Proskauer

Three Point Shot

August 2008

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.

A Personal Foul?

One need look no further than the inevitable "freedom of speech" cries during Internet flame wars to understand that many citizens operate under the false impression that the United States Bill of Rights applies generally to all actions. In actuality, the Bill of Rights applies only to governmental actions. A Florida man found that out the hard way last month when his attempt at enjoining pre-game pat-downs at the Tampa Bay Buccaneers' Raymond James Stadium as violative of both the Fourth Amendment and the Florida Constitution earned him, along with the United States District Court for the Middle District of Florida, an appellate slap on the wrist.

In August 2005, the National Football League ("NFL") instituted a mandatory pat-down policy for all fans entering NFL events. The policy specifically targeted "wires, detonators or other telltale signs of an [improvised explosive device]" in direct response to the then-recent terrorist bombings in London and Madrid. The Tampa Bay Buccaneers forwarded the policy to the Tampa Sports Authority ("TSA"), operators of the Raymond James Stadium and the party contractually required to provide event security, and the TSA began conducting the required searches at NFL games the following month. As instituted, the TSA's policy called for outside screeners to perform same-sex, above-the-waist searches comprised of hand sweeps along the torso sides and down the spine. The TSA provided prior public notice of the new policy via both the stadium and team websites, press releases, pass holder direct mailings and pre-game announcements, and advised fans that refusal to comply with the pat-downs would result in denial of entrance to the game.

Gordon Johnston, a civics teacher and Buccaneers season ticket holder since 2001, believed the policy was unconstitutional under the search and seizure provisions of the Florida Constitution. The Circuit Court for the Thirteenth Judicial Circuit of Florida agreed with Johnston and granted a preliminary injunction against the searches. Johnston then added a Fourth Amendment claim, whereupon the TSA removed the case to the District Court for the Middle District of Florida. There, the court ultimately concluded that the searches violated both the Florida Constitution and the Fourth Amendment.

On appeal, last month, the United States Court of Appeals for the Eleventh Circuit reversed the district court's ruling and vacated the preliminary injunction enjoining the TSA's pat-downs, concluding that Johnston had, in fact, consented to the searches. Because consent creates an exception to constitutional search and seizure protection, Johnston could not claim protection where he was deemed to have given consent. The court reasoned that Johnston knew he would be subject to the pat-down prior to admission; however, he chose to present himself at the stadium on three separate occasions and – albeit grudgingly – allow the searches to be performed.

The Eleventh Circuit further disagreed with the district court's holding that the unconstitutional condition doctrine invalidated Johnston's consent. Under the doctrine, the state is prohibited from requiring the relinquishment of a constitutional right in exchange for a benefit; however, the Eleventh Circuit held that Johnston's ticket was only a revocable license, or personal privilege to attend the games, and not a constitutional right. Additionally, while the TSA, as a state actor created by the Florida Legislature, adopted the pat-down policy, the policy was created and required by the NFL, a *private* actor, to prevent fan injury; therefore, the pat-down did not constitute a government action. Simply put, Johnston was not forced by a state actor to choose between a pat-down (or search) and a constitutional right. Because, as the court stated, the Florida Constitution provided the same protections as the Fourth Amendment, Johnston similarly could not prevail on his state law claim.

The Eleventh Circuit's ruling gives substantial leeway to stadium and sporting event pat-downs. Where such policies are instituted by non-governmental actors and tickets are deemed revocable licenses, there is no guard -- constitutional or otherwise -- against such searches, and individuals wishing to attend sporting events may legally be given the choice to consent or leave. The key is for stadiums to provide ample public notice of the search policies and to have mechanisms in place for tracking whether objecting fans eventually consent and enter the game.

What's In a Name? Washington Redskins' Trademarks Safe for Now, But for How Long?

From sending their famous Redskinettes to India in order to help train that country's first-ever cheerleading squad for Bangalore's local cricket team (the Royal Challengers) to replacing Hall of Fame coach Joe Gibbs with Jim Zorn, the Washington Redskins were very busy during the offseason this year. The most significant story from Redskins camp, however, might not have anything to do with pom-poms, coaching changes or anything else directly related to football. Last month, after sixteen years of litigation, the District Court in Washington, D.C. rejected on technical grounds a claim made by a group of Native Americans that six of the team's trademarks were disparaging. However, the Redskins victory may prove as fleeting as their last Super Bowl victory with the final whistle on the issue yet to be blown.

Some of you might recall 1992 as the last time the Redskins won the Super Bowl; it was also the year that seven Native Americans of various ages petitioned the Trademark Trial and Appeal Board (TTAB), the administrative body responsible for hearing trademark cancellation cases, to have six of the team's trademarks containing the "redskins" name cancelled for violating Section 2(a) of the Lanham Act, which prohibits trademarks from disparaging any race, religion or other group.

