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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 Sophia E. Coutavas, Dorehn P. Coleman, and Ally E. Kaden 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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The Other Shoe Drops for Peruvian Distributor After Circuit Court Reinstates Arbitration Award in Favor of New Balance

On April 6, 2023, popular footwear and fitness apparel company, New Balance Athletics ("New Balance"), stepped away with a win as the First Circuit Court of Appeals reversed an earlier Massachusetts district court's decision to vacate an arbitration award in favor of New Balance arising out of a dispute with its distributor in Peru. (*Ribadeneira v. New Balance Athletics Inc.*, No. 21-1831 (1st Cir. Apr. 6, 2023)). The Court of Appeals found that the respondents were – contrary to their contentions – subject to the arbitrator's jurisdiction and bound by the original agreement between the parties to arbitrate their disputes. As it turned out, the parties' journey to the Court of Appeals was more of a marathon than a sprint.

In January 2013, New Balance entered into a distribution agreement with Peruvian Sporting Goods ("PSG"), whereby PSG would serve as the exclusive wholesale distributor of New Balance products in Peru in exchange for paying distribution fees. The agreement, which was signed only by New Balance and PSG, included a choice of law clause mandating Massachusetts law as well as an arbitration clause, which New Balance ultimately invoked in 2018. However, the dispute is no ordinary breach of contract action. Several key events between 2013 and 2018 before multiple tribunals frame the warm-up to the arbitration.

The original 2013 distribution agreement ("Distribution Agreement") had a one-year term but contained a provision that allowed it to automatically renew year-to-year absent any contrary notice by either party. In 2015, the relationship began to wear thin when PSG fell behind in its payment of distribution fees owed to New Balance, prompting the parties to exchange a draft of a new distribution agreement ("New Agreement"). The New Agreement contained a similar arbitration clause to the original Distribution Agreement. At that time, it was purportedly the parties' understanding that a new entity would be incorporated that would eventually replace PSG as the distributor of New Balance's products in Peru.

That new entity, Superdeporte Plus Peru S.A.C ("Superdeporte") was owned by plaintiff Roderigo Ribadeneira ("Ribadeneira") who, in 2013, was PSG's majority shareholder. Despite negotiations, neither party went the extra mile to give notice of their intent to let the Distribution Agreement expire, so it was auto-renewed until December 31, 2016.

In May 2016, Superdeporte laced up and was ready to assume operations in place of PSG. PSG informed New Balance that it was ready to transfer operations to Superdeporte and sought New Balance's consent to modify their agreement to substitute Superdeporte as New Balance's Peruvian distributor under the Distribution Agreement. At that point, New Balance denied that it had ever finalized the New Agreement with either PSG or Superdeporte and subsequently informed PSG of its intent to end its relationship with both PSG and Superdeporte and work with another distributor, following the Distribution Agreement's expiration at the close of 2016.

In November 2016, PSG and Superdeporte executed assignment agreements with Ribadeneira and transferred to him any legal claims they had against New Balance that arose out of the New Agreement and the surrounding negotiations, as well as a transfer of rights to bring legal actions worldwide against New Balance to vindicate such rights.

A few months later, the race was on. Ribadeneira sued New Balance in a Peruvian court asserting claims that New Balance had breached the New Agreement or, in the alternative, breached its duty to negotiate in good faith. Ribadeneira later moved for an injunction to prevent New Balance from using any distributor in Peru other than Superdeporte (according to the court, the injunction was eventually lifted in July 2018 after the Peruvian court determined that New Balance and PSG no longer had any effective distribution agreement).

In response, New Balance brought arbitration proceedings against PSG and Ribadeneira in Boston for unpaid fees under the Distribution Agreement. Ribadeneira objected to the arbitrator's jurisdiction over him as a non-signatory of the Distribution Agreement and also argued that PSG's assignment of its claims to Ribadeneira were only made in relation to the New Agreement and was not intended to bind him to the Distribution Agreement. PSG itself asserted a counterclaim that New Balance itself had breached the Distribution Agreement. After Ribadeneira and PSG assigned back rights to Superdeporte, New Balance filed an amended notice of arbitration adding Superdeporte as a respondent and added claims relating to PSG's injunction, which had interfered with New Balance's dealings with an alternate distributor.

In August 2020, the arbitrator issued a Partial Final Award, finding for New Balance on its claim that PSG had breached the Distribution Agreement and holding PSG and Superdeporte jointly liable for over $800,000 in damages (on the theory that Superdeporte was PSG's successor-in-interest). Because the arbitrator declined to pierce the corporate veil, Ribadeneira was not found liable for PSG's breach of the Distribution Agreement. However, the arbitrator upheld New Balance's claim that Ribadeneira had tortiously interfered with its agreement with an alternate Peruvian distributor by seeking and obtaining the Peru court injunction based on alleged misrepresentations (also imposing liability and damages on both PSG and Superdeporte for tortious interference based on the parties' assignment of rights). The arbitrator rejected PSG and Superdeporte's counterclaim alleging that New Balance had breached the New Agreement, finding that agreement unenforceable. The Final Award was issued in February 2021.

