



## Summer 2020

A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials. In this issue, we feature contributions from our talented group of summer associates. Thanks to Melissa C. Felcher, Lauren S. Altus, Danielle L. Brooks, Peter J. Cramer, and Thomiah A. Dudley for their hard work on these articles.

Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

Edited by **Robert E. Freeman**

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### Seventh Circuit Slashes Rink Owner's Antitrust Claims over Amateur Hockey Affiliation

In the most recent face-off between ice rink operator [Black Bear Sports Group, Inc.](#) ("Black Bear") and affiliate regulator [Amateur Hockey Association of Illinois](#) ("AHA" or "the Association"), AHA won the drop and secured the puck. Black Bear had alleged an antitrust injury based on its argument that multiple AHA requirements precluded it from obtaining a charter that would have allowed it to sponsor a Tier II amateur hockey club at its ice facility in Glen Ellyn, Illinois. Slapping away the shot, Judge Easterbrook of the Seventh Circuit called the claim one of "impossibility" and affirmed the dismissal of Black Bear's antitrust suit, albeit on different grounds than the lower court, for "lack of a plausible federal claim." ([Black Bear Sports Group Inc. v. Amateur Hockey Association of Illinois Inc.](#), No. 19-2076 (7<sup>th</sup> Cir. June 22, 2020)).

Amateur hockey is regulated by USA Hockey, Inc., which in turn sanctions state and regional affiliates. Within the state of Illinois, AHA has been the affiliate regulator of amateur hockey in the state since 1975. AHA promulgates different rules and regulations for its hockey teams based on age, skill and competitive level. Youth hockey teams (i.e., under the age of 18) range from Tier I to Tier III, with Tier I being the most competitive and Tier III being more recreational. According to Black Bear, nearly all organized amateur hockey teams, including nearly every high school hockey team, is a member of AHA. It also claims that youth hockey teams in Illinois are required to affiliate with AHA (or another sanctioned governing body), and follow its bylaws and regulations. Those teams that violate such regulations may be deemed ineligible for AHA-sponsored tournaments or face other discipline.

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As noted by the district court, another facet to ensure that youth hockey remains a competitive and viable sport is giving each youth hockey team a rink to play in, known as a “home ice.” That’s how rink owners, like Black Bear, find their way into the arena. As a for-profit operator of multiple ice rinks, Black Bear believed that, while its Glen Ellyn rink had been hosting educational programs, it was underused and could host a youth hockey team in the area (as Black Bear apparently provided rinks for, but had not sponsored, other youth teams in the state). However, in order to sponsor a Tier II team at its rink, Black Bear needed an AHA charter. Yet, before even sending an application, Black Bear believed that it was already playing shorthanded. According to Black Bear, AHA officials informed it that there were already enough teams in the relevant market and further, that under AHA’s allegedly anti-competitive rules, it would likely not be approved to sponsor a Tier II club at its Glen Ellyn rink.

In December 2018, Black Bear dropped the gloves and [filed suit against the AHA](#), alleging violations of federal and state antitrust law, as well as related state-law tort claims, based on its allegation that the AHA unlawfully excluded it from youth hockey. In its complaint, Black Bear contended that three specific AHA requirements were enacted to exclude its entry into the Tier II youth hockey market and prohibit it from receiving a charter.

First, Black Bear alleged that AHA had a rule limiting sponsorship to nonprofit entities, thereby removing Black Bear from eligibility. Second, Black Bear pointed to AHA’s alleged requirement that applicants seeking a charter must identify any other youth hockey teams that could be affected by granting the application. Lastly, Black Bear claimed that AHA instituted a rule that prevented “any Tier II team from using ice facilities more than fifteen miles from its home rink.” This rule allegedly created a problem as it supposedly forechecked Black Bear’s plan to rent out the Glen Ellyn rink as “additional ice” to an existing Tier II team because the rink was 24 miles away and exceeded the limit. In all, Black Bear claimed that AHA maintained a monopoly, harmed competition in the youth hockey market and unlawfully prevented its entry into the Illinois youth hockey market. It asserted claims for monetary damages for harm to its

business and for injunctive relief to compel AHA to allow Black Bear to sponsor a Tier II team.

