

Three Point Shot

May 2011

Fore! What Is It Good for? (in New York, Absolutely Nothing)

File this story under “News You Can Use”: what are the limitations on liability when you are playing fantastically, horrifically, [bad golf](#)?

The question struck a chord here in the Sports Group at Proskauer, as surely it will for many of you. Fortunately for the Empire State [duffers](#) among us (if not for our golf partners), the New York Court of Appeals recently affirmed a lower court ruling that a golfer has no duty to warn other players by yelling “fore!” before their errant shot strikes another golfer.

The incident giving rise to the case occurred in October 2002 on the Dix Hills Park Golf Course on Long Island. Dr. Azad Anand and Dr. Anoop Kapoor were golfing buddies and one morning in October their group had just hit their second shots on the first hole. Walking ahead, Anand found his ball resting in the fairway rough but was [unaware](#) that, farther back, his playing partner had already begun his third swing. As Anand turned back toward him, Kapoor unleashed a [hosel rocket](#) that sliced and careened toward Anand, striking him and causing a detached retina that left him blind in one eye. A neuroradiologist, Anand was unable to work after the injury.

Anand commenced a personal injury claim, asserting that Kapoor’s failure to warn of his errant shot amounted to negligence and proximately caused Anand’s injury. Kapoor said he called out a warning after hitting his shot, but both Anand and the third player in the group said they never heard any warning. Kapoor [admitted](#) that he did not know where the other golfers were when he hit the ball that injured Anand.

The case rested on two questions: first, did Anand, by playing golf, assume the risk of being hit by a struck ball, and second, was Anand within the foreseeable danger zone when he was struck and blinded. Assumption of risk is an affirmative defense in which the party-at-issue explicitly or implicitly consents in advance to take a chance of injury from a known risk. If proven, this defense eliminates any legal duty to the injured party. In the law of negligence, [foreseeability](#) is determined by the capacity of a “reasonable person” to know in advance or reasonably anticipate that damage or injury is likely to ensue from the person’s acts or omissions.

A witness in the case testified that Anand was about 20 feet away from Kapoor and at about a 50-degree angle, but Kapoor maintained that he was farther away and the angle was somewhere between 60 and 80 degrees. The trial court [dismissed](#) Anand’s claim, holding that he assumed the primary risk by golfing, and the New York Appellate Division agreed, concluding that Anand was not within the foreseeable danger zone. The single dissenting justice claimed that there remained a factual question under New York case law about whether Kapoor’s violation of the rules and customs of golf “unreasonably increased” Anand’s risk and caused the accident.

Anand’s lawyer argued to the Court of Appeals that the “foreseeable zone of danger” is a fact-specific issue: one’s zone of danger must be viewed differently, he said, when playing alongside an amateur as opposed to Tiger Woods, who has [exceptional control](#) over the ball. Placing the assumption of risk entirely on a golfer who chose to play, he argued, “relieves the striker of almost any responsibility whatsoever.”

However, in December, the Court of Appeals [rejected](#) Anand’s arguments and affirmed the lower court rulings in a summary memorandum. The Court of Appeals held that Anand had assumed the risk of injury by electing to play the game and stated that “the manner in which Anand was injured—being hit without warning by a ‘shanked’ shot while one searches for one’s own ball—reflects a commonly appreciated risk of golf.” Therefore, Kapoor’s failure to warn did not amount to intentional or reckless conduct that unreasonably increased the inherent risks.

Now, if only the New York State Legislature would officially sanction “[winter rules](#)”...

