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# Three Point Shot

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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.

## Only in America – Is It Possible to Defame a [Don] King?

The checkered past of boxing promoter Don King has been well-documented. After serving almost four years in prison for manslaughter, King rose to prominence promoting Muhammad Ali in such famous fights as the "Rumble in the Jungle" and the "Thrilla in Manilla" in the 1970s. Still at it over 30 years later, King has attracted controversy throughout his career. Indeed, as his well-known coif has grown, so has King's propensity for finding trouble with the courts. Over the last three decades, King has been sued by many of his fighters for fraud, breach of contract and other alleged violations of trust; has been sued by the IRS for tax evasion and has been investigated for alleged connections with organized crime. Nonetheless, King is protective of his reputation and when ESPN pulled-out some of the skeletons in King's closet for an episode of its Peabody Award-Winning biographical television program "SportsCentury," King filed suit in July against ESPN in the Circuit Court for Broward County, Florida, for defamation, among other things *Don King Productions, Inc. v. The Walt Disney Company*, Case No. 05-000524(02) (Fla. Cir. Ct.).

Apparently, King took offense to several statements made in the "SportsCentury" program by fellow boxing promoter and former King business partner Don Elbaum. Among other things, Elbaum described how King had organized a boxing exhibition to benefit the now-closed Forest City Hospital in Cleveland, Ohio, but claimed that, in the end, King gave the hospital less than 2% of the gross from ticket sales. Elbaum also claimed that King had underpaid Meldrick Taylor, a boxer, by about a million dollars for a bout, and that Taylor believed King would have him killed. In addition, news reporter and author Jack Newfield claimed in the program that King had threatened to kill him at a press conference.

Although King claimed publicly that the "SportsCentury" profile was the "straw that broke the camel's back," applying certain well-established principles of defamation law applicable to a public figure, the Broward County Court sided with ESPN and in July granted ESPN's motion for summary judgment. In dismissing King's suit, the court relied on the two major prongs of New York Times v. Sullivan and found, first, that the statements made during the profile were not, strictly speaking, false and, second, that King had failed to show actual malice on the part of ESPN.

With regard to the Forest City incident, the court noted that, although the exact amount the hospital received was not clear, it was generally agreed to be far less than the full amount of the collected ticket gross. Under current defamation law applicable to a public figure, so long as the "gist" of particular statement is true, generally speaking, such statement will not be considered false. The court reasoned that the gist of the statement made by Elbaum was that the charity did not receive the full amount of the ticket gross, and it remained the same no matter which account was the truth. With regard to Elbaum's private conversation with Taylor, King admitted that he did not know how much money Taylor was to receive for the bout in question, therefore he could not dispute the truth of Elbaum's statement. Lastly, Newfield himself was the source of the statement regarding his subjective perception that King would kill him, and there was no way to disprove his subjective perception. Thus, the court concluded, King did not prove falsity.

The court also found that King had failed to prove malice on the part of ESPN. In defamation cases, plaintiffs are required to show that the defendant published the defamatory statement with "knowledge that it was false" or with "reckless disregard" for truthfulness. King argued that ESPN's presentation of one side of his story (the negative side) and ESPN's failure to conduct a more thorough investigation constituted actual malice. The court concluded, however, that "whether or not the producers intended to portray King in a negative light or harbored ill-will towards him [is irrelevant] as long as the producers of the show did not seriously doubt the truth of the published statements." Also, the court held that because the law is well settled that a failure to investigate does not constitute actual malice, ESPN was "not reasonably required to continue its investigation until it found somebody who would defend [King]."

King's attorneys have stated that he intends to appeal the decision and take the fight with ESPN into a second round. At the close of round one, however, ESPN is clearly ahead in the punch count.

**Robby Gordon is No GEM – Gillett Evernham Motorsports Seeks to Leave #7 at the Starting Line**

While casual observers may think of NASCAR as a sport involving individual drivers jockeying for position around hairpin turns, a team of people is required for a driver to have any chance of success. Thus, it is not surprising that, increasingly, race teams have looked to mergers to create superteams. One of the more recent announced mergers involves #7 Robby Gordon's team and Gillett Evernham Motorsports or GEM, which is itself the product of an August 2007 merger between Ray Evernham Motorsports and George Gillett, Jr.

In January 2008, GEM and Robby Gordon Motorsports entered into a tentative Memorandum Agreement, pending an audit and due diligence by GEM, for the purchase and sale of Gordon's team to GEM for $23.5 million. The deal also involved a four-year driving contract paying Gordon $3 million annually plus 45 percent of race purses, in addition to insurance, a possible position on GEM's board of directors, the acquisition by GEM of Gordon's shop and property located in Charlotte, North Carolina, and "such other terms and provisions customary for [a] NASCAR driver agreement." Under the agreement, GEM also committed to provide Gordon with a racing infrastructure and to support Gordon's car "in substantially the same manner in which GEM supports its most supported car in the NASCAR Sprint Cup" for the 2008 season, essentially granting Gordon a "most favored nations" clause. Following signing of the agreement, Gordon and GEM also announced a technical, manufacturing and marketing services alliance, and Gordon terminated his previous sponsorship deal with Ford Motor Company in anticipation of a deal with Dodge Motor Company, which sponsors GEM's other teams. Both parties began to perform under the agreement but, before burnouts and victory laps could be completed, a red flag was raised and the race may be over before it starts.