In the Northern District of Illinois, Black Bear argued that these rules restricted the market and demonstrated AHA’s “intent to maintain its monopoly power and to injure Black Bear.” The district court [disagreed](#). In May 2019, the court [held](#) that, although AHA did in fact promulgate these rules, there was “significant doubt” as to whether or not these rules would actually bar Black Bear from obtaining a charter. In denying the antitrust and related claims for lack of Article III standing, the lower court focused on the fact that Black Bear never officially submitted a charter application. Specifically, the court explained that “the bottom line [was] that, on the present allegations, Black Bear [could not] proceed with this lawsuit without having actually applied for a Tier II club charter.” In examining the AHA regulations, the court found, despite Black Bear’s contention that AHA officials preemptively denied its opportunity, that the AHA provisions were not necessarily a blanket prohibition against Black Bear’s charter request as the regulations contained, among other things, exceptions to certain requirements and gave the AHA broad discretion to consider applications. Thus, the court found Black Bear’s claims “too conjectural” to support the injury-in-fact requirement for standing, sending Black Bear’s complaint to the penalty box.

The matter went up on appeal to the Seventh Circuit. In June 2020, Judge Easterbrook, in a terse five-page [opinion](#), quickly swatted Black Bear’s claims and affirmed dismissal, albeit under different reasoning. In rejecting the lower court’s reasoning, the appeals court looked to the text of the Sherman Act and explained that an “exhaustion of nonjudicial remedies” is not required under the statute before a litigant may commence a suit. Additionally, the court took issue with the lower court’s interpretation of AHA’s provisions, explaining that the rules requiring a non-profit sponsor seemed “essential” and that AHA had not “pointed to anything in its bylaws that would make an exception for Black Bear.”

Nevertheless, the Seventh Circuit ultimately agreed that Black Bear’s claims were offside. Specifically, the court explained that Black Bear’s complaint appeared to be an

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attempt to use the Sherman Act to “compel a cartel to admit a new member and distribute the monopoly profits differently,” a request that the court coined as both an “oddity” and “impossibility.” In viewing Black Bear’s claim as an effort to join the monopoly rather than dissolve it, the appeals court held that the complaint did not state a viable federal antitrust claim under the Sherman Act and should therefore be dismissed. The court also declined to take up state antitrust claims on jurisdictional grounds.

Thus, Black Bear remains stuck behind its own blue line in its quest for a Tier II club, and it is uncertain whether the sports group will have another shot at the net if it decides to apply for an AHA charter. It is also unclear what AHA’s defensive alignment will look like should it receive an application from Black Bear. Interestingly, this is not the first antitrust suit that AHA has faced over its administration of youth hockey in Illinois. Regardless, let’s hope that the next face-off won’t occur inside of the courtroom, but rather on the ice.

## Who’s Got the Moves? Former Maryland Basketball Players Are Not Dancing over *Fortnite* Decision

The buzzer sounded for former University of Maryland basketball players Jaylen Brantley and Jared Nickens (“Plaintiffs”) when a Maryland district court dismissed all [eight IP-related claims](#) the dancing duo brought against Epic Games, Inc. (“Epic”) regarding its use of a virtual dance move in its popular video game *Fortnite* that was purportedly similar to the “Running Man” dance the pair hyped up online. (*Brantley v. Epic Games, Inc.*, No. 19-00594 (D. Md. May 29, 2020)). After bringing the dance to [viral fame on \*The Ellen Degeneres Show\*](#) in April 2016, the players claimed Epic’s game *Fortnite* profited off of their intellectual property by selling a [similar dance](#) feature within the game. Unfortunately for the Plaintiffs, the judge did not think it was such a slam dunk.

