of the word "Olympic" violates the Ted Stevens Olympic and Amateur Sports Act (Ted Stevens Act). Olympic Supply is the operator of a wholesale business selling medical, janitorial and industrial supplies primarily to government agencies, large corporations, hospitals and military installations. Olympic Supply also runs a retail business with airport news, gift and concession locations and a "destination resort" street location. Olympic Supply used the word "Olympic" with its retail and wholesale businesses, including use of the trade name "Olympic News," which appeared on Olympic Supply's signage, invoices, bags and advertising materials.

Under Section 220506 of the Ted Stevens Act, the USOC has the exclusive right to use the word "Olympic" and certain words and symbols associated with the Olympic games, including the Five Interlocking Rings which are used as the Olympic symbol, the words "Olympic," "Olympiad" and "Citius, Altius, Fortius," and combinations of the foregoing. In addition, the Ted Stevens Act permits the USOC to file civil actions against a person, for the remedies provided in the Lanham Act (pertaining to trademark infringement) if the person uses the word "Olympic" or a combination or simulation of the above-referenced words tending to cause confusion or mistake, to deceive, or to falsely suggest a connection with the USOC or any Olympic Games activity, and uses the words without the consent of the USOC and to induce the sale of goods or services, or to promote a theatrical exhibition, athletic performance or competition.

The USOC alleged that Olympic Supply's use of the word "Olympic," without the USOC's consent, to identify its newsstand and concessionaire business not only damages the value of the USOC's exclusive rights in the word, but also violates an express prohibition in the Ted Stevens Act since Olympic Supply used the word for the purpose of trade and to induce the sale of its goods and services without the authorization of the USOC. The USOC sought an injunction requiring Olympic Supply to cease use of its business name "Olympic News" and to turn over for destruction all advertisements, packaging and inventory utilizing the word "Olympic," along with other relief, including a monetary award of all profits received by Olympic Supply and an award of three times the amount of Olympic Supply's profits.

Olympic Supply declared a false start and in its answer and affirmative defenses, and later a motion for summary judgment, Olympic Supply argued that the USOC's claims are barred by the doctrine of laches (prohibiting claims when there has been an unreasonable delay in the assertion of one's rights and the delay harms the other party) and that the Ted Stevens Act is not applicable to Olympic Supply's use of the word "Olympic" in its corporate name. According to Olympic Supply, the USOC had constructive notice of Olympic Supply's use of the name "Olympic" for over a decade, beginning from the date that Olympic Supply was incorporated in the state of Delaware in 1991, and the USOC failed to bring an action or enforce its rights. Olympic Supply also argued that the Ted Stevens Act only applies to commercial speech and that Olympic Supply's use of the word "Olympic" as its corporate name is not commercial speech, but merely the identification of a corporate entity.

In the USOC's opposition to Olympic Supply's motion for summary judgment and cross motion, the USOC denied dropping the baton or having constructive notice, and instead alleged that it did not discover Olympic Supply or its use of the word "Olympic" until August 2006, and argued that the doctrine of laches does not apply to, and would not bar, injunctive relief since the infringing conduct is ongoing as Olympic Supply's continued use of the word "Olympic" constitutes new violations of the Ted Stevens Act. The USOC further contended that Olympic Supply's unauthorized use of the word "Olympic" could undercut the USOC's efforts to use, and sell the right to use, the word in the future, since the word's value comes from its limited use.

The court decided in favor of the USOC, finding that Olympic Supply failed to demonstrate facts establishing the doctrine of laches and that there was no basis for attributing constructive knowledge to the USOC based on corporate registrations alone. Instead, according to the court, the USOC acted promptly after obtaining actual knowledge of Olympic Supply's use of the word "Olympic." The court further found that Olympic Supply's use of the trade name "Olympic News" was unauthorized and violated the Ted Stevens Act. As such, the court determined that the USOC was indeed entitled to injunctive relief. In an odd twist, the court left to the parties the decision as to the scope of the injunctive relief to be granted.

The USOC and Olympic Supply reached an agreement that Olympic Supply would be permanently barred from using the word "Olympic" or a simulation of the word; Olympic Supply would cease all use of its business name "Olympic News" and use of the corporate name "Olympic Supply, Inc., (other than certain government filings); and Olympic Supply would destroy its promotional materials using the word. The remaining dispute between the USOC and Olympic Supply centered on when the injunction would take effect, with Olympic Supply arguing for a one-year grace period to allow sufficient time to absorb the costs related to the name change, and the USOC requesting that only an additional thirty days be given to Olympic Supply to change its infringing material.

Before the USOC could take its victory lap, the court granted Olympic Supply a six-month grace period in which to use the six-month supply of infringing inventory that it had in stock at the time of the decision and to spread the costs of changing its trade name over time, but at the same time to limit the period of time that the USOC's trademark would continue to be infringed. Under the court's decision, the injunction will take effect after January 11, 2010.

The court's approach to setting a date for the permanent injunction to take effect and the granting of a transition period to take into account an infringer's business considerations and to allow for sell off of infringing products could have suggestive implications for future similar trademark infringement cases.

Related Professionals

- **Howard Z. Robbins**
  Partner
- **Joseph M. Leccese**
  Chairman Emeritus of the Firm
- **Robert E. Freeman**
  Partner
- **Bradley I. Ruskin**
  Partner
- **Wayne D. Katz**
  Partner