Rather than focusing solely on the next race, Gordon instead finds himself the subject of a breach of contract lawsuit brought by GEM, *Gillett Evernham Motorsports, LLC v. Team Gordon, Inc.*, 08 CVS 019206,filed in August in North Carolina state court. GEM claims that Gordon materially breached the exclusivity (or "no shop") provisions in the agreement when he engaged in talks and meetings with other teams about merging. GEM also alleges that Gordon made disparaging comments about GEM during a DirecTV: NASCAR HotPass telecast at Watkins Glen International race track, when he stated that he was not given comparable equipment to other GEM drivers, which caused his poor performance in the race. GEM further claims that Gordon materially breached the agreement when he ignored GEM's advice and terminated his Ford deal prematurely before GEM could obtain a replacement deal with Dodge.

Per the Memorandum Agreement, Gordon was required to deal with GEM exclusively through December 31, 2008, and to refrain from initiating or engaging in any discussions or negotiations or from entering into any agreements or commitments regarding acquisitions of any kind. Assuming both that the agreement between GEM and Gordon is valid and that Gordon violated the "no shop" provision, the issue before the court will be whether Gordon's actions went to the essence of the agreement with GEM and substantially defeated the purpose of the agreement for GEM to purchase Gordon's team, shop and property. GEM is seeking unspecified damages for Gordon's alleged breach, the reasonable value of GEM's goods and services to the extent that Gordon was unjustly enriched and to have the purchase agreement declared null and void.

Whether GEM and Gordon will one day drink milk together in the winner's circle is unclear. Either way, how the court handles the exclusivity clause in this case may set the pace for similar provisions in future merger agreements between motorsport teams.

**Still Donning a Cap: NCAA Settles Lawsuit over Athletic Scholarships**

In February 2006, college football and basketball players from several major conferences filed a class action antitrust lawsuit against the NCAA. The players alleged that the NCAA and its member institutions engaged in an unlawful horizontal agreement by artificially capping the dollar amount of athletic scholarships awarded by colleges to student athletes. After more than two years of litigation, last month, the U.S. District Court in Los Angeles approved a settlement that, among other things, called for the NCAA to create a $10,000,000 fund to provide certain career development services and reimburse various educational expenses to former student athletes who were members of the class involved.

The case was perhaps most notable for the issue it did not raise: that is, amateurism in college sports. The players alleged that the NCAA had used its market power in order to fix, depress and stabilize the amount, terms and conditions of athletic scholarships. The complaint in the case focused specific attention on the NCAA's Division I Manual, which contains provisions relating to recruiting, ethics, eligibility and financial aid, and specifically limits the amount of financial aid that a member institution may give to a student athlete. By-Law 15.02.5 of the Division I Manual defines a "Full Grant-In Aid" to a student-athlete as "financial aid that consists of tuition and fees, room and board, and required course-related books" (the "GIA cap"). The NCAA prohibits any member institution from giving an athletic scholarship that exceeded the amount of the GIA cap. By-Law 15.02.2 of the Manual, however, states that the full cost of attendance included "an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." Because the cost of attendance was more broadly defined by the Division I Manual than the items included in the GIA cap, the players claimed that the NCAA had artificially capped the amount a school could award via athletic scholarship below that of the cost of attendance. The players went on to allege that the difference between the GIA cap and the actual cost of attendance represented an illegal wealth transfer from the students to the colleges, and their suit sought to recover that transfer of wealth.

With respect to the issue of market power, the players claimed, *inter alia,* that the NCAA has market power because Division I members that deviate from the NCAA rules are subject to sanctions, including expulsion from the NCAA, and the NCAA has no comparable substitute in the marketplace. The agreement among the NCAA and its member institutions was alleged to be an anticompetitive horizontal agreement because, but for the GIA cap, the members of the NCAA would have competed against each other in order to sign the best athletes for their athletic programs.

Notably, the players did not allege that the NCAA and its member institutions had violated the federal antitrust laws merely by capping the amount a school could award a student in the form of an athletic scholarship. Such an allegation may have called into question the essence of amateurism, since without a cap schools would be free to pay their athletes salaries. Courts, however, have repeatedly protected as legitimate the NCAA's argument that amateurism is necessary in order to create its unique product. See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Banks v. NCAA*, 977 F. 2d 1081 (1992) and Lazaroff, "The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?" 86 Or. L. Rev. 329 (2007).

On numerous occasions the NCAA has argued successfully that amateurism is necessary in order to create its unique product. Here, the "amateurism card" was neither played nor trumped. Still, only time will tell whether future plaintiffs will seek to build on arguments made by the players in *White v. NCAA* to further attack the NCAA's efforts to limit the dollars that flow to college athletes.

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