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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.

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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Out! Florida Judge Serves up Dismissal of Tennis Trainer's Breach of Contract Claim against Minor Players

In a contractual dispute between a tennis instructor and the minor players he purportedly coached, a Florida court found multiple faults in the instructor's amended complaint and dismissed the suit, resulting in a straight set victory for the minor players and their father. (*Jean v. Francois*, No. CACE19-002954 (Fla. Cir. Ct. Broward Cty Sept. 13, 2019)). In the case, the tennis instructor had sought to enforce a service contract that purportedly entitled him to 20% of all of the young players' future earnings. While the court found that plaintiff-tennis instructor, Christophe Jean ("Jean"), had committed an unforced error when he drafted an invalid contract under Florida law, no one could argue with his eye for talent. One of the young tennis players-defendants in question was Naomi Osaka, who burst on the scene when she defeated Serena Williams in the 2018 U.S. Open Women's Singles finals, and is the reigning Australian Open champion and the number three ranked singles player in the WTA rankings (as of the date of this publication).

In 2011, Jean began coaching Naomi Osaka and her sister Mari Osaka ("Defendants" or the "Osakas"), the minor daughters of Leonard Francois ("Francois"), in tennis. According to Jean's amended complaint, in early 2012, the Osakas and their father could no longer afford to compensate Jean for his coaching and equipment, or for travel expenses incurred when appearing at the Osakas' tennis tournaments. As a result, Jean alleged that in March 2012, he entered into a contract with Francois on behalf of his daughters. [note: a poor copy of the contract appears under Exhibit A to the amended complaint]. The Osakas were 14 and 15 years old at the time.

The contract at issue provided for Jean to receive "a fixed fee of twenty percent (20%) on every tennis contract or monetary agreement on behalf of Mari Osaka and Naomi Osaka." It also set forth an "indefinite" term of employment, but was silent as to what services, if any, Jean was obligated to provide Francois and the Osakas, and failed to delineate what obligations the Osakas and Francois owed Jean. According to Jean, he performed under the contract for over five years (after which the defendants allegedly terminated the contract), but never

received any compensation, nor did he receive any income from the Osakas' tennis careers, including from endorsement deals or tournament prize money.

On February 7, 2019, Jean filed a complaint (and later an amended complaint in March 2019) against the Osakas and Francois in Florida Circuit Court, Broward County, asserting three claims: (i) breach of contract; (ii) quantum meruit; and (iii) unjust enrichment. Charging the net, the defendants volleyed by filing a motion to dismiss the amended complaint for failure to state a cause of action. In response, Jean lobbed his opposition over the net, arguing, in essence, that Osakas' father Francois lawfully executed the agreement on the Osakas' behalf and that the agreement itself was not indefinite because a court could interpret the contract simply as a service contract between a coach and a player. Ultimately, the court made quick work of Jean's claims, finding that all three failed to state a cause of action.

The court began its analysis by noting that, in order for Jean to succeed on his contract claim, he must first prove the existence of an enforceable contract. The court noted that under Florida law, "contracts with a minor are voidable and the minor has a legal right to disavow a contract because of minority." As noted, Mari and Naomi Osaka were 14 and 15 years old at the time of the alleged contract and they subsequently disavowed it. Moreover, under Florida's Child Performer and Athlete Protection Act, Fla. Stat. §743.08, artistic, creative or professional sports contracts with minors can be submitted to a court for approval and afterward, if approved, the minor may not disaffirm the contract based on their status as a minor (however, under Florida law such contracts cannot have a term longer than three years). In a double fault of sorts in his argument for validity, Jean admittedly never submitted the contract to a court for approval and the contract's term was "indefinite." Therefore, because the contract was never validated and the Osakas disavowed it, the court held that it was neither valid nor enforceable.

Alternatively, the court noted that the agreement on its face failed to specify the basic elements for a valid contract, namely offer, acceptance, consideration and sufficient specification of essential terms. The court found that the contract in question was "a *nudum pactum* – a naked agreement – a promise without legal support, which the law will not enforce…." because the subject contract was silent as to Jean's obligations under the contract, if any, and did not specifically outline any of the Osakas' obligations.

Turning to Jean's equitable claims of quantum meruit and unjust enrichment, the court quickly swatted them away, stating simply that Florida courts have "routinely held that one cannot bring a claim for unjust enrichment against a minor." Jean's final claim against Osakas' father was also called wide because, as the court stated, Francois was acting solely in his capacity as an agent for his daughters, and "Florida law imposes no personal liability on one signing in a representative capacity except in the rare exception where there is an express agreement to the contrary." Accordingly, the court granted the defendants' motion to dismiss the amended complaint and dismissed the case in its entirety.

Game. Set. Match.

Athletic Cup Manufacturer and Sports Retailer Fail to Dodge Products Liability Claims

A manufacturer and retailer of athletic cups recently failed in their initial defense against claims that they designed and distributed a defective product, resulting in a serious injury to an athlete that was wearing the product in question.