In their [original complaint](#), filed in February 2019, Plaintiffs argued that *Fortnite* unlawfully capitalized on the “Running Man” dance “created, named and/or popularized” by the Plaintiffs and offered it for purchase in an otherwise free video game. In its decision, the court noted that the Plaintiffs had previously stated on *The Ellen Degeneres Show* clip that two high school students actually created the dance, but that Plaintiffs

made the dance [explode in popularity](#) via their social media platforms and by doing the dance at games and practices. The “Running Man” dance is one of many purchasable features in the game, called an “emote.” Emotes allow a player’s avatar to celebrate on the virtual battlefield—their availability has a significant role in the game’s popularity and commercial success. In essence, Plaintiffs claim that the “Running Man” dance was their property, and that Epic appropriated it for use in *Fortnite* without permission or requesting a license to use their likenesses. In all, after amending their Complaint in March 2019 to remove claims of copyright infringement, Plaintiffs advanced various claims, including right of publicity, unjust enrichment, and a host of trademark-related claims.

In May 2019, Epic went on a fast break and moved to dismiss the complaint. Among other things, Epic [argued](#) that Plaintiffs’ non-trademark claims were preempted by the Copyright Act and their trademark-related claims should be dismissed for a lack of a registered mark and because the game maker has First Amendment rights in the expressive elements of its video games. Plaintiffs [countered](#) that their claims contained an extra element that placed them outside of copyright preemption, that they possess right of publicity claims in their characteristic dance under various state publicity laws or under common law and that Epic’s use of the dance was not transformative to justify its alleged misappropriation.

Unfortunately for the Plaintiffs, their argument turned out to be an air ball. In its May 2020 [opinion](#) dismissing the complaint, the court began by noting that the Copyright Act preempts a wide range of claims that fall within the subject matter of copyright (“The scope of copyright preemption is broader than the scope of copyright protection”). To determine if the Copyright Act preempts Plaintiffs’ various claims, the court applied a two-prong test: (1) the work must be within the scope of the subject matter of copyright, and (2) the rights granted under state law must be equivalent to the rights within the scope of the federal Copyright Act. As the court stated, because the Copyright Act specifically lists choreographic works, the “Running Man” dance fit into the first prong like a ball swishing the net. Though not all dances qualify as protected copyrighted works, the court noted that the question of copyright preemption is a broader one than that of copyright protection, and that

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the dance fell within this larger framework (“In short, the “Running Man” is somewhere on the continuum between copyrightable choreography and uncopyrightable dance”). The second prong states that the rights to be preempted must be equivalent to the rights protected by the Copyright Act. Here, the court held that because the rights the players are seeking to protect are also protected by the Copyright Act – namely, that Plaintiffs brought common law claims based on alleged unauthorized copying of “Running Man” and that Epic’s alleged “capturing and digitally copying” of the “Running Man” dance to create the virtual Fortnite emote was “squarely within the rights protected by the Copyright Act.” Plaintiffs’ trademark-related claims for unfair competition and false designation of origin were similarly precluded, or “*Dastar*-ed,” that is, dismissed under the Supreme Court’s *Dastar* precedent because the allegations were properly the subject of copyright, not Lanham Act protection. The court also dismissed Plaintiff’s trademark infringement and dilution claims for failure to allege a valid trademark.

Despite Brantley and Nickens’s attempts to claim Fortnite committed a technical foul, the clock ran out in this one-sided contest, with little hope for a rematch, at least in this court. In granting Epic’s dismissal motion, the court held that because Plaintiffs have already been given previous opportunities to cure the deficiencies in their pleadings and had already filed an amended complaint, the claims were dismissed with prejudice. Thus, barring an appeal, there will likely be no runaround on the “Running Man” decision. This also likely means that the Plaintiffs will have to be satisfied with their online fame and the benefits that flow from such exposure. In the future, if Fortnite chooses to create new emotes inspired by the next dance craze, it’s a good bet there will be many to choose from, given the number of memes and viral videos that come and go on social media.

## JUST DON’T DO IT: Nike Successfully Opposes Similar Sports Apparel Trademark

If you do not know the phrase JUST DO IT, you are *doing* something wrong. The three word, all-capital-letter mark is touted by [Nike, Inc.](#) (“Nike”) to be “one of the most famous and recognizable marks of the 20<sup>th</sup> and 21<sup>st</sup>

centuries.” Not only can the slogan be seen across social media platforms, but it also has been featured globally alongside top-notch athletes. So, when a couple of upstarts tried to register a mark for athletic apparel that was confusingly similar to Nike’s famous JUST DO IT mark, they quickly discovered that perhaps next time they shouldn’t.