In yet another twist, Ribadeneira and Superdeporte filed a motion in Massachusetts district court to vacate the arbitral award. In September 2021 the district court sided with Ribadneira and Superdeporte, finding that the arbitrator had improperly exercised jurisdiction over those parties, as Ribadeneira and Superdeporte were non-signatories of the Distribution Agreement, and that neither principles of assumption nor of equitable estoppel overcame their non-signatory status. New Balance appealed.

Unfortunately for Ribadeneira and Superdeporte, upon review, the First Circuit reversed, all but putting an end to this six-year litigation. The court explained that while "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," "arbitral jurisdiction is 'not limited to those who have signed an arbitration

agreement.'" Under the theories of assumption and equitable estoppel, the Court reversed the earlier decision to vacate the award. As the appeals court explained, the basic notion is that a non-signatory may still be bound to an arbitration agreement if their subsequent conduct indicates that they are assuming the obligation to arbitrate. The court noted that other federal courts had applied the assumption theory in instances where a non-signatory is also the successor-in-interest, in which case they generally assume the predecessor's obligation to arbitrate. The court also cited precedent where courts applied assumption theory where a non-signatory is assigned rights under a contract with an arbitration clause, thus assuming the obligation to arbitrate under that clause (absent a waiver). Here, the shoe fit. The appeals court concluded that Superdeporte was a "mere continuation" of PSG and that as such, Superdeporte was liable for PSG's obligations under the Distribution Agreement as its successor-in-interest and thereby became bound by the agreement's arbitration clause. As to the arbitrator's jurisdiction over Ribadeneira, the appeals court found that because he sought to enforce the terms of the New Agreement, thereby knowingly receiving a direct benefit from that contract, Ribadeneira was "estopped from avoiding that putative contract's arbitration clause, despite his non-signatory status."

Given the serpentine journey of this litigation, it would not be surprising if there were further developments (as of publication, a check of the district court's docket did not reveal any new filings by either party). At the very least, for now it seems New Balance will be keeping its Peruvian shelves stocked with the help of another distributor.

Snaps Count: High School Quarterback Suspended for Snapchat Post Gets Sacked in Appeals Court

In a saga that combined the gridiron, social media, a vehicle search, and a First Amendment-related lawsuit against a school district, a former high school football star failed in his comeback to revive claims at the Fifth Circuit. In an imbroglio that started with a Snapchat post and ended with a high school quarterback's suspension, the Fifth Circuit affirmed the dismissal of claims against a Texas school district and a roster of school administrator and law enforcement defendants and ruled that the various defendants did not violate Bronson McClelland's ("Plaintiff") First Amendment rights after he was benched and suspended for posting an offensive, post-game Snapchat message that later went public. (*McClelland v. Katy Ind. School Dist.*, 63 F.4th 996 (5th Cir. 2023)).

Plaintiff Bronson McClelland was the star quarterback and captain of his successful high school football team at Katy High School in Katy, Texas. He had apparently received potential interest from college programs, but one snap changed everything. On October 3, 2019, after a narrow victory over a rival team, a post-game rendezvous at a local Whataburger resulted in taunting by students from the opposing school. This banter culminated in McClelland sending a Snapchat video that included both a threat of violence and racially charged language. Though the snap was initially sent to a non-athlete, the video was circulated to members of the opposing football team, posted on Twitter, and received media attention.

Within 24 hours McClelland and his parents met with his coach and the school principal, where he was handed a two-game suspension and stripped of his captain's title. McClelland issued a public apology on social media and noted his punishment; this drew the ire of the Katy Independent School District ("KISD"), however, who were purportedly concerned that the public might believe they rushed to judgment. The school responded with a statement of their own that the investigation was continuing and noted that a Katy High School student "had used racially charged language to taunt a student athlete on the opposing team." Plaintiff took issue with the school's characterization that he had sent the snap directly to anyone on the opposing team, as opposed to having sent the snap to a non-player, who then forwarded the snap to the opposing player and others. Upset with KISD's statement, McClelland eventually filed suit against a myriad of persons and entities affiliated with his school and community at large.

One day before the deadline he had given the school district to retract its statement, McClelland's car was flagged in an allegedly routine search of the school parking lot. Further investigation resulted in the discovery of a trace amount of a green leafy substance

on the car's floormats, later identified by the police as marijuana. This encounter with grass resulted in a possession charge, placement in an alternative school program, and de facto disqualification from the football program.