In a case brought by plaintiff Hunter J. Patenaude (the "Plaintiff"), a South Carolina federal judge allowed all but one of the Plaintiff's claims to move forward in a suit against sporting goods chain Dick's Sporting Goods, Inc. and athletic cup manufacturer Shock Doctor, Inc. (collectively, the "Defendants") in connection with an injury that Plaintiff sustained during a lacrosse game (*Patenaude v. Dick's Sporting Goods, Inc.*, No. 18-3151 (D.S.C. Oct. 18, 2019)).

The facts of the case are not in controversy. Plaintiff wore an athletic cup made by Shock Doctor, Inc. and purchased at Dick's Sporting Goods during a high school lacrosse game. While no athlete ever hopes to test the strength of the protective accessory he or she is wearing, Plaintiff, caught up in the zeal of the game, attempted to block an opponent's shot, but the lacrosse ball rocketed into his groin area and hit his cup dead-on. Following the impact, the Plaintiff visited a doctor, who diagnosed Plaintiff with a fractured left testicle, needing surgical removal.

The Plaintiff, feeling aggrieved, fired a shot back at the Defendants and brought products liability claims for strict liability, negligence and breach of warranty.

The Defendants, hoping to block the Plaintiff's claims with some clever stick work, filed a motion for summary judgment in the hopes that the judge would knock down the allegations.

Failing to see any evidence that the Plaintiff's injury was caused by a manufacturing defect in the athletic cup, the court granted summary judgement for the Defendants on the claim of manufacturing defect. The Defendants, however, were not so lucky on the other claims.

The court found that the next claim for design defect was sufficiently stated to move onto the next phase. According to the court, Plaintiff's claims essentially rested on a design defect, namely that the cup was not designed to withstand a reasonably foreseeable impact during a sporting event. An expert witness for the Plaintiff opined that the particular Shock Doctor athletic cup "exhibit[ed] extreme deformation upon direct impact" from a similarly sized ball travelling at speeds to be expected in a lacrosse game, and also showed that other cups subject to the same testing would have prevented the same injury. Thus, the court noted that Plaintiff's presentation of alternate designs from other manufacturers that might have adequately protected the Plaintiff from the lacrosse shot created a dispute of material fact that the Sport Doctor cup at issue was defective.

Next, the judge permitted the claim of an implied warranty of fitness for a particular purpose to proceed, over objections from the Defendants that the Plaintiff purchased the athletic cup on his own and without assistance of any Dick's Sporting Goods representative. Bumping Defendants out of the crease, the court found that because the purpose of the athletic cup was to provide protection to the genitals and it was foreseeable for it to be used during a sporting event, the "ordinary purpose of the product is also the particular purpose for which it was purchased." Thus, the court held that Plaintiff's implied warranty claims could proceed. Lastly, the judge swatted down the Defendants' claim that the Plaintiff assumed the risk of injury by playing lacrosse. The judge quickly pointed out that "assumption of risk is not an absolute bar to damages where plaintiff's degree of fault is not greater than the negligence of a defendant" and ruled that to the extent the assumption of risk doctrine could reduce damages is an issue for the jury.

Since the Defendants were unable to level the playing field by striking down some of the Plaintiff's claims early in the suit, it appears they would have needed to play catch-up in an attempt to minimize any liability they may have in this products liability suit. Not surprisingly, the parties settled the matter on December 17, 2019.

Chairlift Ticket RFID Provider's Antitrust Claims Won't Scan at Second Circuit

A ski lift ticket validation manufacturer, Mountain Pass Systems, LLC ("Mountain Pass" or "Plaintiff"), recently had its antitrust lawsuit put on ice by the Second Circuit, which affirmed a ruling by the U.S. District Court for the Eastern District of New York that Mountain Pass failed to successfully state a claim under the Sherman Act (*Charych v. Siriusware, Inc.*, No. 18-3191 (2d Cir. Nov. 4, 2019) (summary order)).

Mountain Pass had alleged that various software and related providers used their market power and acted unlawfully in connection with the distribution and marketing of automated ski resort validation systems. The litigation was akin to a ski cross where a host of skiers start simultaneously from an initial jump and navigate a difficult freestyle course, only instead of skiers, the competitors/defendants were eight ski resort management software and RFID gate scanning providers trying to steer clear of antitrust claims brought by a competing gate scanning company. Despite some nifty aerials in fashioning its claims, the Plaintiff's complaint was quickly dismissed by the appeals court, leaving it at the back of the lift line.

Scanning technology has become increasingly popular at certain larger ski resorts. The scanners use Radio Frequency Identification ("RFID") technology to scan the unique barcode on each lift ticket as the skier or rider passes through a gate at the bottom of the chairlift (essentially, an EZ Pass for skiers), eliminating the need for resort employees to manually check each skier for a valid lift ticket.