Super Bowl Song Owner Shuffles into Court

The 1985 Chicago Bears (“’85 Bears”) was one of the most talented and memorable football teams of all time, both for the team’s [on-field domination](#) of opposing teams and for the team members’ off-the-field antics. With personalities like “Punky QB” Jim McMahon and William “Refrigerator” Perry, the ‘85 Bears [transcended](#) the gridiron. Before the regular season even ended, members of the ‘85 Bears, calling themselves the “Chicago Bears Shufflin’ Crew,” brashly recorded and released a rap song and music video called the “Super Bowl Shuffle.” Controversial at the time – Bears defensive lineman Dan Hampton declined to participate [because he thought the song was too arrogant](#) – more than 25 years after the ‘85 Bears backed up their words (or lyrics) by easily defeating the New England Patriots 46-10 in [Super Bowl XX](#), the song was the subject of a recent copyright infringement claim.

The idea for the Super Bowl Shuffle arose when record label owner and Bears fan Richard Meyer contacted Bears receiver “Speedy” Willie Gault about [making a record with the team](#). The song was eventually co-written by Meyer and three others and became an instant hit, reaching [number 41 on the Billboard charts](#) and earning a Grammy nomination for [best rhythm and blues vocal performance by a duo or group](#) (though it lost to Prince’s “Kiss” in what hardly anyone would consider an upset). Meyer became the copyright owner of both the song and the video, and ownership of the copyright passed to Meyer’s wife, Julia, upon his death in 1992. As the current rights holder, Ms. Meyer has carefully protected the Shuffle, [preventing YouTube from displaying the Shuffle video](#) and even [suing multiple television networks](#) for allegedly displaying short clips of the video.

As the 20-year anniversary of the ‘85 Bears approached, Triumph Books (“Triumph”), a publisher specializing in sports books, released “The ‘85 Bears: Still Chicago’s Team” (the “Book”). In connection with the Book, Triumph entered into a royalty agreement with Renaissance Marketing Corporation (“RMC”), Ms. Meyer’s exclusive licensing agent for rights related to the Super Bowl Shuffle. The royalty agreement granted Triumph the right to include an audio CD of the song on the inside cover of each Book for the duration of the agreement, which expired on September 30, 2008.

According to the [complaint](#) filed by Ms. Meyer and RMC in the Northern District of Illinois, Random House (which purchased Triumph in 2006) and Mitchell Rogatz, founder of Triumph and President of Random House's Triumph Books imprint, continued to distribute the Book with the Shuffle CD after the expiration of the royalty agreement. The complaint further contends that Triumph included a picture taken from the Super Bowl Shuffle video in the Book without the permission of Ms. Meyer or RMC.

As a result, the complaint alleges that the defendant's "willful and deliberate" acts infringed upon Ms. Meyer's exclusive rights under the federal [Copyright Act](#) and seeks damages under [17 U.S.C. §504](#) as well as an order from the court that all copies of the Book be retrieved from Random House's retailers and, together with all copies already in the possession of Random House, be destroyed, pursuant to [17 U.S.C. §503](#).

The plaintiffs also claim that Random House's continued distribution of the Book after the expiration of the royalty agreement "implicitly misrepresented" that the plaintiffs approved or sponsored the use of the CD and the picture and constituted "unfair competition" and "unfair and deceptive trade practices" which "likely caused confusion and mistake by the public" in violation of both [§43\(a\) of the Lanham Act](#) and the [Illinois Uniform Deceptive Trade Practices Act](#).

Regardless of the outcome, this current dispute adds to the legend and mystique of the '85 Bears, showing that even 25 years later there remains significant interest in the team and the Super Bowl Shuffle. For better or worse, the Shuffle helped pave the way for athletes to dabble in the world of entertainment. Next time you are watching television or listening to the radio and come across an episode of "[Ochocinco: The Ultimate Catch](#)" or a song from "[Shaq Fu: Da Return](#)" you can blame Speedy Willie and the rest of the Chicago Bears Shufflin' Crew.

The House Doesn't Always Win, Especially When It Disregards IP Rights

It's an adage as old as gambling itself: "The house always wins." Apparently, that is, until the house ignores intellectual property rights. One Jacksonville-area casino company learned this lesson the hard way, after the United States District Court for the Middle District of Florida issued a [consent order](#) fining the company and enjoining it from using the likeness of Jacksonville Jaguars quarterback David Garrard.