Nike claims that it has used the slogan JUST DO IT in commerce since at least 1989 and cited a [trademark](#) for clothing and sweatshirts bearing the slogan registered in 1995 (JUST DO IT has since been registered for other classes of goods over the ensuing years). Given the mark’s designed ambiguity (as the word “It” can really mean anything), JUST DO IT has become synonymous with competitive sports ideas like “excellence on the field” and “giving 110%” and has shaped the Nike brand into what it is today. It, therefore, was not surprising when Nike quickly [opposed](#) an application to register [JUST DREW IT!](#) with the USPTO.

The application for the proposed JUST DREW IT! mark was filed by Jamin Caldwell and Courtney Miles (“Applicants”). The Applicants sought to register their JUST DREW IT! mark for use on Class 25 clothing items, which includes athletic apparel, that purportedly would contain original artwork under the campaign of JUST DREW IT!. The mark was [published for opposition](#) in December 2017.

Subsequently, Nike filed a [notice of opposition](#) in April 2018. In its notice, Nike cited prior instances where the Trademark Trial and Appeal Board (“TTAB”) had upheld prior challenges to other “JUST \_\_\_ IT” marks and raised several grounds as to why the Applicants’ proposed registration should be refused. Nike relied on Section 2(d) of the federal Lanham Act to claim the Applicants’ mark would cause confusion with Nike’s JUST DO IT mark and Section 43(c) to allege the Applicants’ mark would dilute, by way of blurring, Nike’s famous slogan. For both of these claims, Nike relied on its longtime, continuous use of its famous mark.

Under the Lanham Act, the USPTO may refuse to register any mark if it is likely to confuse, mistake, or deceive consumers as to the commercial source of the goods or dilute the distinctiveness of a famous mark. See 15 U.S.C. § 1052(d); 15 U.S.C. § 1125(c)(2)(B). To determine the former, a multifactor test is applied using

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the “[DuPont Factors](#),” which are then weighed against one another to determine whether there is a likelihood of confusion. The DuPont Factors include, among others, the fame of the registered mark, the degree of similarity of the marks, the nature of the goods using the marks, the channels of trade, the classes of consumers, and the purchasing conditions of the goods. In this instance, the TTAB focused on three factors: the similarity of the marks, the similarity of the goods, and the similarity of the trade channels. Likewise, the analysis for dilution considers multiple factors, including the fame and distinctiveness of the existing mark, the timing of the existing mark’s fame, and the degree to which a new mark will be used in commerce and dilute, by blurring, the famous registered mark.

At the outset, the Applicants admitted Nike’s JUST DO IT mark is famous within the meaning of Section 43(c) of the Lanham Act for dilution purposes and became famous prior to the filing of their own trademark application. Thus, Nike came ready to play and started with a big advantage. In its [opening brief](#) filed in September 2019, Nike argued the Applicants’ proposed mark—which begins and ends with the same word, with a similar-sounding word in the middle—was confusingly similar to its own famous mark and by using JUST DREW IT! on comparable goods, the Applicants were trying to create an unauthorized association with Nike.

Motivated to succeed, Nike did not stop there. It further argued the Applicant’s registration also created a likelihood of dilution. Dilution by “blurring” may occur where an entity uses or modifies the plaintiff’s trademark to identify the entity’s goods and services, raising the potential that the mark will lose its ability to serve as a unique identifier of the plaintiff’s product. In its argument against registration of the JUST DREW IT! mark on these grounds, Nike referred to many of the same points outlined in its likelihood of confusion analysis and relied on the Applicants’ concessions of the fame of the JUST DO IT mark and Nike’s efforts to vigorously protect diluting uses of its mark.

In October 2019, Applicants attempted to put up a fight by filing a *pro se* [brief](#) in support of JUST DREW IT!. After acknowledging JUST DO IT is a famous mark and has been in use since the late 1980s, the Applicants attempted to argue Nike’s mark lacked distinctiveness

because it is not “fanciful.” Moreover, Applicants attempted to distinguish their mark by highlighting the difference between the second words “DO” and “DREW” and the exclamation point used at the end of their mark.