Initially, the TTAB granted the cancellation petition because it found that the word "redskins" had a derogatory connotation that was manifested in the team's trademarks. But the TTAB ruling was overturned by Judge Colleen Kollar-Kotelly of the District of Columbia who ruled that the suit was barred by laches (a delay in asserting one's rights that results in prejudice) and that the cancellation order was not supported by sufficient evidence. The plaintiffs appealed and the Court of Appeals for the District of Columbia Circuit ordered Judge Kollar-Kotelly to reexamine the youngest plaintiff's claim because laches begins to toll only once a plaintiff reaches the age of majority and he was only a one-year old when the first Redskins trademark was issued in 1967.

Last month, Judge Kollar-Kotelly upheld her original order dismissing the plaintiffs' claims, holding that even the youngest plaintiff's trademark cancellation claim was barred by laches. In a two-pronged analysis the court first found that the youngest plaintiff demonstrated a lack of diligence because he had knowledge of the Redskins trademarks before turning eighteen but filed his claim eight years after that. The court then found that, as the result of the delay, the Redskins organization was subject to both trial and economic prejudice. The court found trial prejudice because there was a loss of survey evidence and because Edward Bennett Williams, president of the Redskins organization from 1965 to 1980 (when the majority of the trademarks were registered), died in 1988. The court also found economic prejudice because the Redskins organization expanded the use of, and increased investment in, the team's trademarks during the youngest plaintiff's eight-year delay.

Despite finding the claim barred by laches, the court explicitly wrote that its holding was not intended to "make any statement on the appropriateness of Native American imagery for team names." As this case heads to the D.C. Circuit Court of Appeals once again, it is possible that the appeals court will agree with Judge Kollar-Kotelly and dismiss the group's claim. However, even if that occurs, the issue will live on. In 2006, another group of Native Americans, ranging in age from eighteen to twenty-four, filed a similar suit against the Redskins organization. That suit is on hold until the 1992 suit is resolved.

Eventually, some court will have to decide whether it views the Redskins trademarks as disparaging. Such a decision point appears to be at least a few years away and, for Redskins fans, the question is whether another Super Bowl victory (or even a trip) will come before the trademarks issue is finally resolved.

Honesty is the Best Policy: Perjury and Performance Enhancing Drugs

In 2000, after winning five medals at the Summer Olympics in Sydney, including three golds, Marion Jones was a full-fledged heroine. That same year in Sydney, Antonio Pettigrew achieved a lifelong dream by capturing the gold medal in the 4x400 relay. In the 2004 Summer Olympics in Athens, having won three medals, Justin Gatlin was on top of the world.

It's amazing how things can come crashing down so fast, especially when performance enhancing drugs are involved. Today, Marion Jones and Antonio Pettigrew have had their Olympic medals stripped by the International Olympic Committee and, as discussed in a previous edition of Three Point Shot, Justin Gatlin is serving a four-year ban imposed by the International Association of Athletics Federations ("IAAF"). These athletes all had one thing in common: they had all, at one point or another, employed the services of track and field coach Trevor Graham.

In July, the United States Anti-doping Agency ("USADA") imposed a lifetime ban on Graham from participating in any event sanctioned by United States Olympic Committee, the IAAF or any other group that participates in the World Anti-Doping Agency ("WADA") Program due to his role in helping athletes obtain performance enhancing drugs. Graham was found to have committed four violations under the WADA Code, including the "[a]dministration or attempted administration of a prohibited substance...to any athlete or assisting, encouraging, aiding...or any other type of complicity involving an anti-doping rules violation...."

Even more seriously, in 2006Graham was indicted on three counts of perjury relating to the federal investigation surrounding the Bay Area Lab Co-operative ("BALCO"). In May 2008, Graham was found guilty of only one count: lying to federal investigators about having had only one telephone call with Ángel Guillermo Herédia, an admitted drug supplier. The evidence at trial demonstrated that Graham and Heredia had more than 100 telephone conversations. As to the other two charges, that Graham lied about setting up his athletes with performance enhancing drugs and that he lied about previously meeting Herédia, the jury was unable to reach a unanimous vote. Graham now faces up to five years in jail and as much as $250,000 in fines. He will learn his fate when he is sentenced on September 5.

Trevor Graham is not the first to be found guilty of perjury stemming from the government's investigation into athletes' use of illegal performance enhancing drugs. In January 2008, Marion Jones pleaded guilty to perjury and was sentenced to six months in prison. In April 2008, Tammy Thomas, a former cyclist (and, interestingly, a current law student), who was banned for life from cycling competitions by USADA in 2002, was convicted on three of five perjury counts.

With the 2008 Beijing Olympics behind us, it remains to be seen whether any of Beijing's heroes will be forced to trade the Olympic podium for the defendant's table. But, if asked, those prior Olympians who have been caught in the BALCO web may offer one simple piece of advice to those who follow in their footsteps: Honesty is truly the best policy.

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