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This Week's Feature

In Defense of Sports: The Difference between "Sports Law" and "Entertainment Law" – And Why It Matters

By Alan S. Goldberger

Nowhere than in the legal profession is the ancient Chinese proverb more relevant: "A problem well stated is half solved." The "problem" of representing a defendant in a claim arising out of a collegiate, interscholastic or recreation organization sponsored sports event, well stated, is "solved" by reference to precedent, codified law and administrative rules specifically dealing with nonprofessional sports. This body of law is well developed and fairly comprehensive. Hence, "sports law" has emerged as a free-standing specialty.

Conversely, the "problem" of representing a defendant involved in professional sports may be well stated by reference to "entertainment law" principles and precedent. These principles and precedent are, for the most part, separate and distinct from case law and codified law specific to sport. Although, historically, anecdotal evidence seems to suggest that the substantive law of "sports" is the equivalent of the substantive law of "entertainment" – and vice versa, that the two areas of the law should be inextricably linked – represents the thinking of earlier, less complicated legal times. Still, legal commentators and bar associations typically maintain that sports law and entertainment law are indistinguishable. When continuing legal education courses and conferences turn their focus on sports, entertainment issues are not far behind – and vice versa. Tradition has it, then, that legal issues involving sports and entertainment go hand in hand as a single area of "the law."

Undoubtedly, much of the rationale for equating "sports law" to "entertainment law" has its roots in the significant body of case and codified law dealing with professional sports. Anyone who owns a television in 2008 can readily see that the goals (so to speak) of professional sports are to provide a product that entertains. And, since pro athletes, coaches and officials are paid employees whose activities are recorded and played out before tens of thousands in a stadium or arena, and often millions more on television, the Internet and radio, the professional sports industry begets legal issues in a number of areas, including intellectual property, antitrust and contracts, and labor law. Indeed, At least one major bar association's "Sports and Entertainment Law" committee has a check off box on its membership application: "Labor" or "Management."

While professional sports is, without a doubt, bound to the "entertainment" side of the law, the "law" of sports is much more than the labor law, contracts and intellectual property aspects of

the legal relationships created for entertainers and professional athletes.

Those attorneys involved in defending claims arising out of college, scholastic, youth and recreational sports programs often face a vastly different universe of legal issues than counsel for professional athletes, team and leagues. While pro sports and nonprofessional sports both have their share of labor law, I. P., negligence, and contract issues, amateur sports presents markedly different legal challenges for defense counsel.

These challenges are highlighted by the now ubiquitous presence of a panoply of state statutes relating specifically to educational, government sponsored and proprietary entity sponsored sport programs and activities. While professional sports has seen the enactment of sports agent legislation in about two-thirds of the states, the nonprofessional sports segment has witnessed the proliferation of codified law in any number of substantive areas, including at least the following:

- Tort: federal and state volunteer immunity legislation, immunity legislation for coaches and certain volunteer officials, state volunteer tort immunity statutes for licensed sports officials;
- Administrative: mandated criminal background checks for coaches, officials and volunteers; statutorily authorized athletic code of conduct legislation and regulations; athletic trainer licensing;
- Criminal: statutes providing for enhanced criminal penalties for assaults on officials and coaches, anti-hazing legislation, and penal sanctions for those disrupting sports events.

Claims arising out of college, high school and recreational organization sponsored sports events dot the legal landscape: allegations of negligently inflicted bodily injuries; violent acts in athletic competition; administrator, coach and official liability; defamation; governing body sanctions; and legal challenges to disciplinary actions are a few examples. The defense of these claims requires knowledge of the growing body of both emerging case and codified law specific to sports and athletics in most jurisdictions.

Codified law, administrative law and case law all contribute to the evolution of "Sports Law" as a freestanding specialty area of the law – independent of the "Sports and Entertainment Law" amalgam of contracts, player unions and licensing and media rights.

The interplay of state and local government with voluntary participation in athletics, statutory immunity, and sport specific statutes all point to a welter of litigation issues for defense attorneys. Thus, the demographics of the entity client in sports law change dramatically when the focus shifts from the professional sports industry to the nonprofit segment.