McClelland attempted to transfer. A settlement between Plaintiff and his family and KISD was reached in which, among other things, KISD would not impede his transfer to and ability to play football for another school and Plaintiff would release any claims against KISD as long as he was not denied admission to a transfer school or declared ineligible for varsity sports in California. However, for several reasons, plaintiff was unable to enroll in a different district. Remaining in KISD, he was placed in the alternative school program and graduated in December 2020. As a result, the game clock on McClelland's high school and football career expired due to his disciplinary issues and inability to find a transfer school, and in January of 2021, McClelland filed a lawsuit against KISD and its principal and a host of local school and police employees. Alleging violations of 42 U.SC. § 1983 (Civil Deprivation of Rights), substantive and procedural due process rights, defamation and various state law claims, McClelland's new playing field was the U.S. District Court for the Southern District of Texas.

Central to McClelland's position was that the school district overstepped and violated his First Amendment rights when they punished him for off-campus speech. Since the Supreme court famously declared in the *Tinker* decision that "students or teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," municipalities across the country have tackled issues of how far free speech can go in school and how far school districts can regulate or punish students' school-related off-campus activities to prevent substantial disruption or protection of the school community. More recently, with the uptick of social media and internet use, the bounds of "in school" and the potential reach of student off-campus speech have expanded as well. As the appeals court stated, the present field position is that schools have a special interest in regulating student conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" and to satisfy this standard, schools must demonstrate that "the speech in question actually caused, or may reasonably be forecast to cause, a 'substantial disruption of or material interference with school activities'", thereby balancing students' freedom of expression against the need to maintain a safe, effective learning environment. [See also our coverage of a recent Supreme Court decision involving school discipline over social media posts in the Summer 2021 Three Point Shot]. Whether it's the Whataburger or the water fountain, take heed.

In response to the suit, the individual defendants (principal, football coach, police officials) ("Individual Defendants") and school district defendants (which includes KISD) (collectively "Defendants") asserted qualified-immunity defenses. As the appeals court stated, qualified immunity from civil liability is available for government officials if a defendant's conduct does not violate statutory or constitutional rights "clearly established" at the time. And, the district court found: "Though courts 'do not require a case directly on point' to defeat a qualified-immunity defense, a school official is entitled to immunity from suit unless 'existing precedent…placed the statutory or constitutional question *beyond debate*.'"

Examining all the blurred lines around school speech, a Texas district in September 2021 held that McClelland's free speech rights were not clearly established when he was disciplined. Thus, the lower court concluded that the individual defendants were entitled to qualified immunity; Plaintiff's claims against KISD were also dismissed as the court held that under 42 U.S.C. § 1983, municipalities cannot be held vicariously liable for the acts of their employees unless a plaintiff's allegations satisfy certain requirements, which were not met in this case.

Having failed to state a claim for either municipal or individual liability for the violation of his free speech rights, McClelland's § 1983 claim was dismissed. Following this holding, Plaintiff's claims for a violation of substantive and procedural due process were also denied. Among other things, the district court concluded that the rights claimed – playing high school football or team captainship – are not protected property rights or liberty interests (the court also held that students do not have a protected right to placement at a particular school

or that placement in alternate education programs deprives students of a protected interest). Given the dismissal of federal claims, the district court declined to exercise supplemental jurisdiction over Plaintiff's state claims.

Upon appeal in the Fifth Circuit, the lower court decision was affirmed. The appeals court agreed that, at the time of the claim, the Supreme Court and the Fifth Circuit had not clearly demarcated the limits of off-campus speech regulation. As a result, Plaintiff could not point to a clearly established rule that discipline for a "threat of violence apparently stated in jest" is unconstitutional. The court went on to find that the school administrator and other individual defendants were entitled to qualified immunity, thereby negating the need for the appeals court to undertake a deep inquiry into Plaintiff's First Amendment claims. The decisions to dismiss McClelland's other claims were also affirmed with the appeals court. And with that, the final whistle was blown.

In the end, this saga is an unfortunate, cautionary tale that has sadly occurred in many school settings. The district court in this case offered its own take that despite one disgraceful act that escalated into a federal case, the law could not absolve the Plaintiff: "The Court is not insensitive to Plaintiff's circumstances. His educational career and his hopes for a future in college athletics suffered significant injury, largely due to a moment's worth of juvenile and shameful misconduct. Nevertheless, sympathy for a young man's plight does not license any court to countermand well-established law or to offload ultimate responsibility from the individual to educational authorities."

Circuit Court Puts on Blinders, Refusing to Rehear Ruling on Horseracing Regulation

The Sixth Circuit will not revisit its decision from this past spring that upheld the constitutionality of the regulatory scheme established when Congress amended the Horseracing Safety and Integrity Act. In May, the circuit court denied the petition for full court review filed by a host of plaintiffs, which included Louisiana, Oklahoma, West Virginia, and an enumerated list of entities and businesses within the horseracing industry. (*Oklahoma v. U.S.*, 62 F.4th 221 (6th Cir. 2023), *reh'g denied* No. 22-5487 (6th Cir. May 18, 2023)).