In the fall of 2010, Jax or Better LLC d/b/a Jacks or Better Casino LLC (“Jacks”), a riverboat casino that operates out of Jacksonville, Florida, rolled the dice against the NFL, the Jacksonville Jaguars, and Jaguars’ quarterback David Garrard when it used an [image](#) of Garrard on the casino’s website without authorization. The image, which shows Garrard in his full Jaguars uniform (bearing the NFL’s Shield logo), was posted as the banner image promoting Jacks’ sports book.

In November of 2010, the Jaguars sent a letter to Jacks, demanding that it discontinue its unauthorized use of the Jaguars’ marks. The letter also advised Jacks that use of the Jaguars’ marks in connection with a gaming operation conflicted with the NFL’s longstanding policy against affiliations with gambling, and raised issues regarding Garrard’s rights of publicity.

Jacks’ president, Jack Slotkin, responded to the letter like a poker player [on tilt](#). He asserted that the image was free for anyone to use because it was obtainable on Google Images. Further, Slotkin justified the use of the image on the ground that using the image of a player not associated with the local NFL team would be, well, wrong: “The Jacksonville Jaguars ... are the home team for Jacks or Better Casino which is based in Mayport. How would it look if we chose Michael Vick of the Philadelphia Eagles? Your fans and our customers would find that out of place because Vick doesn’t play for the Jaguars.”

The NFL, the Jaguars, and Garrard were not satisfied with the casino’s response, and followed up with additional demand letters. Slotkin eventually agreed to remove the photograph before January 15, 2011. However, Slotkin did not indicate that the casino would refrain from using similar images in the future.

On January 12, 2011, David Garrard, Jacksonville Jaguars, Ltd., the National Football League, and National Football League Properties, LLC filed suit against Jacks. The NFL, the Jaguars, and Garrard put all their chips on the table in the [complaint](#), which alleged that Jacks engaged in: (i) violations of the right of publicity under federal and Florida law, (ii) trademark infringement under federal and Florida law, (iii) trademark dilution under federal and Florida law, (iv) false designation of origin, (v) false representations and false advertising, (vi) unfair competition, and (vii) deceptive acts and practices. The complaint requested relief in the form of monetary damages and a permanent injunction preventing Jacks from displaying any NFL marks, Jaguars' marks, and/or images of Garrard on any website or other form of mass media advertising; representing, by any means, that Jacks had a formal marketing relationship with the NFL, the Jaguars or Garrard; and/or doing anything likely to cause confusion or mistakes in the minds of the public or to lead consumers to believe that the NFL, the Jaguars, or Garrard supported or endorsed goods or services offered by Jacks.

Slotkin folded on February 24, 2011, [agreeing to](#) a permanent injunction and an award of \$5,000 in damages to the plaintiffs, pursuant to a consent order issued by the court. The consent order also included a provision that would require the casino to pay \$25,000 in liquidated damages for any future infringements of NFL or player IP, per NFL mark or player identity, per use. Slotkin and the casino also agreed to pay attorney fees required to enforce the consent order.

Typically, the odds are stacked in the house's favor. But, when bets are placed off the casino floor – particularly in the arena of law and intellectual property – the house won't always be a winner.

Update

In our June 2010 edition, we [reported](#) on the dispute between rap mogul Jay-Z and pro baseball player David Ortiz, over trademark rights in "The 40/40 Club" trademark registered by Jay-Z in the United States. Jay-Z brought an action challenging Ortiz's use of the term "Forty-Forty" on his nightclub in the Dominican Republic. The case was settled and marked "CLOSED" on the court's docket on March 14, 2011.

- **Howard Z. Robbins**

Partner

- **Joseph M. Leccese**

Chairman Emeritus of the Firm

- **Robert E. Freeman**

Partner

- **Bradley I. Ruskin**

Partner

- **Wayne D. Katz**

Partner