Governing Bodies and Their Authority

Counsel representing athletes and other participants should be aware of some basics: amateur sport for school and college athletes is subject to the pervasive influence of two national organizations: the National Collegiate Athletic Association (NCAA) and the National Federation of State High School Associations (NFHS). The NCAA, once described by the Supreme Court of Kansas as a "plump fowl with tempting luxurious plumage" (NCAA v. Kansas Department of Revenue, 1989), operates on a \$614 million budget. Its membership numbers nearly 1300 colleges and

universities. The NFHS, with a membership including virtually all state high school athletic association governing bodies and a number of other institutional members, provides program initiatives that impact more than 11 million students involved in athletics.

Related subgroups, chapters, conferences, and constituent organizations impact the legal rights and obligations of the majority of amateur athletes and sports entities in the United States. Some organizations exercise their authority along geographical or participant classification lines. These include, among many others, Amateur Softball Association, American Amateur Racquetball Association, Disabled Sports USA, Little League Baseball, Inc., Pony League, Pop Warner Football, and Special Olympics International. Federal legislation has recognized the existence of so-called "national governing bodies" whose focus is sport-specific and whose authority takes up where the academic institutions and lower-level competition groups leave off.

Superimposed across the national structure of the various governing bodies that embraces and regulates competition among high schools and colleges are any number of college and high school conferences and leagues.

Limits of Power

In practice, each of these conferences and leagues constitutes its own form of governing body that regulates the athletes enrolled in the institution and is itself subject to be sued and can sue where legal rights are being asserted.

Attorneys for these entities must be aware not only of the rules, regulations, and by-laws of the groups to which their schools belong, but also to the procedures by which rules are enforced. For it is often in the enforcement that the denial of procedural due process or violation of the contract rights of the athlete or institution will invalidate what would otherwise be an enforceable rule, regulation, or by-law.

And, while Constitutional issues are frequently raised by sports plaintiffs, "state action" is by no means an absolute prerequisite for aggrieved parties to vindicate their rights in court when associations fail to abide by their own rules in imposing sanctions or penalties. Similarly, when an association's rules run afoul of the concept of conscionability, enforcement may be denied by the courts.

Although courts are generally reluctant to interfere in the internal affairs of associations, they will take action if a fight is lost because an association has disregarded its own rules. Although such lapses may not be grounded in Constitutional law, they nevertheless can spell the difference between a governing body that is able to enforce its actions and one that weakens itself by making rules and breaking them.

Courts generally require that an aggrieved party exhaust an association's procedures for redressing a wrong or appealing an unfavorable decision before bringing suit.

To be sure, both amateur and professional sports are the subject of a significant body of codified and case law. Sport specific statutes and a mounting docket of case law span a number of interrelated areas of the law, including torts, contracts, administrative procedures, associations and corporations ,

antitrust, labor law, intellectual property, taxation, and criminal law. As one state's Chief Justice observed: "Anyone who has ventured beyond the confines of the courthouse knows what sport, even amateur sport has become. On the best days it is inspirational. On its worst days . . . it is a reflection of how uncivil and violent our society can be. In the heat of competition, otherwise sensible adults can lose all sense of proportion. Tempers flair. Mayhem can spread in an instant."

The unhappy truth is that violence in youth sports has become commonplace. The era of friendly pick up games and sandlot ball where kids made the rules and adults seldom meddled has passed. Accounts of fist fights, beatings and even homicides involving parents, coaches, and officials at children's sporting events are appearing in the media with ever-increasing frequency. *Hills v. Bridgeview Little League Association*, at 195 Ill.2d 210 (2000) (Harrison, C.J. dissenting).

Further, in recent times, more than one state supreme court has dealt with claims seeking damages for personal injuries as well as claims for injunctive relief regarding an "on field" or administrative ruling.

In the years to come, defense counsel will need to deal with a number of considerations in handling sports related claims:

- the interplay of tort claims acts, immunity legislation, volunteer protection acts, athletic codes of conduct, and common law defenses;
- the critical mass of defending multiple defendants: how not to help the plaintiff proof his case;
- defending eligibility claims seeking injunctive relief and dismantling plaintiffs' assertions of irreparable harm.

The End of "Entertainment & Sports Law"

The legal parameters of regulating athletes, coaches, officials, administrators, health care providers, sports governing bodies, teams, leagues, and related organizations present unique challenges to attorneys representing nonprofessional sports organizations, municipal and county recreation agencies, and educational institutions. As legal commentators gravitate to recognizing sports law as a specialty unto itself, practice in this area will be enhanced.

*For more information on sports law and its practitioners, join the DRI Sports Law Special Litigation Group of the Commercial Litigation Committee. Email alan@RefLaw.com or call **Al Goldberger** at 973.471.9200.*

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