In April 2020, the TTAB delivered an opinion in favor of Nike’s opposition petition. ([Nike, Inc. v. Caldwell](#), No. 91240394 (TTAB Apr. 28, 2020) (non-precedential)). The Board found Nike was successful in establishing, by a preponderance of the evidence, the Applicants’ mark would likely cause confusion with and dilute Nike’s “exceedingly” famous JUST DO IT mark. It found the relevant DuPont Factors weighed in Nike’s favor—the marks are confusingly similar and the goods and trade channels identical. The Board also found, among other things, the exclamation point in the Applicants’ proposed mark did not help distinguish the marks, and while the words DO and DREW look different, their meanings and sound are “not necessarily significantly different.” Regarding dilution, the TTAB stated JUST DO IT enjoys the “highest level of fame” and “broadest scope of protection,” which weighs in favor of finding a likelihood of dilution. As a result, the Board sustained Nike’s opposition on confusion and dilution grounds and directed that the Applicants’ mark be refused.

With no further appeals following the ruling, Applicants were deemed to have [abandoned](#) their application this past July.

This decision favoring Nike is only the most recent of many; Nike [claims](#) the corporation has successfully enforced its trademark rights against dozens of marks and applications over the years. With another clever “JUST \_\_\_ IT” spinoff likely to surface in the near future, stay tuned to see whether or not Nike will remain undefeated and continue to JUST DO IT.

## Last Call for Plaintiffs in Sports Bar Robocall Suit

When he looks back, 2014 must have seemed like a hopeful time for plaintiff Zachary Smith (“Smith”). Feeling lucky and hoping to win some free drinks, the Missouri resident signed up for a raffle at the popular social spot [No Other Pub](#). He had no idea the Kansas City sports bar would become such a royal pain.

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In his [complaint](#) filed in March 2019, Smith alleged that for several years after visiting the popular pub in KC’s Power & Light District, No Other Pub bombarded him with promotional texts and calls in violation of the Telephone Consumer Protection Act (“TCPA”). Smith teamed up with co-plaintiff Brian Kagarice (“Kagarice”), who made similar allegations—though he claimed he had never set foot in the bar, much less provided his mobile phone number (it isn’t clear if his presence in the bar’s marketing system was the result of a typo or a mischievous acquaintance). Attempting to build out their roster even further, Smith and Kagarice asked the Court to certify a class of similarly-situated spam sufferers. Finally and separately, Smith and Kagarice claimed that, because they had registered their mobile phone numbers on the National Do Not Call Registry, the bar’s unsolicited calls violated the Federal Trade Commission’s [Telemarketing Sales Rule](#) (the “Do-Not-Call Rule”). In 2019, both parties moved for summary judgment.

For the most part, the April 2020 ruling on the summary judgment motions ([Smith v. Truman Rd. Development, LLC](#), No. 18-00670 (W.D. Mo. Apr. 28, 2020)) was a big night for No Other Pub. First, the court balked at Smith and Kagarice’s claim regarding the allegedly unsolicited text messages. The TCPA prohibits using an automated telephone dialing system (“ATDS”) to make non-emergency calls or texts without the prior express consent of the recipient. The TCPA defines an ATDS as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. §227(a)(1). The meaning of this definition has generated much litigation in recent years; in any particular case, courts generally examine whether the messaging platform at issue falls within the scope of an ATDS.

No Other Pub urged the court to read the definition of ATDS narrowly, arguing that they weren’t using such a system because their messaging software was incapable of generating random or sequential phone numbers. The pub also pointed out that its employees manually entered the numbers from a sign-up sheet into its marketing database and that an employee had to log into the system, select the groups of names to receive a specific promotion, and then send the message (as

opposed to a fully automated pitch). Here, the court faced a splitter: Some circuit courts, such as the Ninth Circuit, have broadly interpreted the term “capacity” in the TCPA, holding that a device that stores telephone numbers—whether or not those numbers have been generated by a random or sequential number generator—can still be an ATDS. But other circuits have taken a narrower view (Missouri’s circuit, the Eighth, apparently hasn’t weighed in). Yet, the pub seemed to have home field advantage, as the court pointed to three other District Courts within the Eighth Circuit that supported a narrow reading. Thus, the judge in this case also applied a narrow interpretation of an ATDS, finding that “the best reading of the plain text of the ATDS definition indicates that a system must include a random or sequential number generator.” As a result, the court granted summary judgment in favor of the pub on Smith and Kagarice’s TCPA “autodialer” claim. Strike one for the plaintiffs.