The use of such RFID technology requires both management software and a RFID gate scanning product, which the Plaintiff Mountain Pass produces.

The numerous defendants included Siriusware, Inc. ("Siriuisware"), Accesso Technology Group, PLC (Siriusware's parent company) ("Accesso"), Axess North America, LLC ("Axess"), Axess International, AG ("Axess AG"), Active Network, LLC ("Active"), Vista Equity Partners, LLC (Active's parent company) ("Vista"), Skidata Inc. ("Skidata"), and Skidata AG ("Skidata AG") (collectively, the "Defendants"). Siriusware, Accesso, Active and Vista are management software providers, with Siriusware and Active, according to the lower court, representing 80% of the market. Axess and Skidata are RFID gate scanning product providers, like Mountain Pass. Many of the Defendants' products and services are compatible and some of the companies have common ownership –– according to the court, for example, ski resorts that use Skidata's gate products also use Active's management software (the court noted Skidata has an ownership interest in Active) and ski resorts that use Axess's gate products use Siriusware's management software.

Mountain Pass claimed that its gate scanning product, which incorporates ultra-high frequency (UHF) technology, was less expensive and more accurate than that of any of the Defendants' gate scanners. However, Mountain Pass's product was incompatible with Active and Siriusware's software, which represents a large majority of the ticketing management software market. Thus, to integrate Mountain Pass's product, both companies would have had to make their systems compatible with Mountain Pass' gate scanning product or else provide interface information to allow Mountain Pass to do such an integration. The complaint alleges that various resorts declined to carry the Mountain Pass RFID product because its software licensors, including Active and Siriusware, informed the ski resorts that any updates to conform with Mountain Pass' product would be costly. Mountain Pass viewed Siriusware's and Active's alleged failure to create and offer a software interface that would allow Mountain Pass's product to function at resorts running their software as a restraint of trade and an unlawful agreement to monopolize. In 2017, Mountain Pass filed two antitrust claims under the Sherman Act. The Defendants subsequently filed a motion to dismiss.

In July 2018, Mountain Pass' case encountered big moguls when a magistrate issued a Report, recommending that the Plaintiffs' claims be dismissed; the district court adopted the report in September 2018 and dismissed the case, prompting Mountain Pass to appeal. In a non-precedential decision, the Second Circuit upheld the decision. The Second Circuit affirmed the district court's finding that the Defendants' conduct was not anticompetitive behavior just because they refused to pay to integrate their systems with Mountain Pass. Here, as the court noted, the allegations did not give rise to a conclusion that Defendants refused to provide the sought-after interface; rather, the court found that Defendants were simply unwilling to bear the costs of developing an interface without reimbursement. In all, the appeals court held that "Defendants were under no obligation to develop an interface that was compatible with

Plaintiffs' product," and that there were no allegations that "Defendants voluntarily withheld a service they were already providing, or could easily have provided, absent substantial time and cost." The Second Circuit also noted that the mere fact that an anticompetitive agreement was "implied" in Mountain Pass' complaint did not show any anticompetitive intent or rationale ("[W]hile Active and Siriusware indisputably recommended the products of other defendants to ski resorts, there is no allegation that either company ever refused to sell to a ski resort unless it also purchased the product of another defendant").

Ultimately, both the lower court and appeals court found that the Defendants' agreements with one another represented rational business decisions and not, as Mountain Pass claimed, anticompetitive conduct. As a consequence, it appears that Mountain Pass will need to find another way down the mountain in order to find a way to integrate with compatible software.

Postscript: Ninth Circuit KOs Litigation over Pacquiao - Mayweather "Fight of the Century"

Despite being billed the "Fight of Century," the May 2, 2015 boxing match between Emmanuel "Manny" Pacquiao ("Pacquiao") and Floyd Mayweather, Jr. ("Mayweather") to many boxing aficionados was no prize, but rather a 12-round "yawner." Disgruntled pay-per-view spectators brought putative class actions against the boxers and promoters ("Defendants") and claimed that the defendants concealed a rotator cuff injury Pacquiao suffered a month prior in order to sustain the pre-fight hype and increase pay-per-view subscriptions. As we wrote in the September 2017 edition of *Three Point Shot*, a California district court previously dismissed dozens of lawsuits, concluding that the pay-per-view purchasers failed to state a claim based on a cognizable injury to a legally protected right or interest. On November 21, 2019, the Ninth Circuit rung the bell on the dispute and affirmed the dismissal (*In re Pacquiao-Mayweather Boxing Match Pay-Per-View Litig.*, No. 17-56366 (9th Cir. Nov. 21, 2019)). The court held that the plaintiffs did not suffer a legally cognizable injury and that viewers essentially got what they paid for – perhaps not a fight worthy of the hype, but still a full-length regulation fight between two champion boxers. Echoing the judicial reticence to recognize "disappointed fan" injuries, the opinion stated: "The 'human drama of athletic competition' distinguishes this case from the garden-variety consumer protection cases."

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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