Unlike other major sports, horseracing has not had one leading regulatory authority, but rather has been overseen by a variety of state and local regulatory bodies and private organizations. As the Fifth Circuit noted in a related litigation, at least 38 state regulatory schemes have applied differing protocols and safety requirements for horseracing, including those relating to overworking horses, unsafe tracks, doping, and other health and safety issues facing jockeys and horses. Concerned by the number of recent doping scandals in the industry and track fatalities in the U.S. – indeed, it had been reported that at least 500 thoroughbreds died in 2018 alone from racing-related injuries – in 2020, Congress decided to act and created a national oversight body to govern racetrack safety, anti-doping, and medication control when it passed the Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-60 (the "Act").

The Act nationalized the regulatory authority for thoroughbred racing in a slightly unconventional manner by putting a private, nonprofit organization, the Horseracing Integrity and Safety Authority, Inc. (the "Authority" or "HISA"), in charge of developing and administering regulatory programs and rules, as well as apportioning funds. HISA was empowered to promulgate rules on a variety of issues, including prohibited medications, laboratory protocols and accreditation, racetrack standards and protocols, injury analysis, enforcement, and fee assessments, all affecting "covered" thoroughbreds, jockeys, and horseraces. As originally enacted, the Act granted expansive regulatory power to the Authority with only a limited role given to the Federal Trade Commission ("FTC") to, among other things, publish and review the Authority's proposed rules and issue certain interim rules only with "good cause." This framework prompted legal challenges from a crowded field of horsemen's associations and state racing commissions that argued that the Act violated the Constitution's private non-delegation doctrine by delegating unmonitored lawmaking power to a private entity. As the Sixth Circuit noted, the Constitution permits only the federal government to exercise federal power and prohibits unchecked reassignments of power to a non-federal entity, including in instances where a private entity participates in developing government standards and rules. In brief, as the court explained, "[A]

private entity may not be the principal decisionmaker in the use of federal power, may not create federal law, [and] may not wield equal power with a federal agency" [citations omitted].

In response to these legal challenges, Congress amended the Act to ultimately give final discretion and thus more governmental authority to the FTC. (Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022)). Under the amended Act, the FTC was given discretion to "abrogate, add to, and modify" any rules that bind the industry as the FTC "deems necessary or appropriate." The Act also provides that the FTC may act as it "finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act." 15 U.S.C. § 3053(e). Following these legislative changes, the numbers displayed on the "odds board" quickly made the Authority a favorite to overcome any legal challenges.

However, despite the changes to the Act, the plaintiffs remained unbowed and argued that the Act remained unconstitutional because of the excessive authority granted to a private entity. In June of 2022, a Kentucky district court rejected the plaintiffs' legal challenge to Congress's delegation of power to HISA.

Subsequently, in March 2023, the "stewards" from the Sixth Circuit upheld the Act as constitutional. In deciding the issue, the court had to determine if the private entity (i.e., HISA) functions subordinately to the supervising agency, the FTC. If HISA was indeed subordinate to the FTC, then the Act would be upheld; if not, the delegation of power would be unconstitutional. Ultimately, the court found that since HISA was inferior and subordinate to the FTC, the Act could withstand the constitutional challenge. While the 2020 version of the Act gave the Authority unbounded regulatory and enforcement power, leaving the FTC with little oversight to modify proposed rules, the court found that the amended Act provides the FTC "pervasive" oversight and "ultimate discretion over the content of the rules that govern the horseracing industry and the Horseracing Authority's implementation of those rules." In the court's view, this overarching review power allows the FTC to bear responsibility from a policy and enforcement standpoint.

At the homestretch, the court also reined in the plaintiffs' challenge under the Tenth Amendment anti-commandeering doctrine, which generally provides that States cannot be commanded by the federal government to administer a federal regulatory program. The plaintiffs argued that HISA has the power to "put the states to an unconstitutionally coercive choice" to fund a federal program because if local horseracing administrators do not pay fees to HISA, they may be threatened with federal preemption. In rejecting this argument, the court stated that the States are offered a non-coercive choice (as opposed to a command), and the States make the ultimate decision of whether to comply: "If a State participates, it often has discretion in how it implements the program. If a State decides not to participate, the State's activities are preempted. By offering States such a non-coercive choice – regulate or be preempted – Congress has not violated any constitutional imperatives."

Following the decision, the plaintiffs filed a petition for rehearing en banc. The appeals court responded "Nay" and denied the petition on May 18, 2023. Thus, barring Supreme Court review, if you had HISA to win in the second race at the Sixth Circuit track in Cincinnati, you were a winner.

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