With the TCPA claim thrown out, Smith and Kagarice’s attempt at a class action never had a chance—the Court tossed their class certification as well. Strike two for the plaintiffs.

The plaintiffs had one last argument on tap: their Do-Not-Call claim. Smith and Kagarice claimed that the pub violated 47 C.F.R. § 64.1200(c), which prohibits “telephone solicitations” to residential telephone subscribers who are registered on the National Do Not Call Registry. Among other things, the TCPA provides a private right of action for individuals who have received more than one telephone call within any twelve-month period in violation of these regulations (see 47 U.S.C. §227(c)(5)), but a potential recipient’s “established business relationship” with the defendant is an affirmative defense to such a claim.

The court addressed this claim one plaintiff at a time, and it soon became clear why: It turned out Smith had responded favorably to some of No Other Pub’s texts, and even wet his whistle there as recently as 2017. This was enough for the court to rule that he and the bar had an established business relationship, clearing the tab on Smith’s Do-Not-Call claim. Strike three; Smith’s suit was out.

The established business relationship defense that took down Smith wouldn’t get past Kagarice, however, since

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he claimed to have never visited No Other Pub. But the bar had one more shot in its arsenal. They argued that Kagarice, who regularly used his personal cell phone for work, could not properly register the number on the Registry because of a Do Not Call Rule requirement that registered numbers be “residential,” not business lines. With Smith out and Kagarice down to his last strike, this residential-versus-business question was too close for the court to call: The judge denied summary judgement to either party and left the “question of fact” to a jury.

According to the parties’ latest [status conference](#) in June 2020, the pub will be bringing a further motion to dismiss the remaining claim or else the matter will proceed to trial. As it stood, things were looking bleak for Smith and Kagarice on their TCPA claim, but recently the Supreme Court stepped in with a potential game changer: SCOTUS [announced](#) that it would review a dispute that is expected to produce a ruling clarifying the definition of “autodialer” under the TCPA. Depending on how the Justices rule on the ATDS issue, Smith, Kagarice and No Other Pub may go into extra innings. Pull up a bar stool and stay tuned.

## Cruise Line in Deep Water after Appeals Court Reinstates \$667,000 Ice Skating Injury Verdict

It’s the annual office retreat and it’s finally your turn to tell two truths and one lie (your favorite icebreaker game). While it might be fun to *break the ice* at an office retreat, for a cruise ship, breaking the ice on the skating rink may lead to a sizeable verdict.

The slippery slope of events began with an [incident in June 2016](#), in which Edgardo Lebron (“Plaintiff”), a passenger onboard [Royal Caribbean's Adventure of the Sea](#) (“Defendant” or “Royal Caribbean”) cruise ship, fell and suffered a broken ankle while skating on the ship’s ice rink. He was taken to sick bay and then by air to a hospital in Antigua, which set his ankle. He then had surgery back home in Puerto Rico. But, the plaintiff’s ordeal merely cracked the surface of the future events that would occur.

As we previously relayed in the [February 2019 edition of Three Point Shot](#), the plaintiff alleged that the defendant’s negligence regarding the condition of the ice

and skating equipment caused his injuries. In the [complaint](#), the plaintiff asserted that Royal Caribbean was negligent for its employees’ failure to properly inspect and maintain both the ice rink and the ice skates that it provided to the ship’s passengers. Specifically, the plaintiff claimed that one of the ice skates he was given had a broken lace and, thus, could not be laced to the top and that the surface of the ice in the rink had gouges in it, which should have been noticed by crewmembers, and which caused plaintiff to fall. In short, the plaintiff claimed that the defendant’s negligence with regard to the condition of the ice and skating equipment caused the plaintiff’s injuries while ice skating onboard. Unable to reach a resolution, on September 25, 2018, both parties decided to test the waters of a jury trial. Initially, it appeared that Royal Caribbean was on thin ice, as the jury entered a nearly [\\$667,000 verdict](#) against the company. But, once the fog cleared, it was apparent that Royal Caribbean was not the only party at fault, as the jury found that the [plaintiff was 35% responsible](#), thus reducing the damages payable by Royal Caribbean.

However, the jury’s verdict was just the tip of the iceberg as there was more to this maritime tort suit than initially thought. Ruling on defendant’s motion for a directed verdict, the Florida district court [held](#) that while there was sufficient evidence that Royal Caribbean knew or should have known about the defective skates, there was “not sufficient evidence for a jury to find that the defendant knew or should have known about the gouges in the ice that, *together* with the broken skate lace, created the dangerous condition.” [emphasis added]. Therefore, the trial judge overturned the jury verdict, stating the plaintiff had presented insufficient evidence for a reasonable jury to infer that Royal Caribbean had actual or constructive notice of the unsafe ice conditions that caused plaintiff’s fall. ([Lebron v. Royal Caribbean Cruises, Ltd.](#), No. 16-24687 (S.D. Fla. Dec. 18, 2018)).

But, change was on the horizon, as the Eleventh Circuit did not give high scores on the lower court’s post-verdict routine. Taking points off concerning the lower court’s fundamentals, the appeals court [held](#) that jury verdict should be reinstated because the plaintiff had adequately proven negligence concerning Royal Caribbean’s maintenance of the ice *and* its negligence regarding the broken lace on the plaintiff’s skate ([Lebron](#)

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[v. Royal Caribbean Cruises, Ltd.](#), No. 19-10115 (11th Cir. June 19, 2020)).

In examining the question about whether Royal Caribbean should have known about the condition of the ice before the fall, the appeals court cited testimony from the plaintiff's 12-year-old daughter, who had noticed the gouges and flakiness in the ice 10 to 15 minutes before the plaintiff fell. Coupled with evidence that several crewmembers were present at the rink – one of whom was responsible for “watching the ice” – the court noted that since an “an inexperienced skater, noticed the gouges, it goes without saying that trained employees responsible for 'watching the ice' should notice them.” Thus, the appeals court reversed the lower court’s directed verdict and found that plaintiff had presented sufficient evidence to prevail on both theories of negligence—that Royal Caribbean negligently maintained the ice *and* negligently provided plaintiff a skate with a broken lace. As the court put it: “[W]hile the evidence supporting notice of the unsafe ice conditions is by no means overwhelming, it is more than sufficient to support the jury’s verdict.”

This double axel of litigation resulted in the appeals court [reinstating](#) the jury's 2018 verdict (as adjusted for the parties’ representative fault) and stopping Royal Caribbean from skating from the negligence claims. For now, it appears the parties have finally reached more settled shores.

## Postscript: Online Gambling Operator Hits Jackpot in “Lotto” Domain Name Dispute

In the [April 2017 edition of \*Three Point Shot\*](#), we covered a dispute between Italian sportswear company Lotto Sport Italia (“Lotto Sport”) and an online gambling operator, David Dent (“Dent”). After Lotto Sport [prevailed in a UDPR proceeding](#) regarding Dent’s registration of the domain names <lottostore.com> and <lottoworks.com>, Dent filed a [declaratory judgment action](#) in Arizona district court seeking a ruling that his domain name registrations (which were purportedly done in contemplation of future gambling-related ventures) were lawful under the Lanham Act and that Lotto Sport engaged in reverse domain name hijacking under the Anticybersquatting Consumer Protection Act (ACPA). In March 2020, a magistrate judge ruled that, as a matter of law, Dent did not unlawfully register or use the disputed domain names (and also stated that Dent did not use them in bad faith, even though the domains had resolved to parking pages strewn with paid advertisements, an action the court found was controlled by the registrar, not Dent). ([Dent v. Lotto Sport Italia SpA](#), No. 17-00651 (D. Ariz. Mar. 10, 2020)). Because Dent had not used the disputed domain names in commerce, the court also ruled that Dent had not violated the Lanham Act as a matter of law. Days later, Lotto Sport appealed the ruling to the Ninth Circuit. Meanwhile, in July 2020, the parties filed dueling briefs over Dent’s motion for attorney fees under the Lanham Act and ACPA. Thus, this hard-fought match appears far from over.



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