Recent Developments in

Sports Law

Bob Barton

Partner, Executive Committee
Adjunct Professor, LSU Law

TAYLOR PORTER
ATTORNEYS AT LAW

BRBA Bench Bar Conference
Grand Hotel Marriott Resort, Golf Club & Spa, Point Clear, Alabama
July 23, 2016

NCAA®

Litigation and Developments

TAYLOR PORTER
ATTORNEYS AT LAW

Primary Areas of Developing Law

- Title IX
- Antitrust
- Labor
- Right-of-Publicity
- Concussions/Safety
- NCAA Compliance

TITLE IX COMPLIANCE

A Continuing Issue …

TAYLOR PORTER
ATTORNEYS AT LAW

TITLE IX COMPLIANCE

- Three Basic Components of Title IX – College Athletics:
  - **Participation:** Title IX requires that women and men be provided equitable opportunities to participate in sports. Title IX does not require institutions to offer identical sports but an equal opportunity to play;
  - **Scholarships:** Title IX requires female and male student-athletes receive athletics scholarship dollars proportional to their participation;
  - **Other benefits:** Title IX requires the equal treatment of female and male student-athletes in the provisions of: (a) equipment and supplies; (b) scheduling of games and practice times; (c) travel and daily allowance/per diem; (d) access to tutoring; (e) coaching, (f) locker rooms, practice and competitive facilities; (g) medical and training facilities and services; (h) housing and dining facilities and services; (i) publicity and promotions; (j) support services and (k) recruitment of student-athletes.

TAYLOR PORTER
ATTORNEYS AT LAW

Title IX Continued

- In April, 2011, the Office for Civil Rights in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual violence and harassment. While not limited to student-athletes, recent problems have often focused on them. Among other things, the DCL:
  - Provided guidance on the school's responsibility under Title IX to investigate and address sexual violence.
  - Related general Title IX requirements to sexual violence, such as requirements to publish policies against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.

- Essentially, the DCL made much more clear the obligations that Universities have to respond to complaints of sexual violence.

TAYLOR PORTER
ATTORNEYS AT LAW

Baylor University Sexual Assault Investigation

- Following almost one year of investigation, on Thursday, May 26, 2016, Pepper Hamilton released a report on Baylor University's handling of sexual assault cases.

- On the whole, Baylor University's student conduct processes were "wholly inadequate to consistently provide prompt and equitable response under Title XI."

- The firm found examples of actions by university administrators that directly discouraged complainants from reporting or participating in student conduct processes.

TAYLOR PORTER
ATTORNEYS AT LAW

Baylor University Sexual Assault Investigation

- In regards to the football team:
  - Football and athletics staff failed to "protect campus safety once aware of a potential pattern of sexual violence by multiple football players."
  - In several instances, athletics and football staff chose not to report sexual violence and dating violence to any administrator outside of athletics.
  - In one instance, football coaches or staff *met directly with the complainant and did not report the misconduct.*
  - The football program operated an internal system of discipline, separate from University processes, which is fundamentally inconsistent with the mindset required for effective Title IX implementation.

TAYLOR PORTER
ATTORNEYS AT LAW

Baylor Aftermath

- Following the release of the Pepper Hamilton report:
  - Baylor Football Head Coach Art Briles was fired.
  - Baylor Athletic Director Ian McCaw resigned.
  - Baylor President Ken Starr was demoted to Chancellor, and he subsequently resigned that position though he continues to teach at the law school.
  - Two additional athletics staffers (Colin Shillinglaw and Tom Hill) were fired.

TAYLOR PORTER
ATTORNEYS AT LAW

Northwestern Unionization Attempt

- On January 28, 2014, Ramogi Huma, President of the College Athletes Players Association ("CAPA") filed a petition on behalf of the scholarship football players at Northwestern University at the regional office of the NLRB.
  - Players stated that a union will allow for them to collectively bargain for better protections allowable under NCAA rules
- In reviewing the petition, the Board was required to determine whether the football players function primarily as university students or as university employees.

TAYLOR PORTER
ATTORNEYS AT LAW

Northwestern Unionization Attempt

- **The players made clear that this unionization effort would not be limited to Northwestern.**

- Establishing a union at Northwestern was not the endgame. Rather, it was a first step toward building a nationwide players association in CAPA that will eventually have the leverage to eliminate "unjust" NCAA policies that affect players at each college.

TAYLOR PORTER
ATTORNEYS AT LAW

Standards for Employees

- Standard benchmarks for whether the parties have an employer/employee relationship are:
  - Extent to which an employer controls the employee's schedule
  - The discretion the employer has in hiring and firing; and
  - Evidence of compensation

TAYLOR PORTER
ATTORNEYS AT LAW

Player Unionization At Public Universities

- At public universities, like LSU, athlete unionization would likely prove to be a fruitless quest. Even if the players were considered to be employees, the University, as an arm of the State, is not an employer within the jurisdiction of the NLRB.

- Therefore, while athletes at a public university could form a "union" or otherwise affiliate with a bargaining unit, the University would have no obligation to bargain with that organization, and the NLRB would have no method of forcing the University to do so. True pressure would come from competitive benefits enjoyed by private universities if their student-athletes enjoyed collective bargaining.

TAYLOR PORTER
ATTORNEYS AT LAW

NLRB Initial Decision

- On March 26, 2014, the NLRB Regional Director for Chicago, Peter Ohr, ruled that the Northwestern players are employees. Ohr held that:
  - scholarship football players "perform services for the benefit of the employer for which they receive compensation."
  - scholarship players are "under strict and exacting control by their Employer throughout the entire year" evidenced by "daily itineraries to the players which set forth, hour by hour, what football related activities players are to engage in from as early as 5:45 a.m. until 10:30 p.m."

TAYLOR PORTER
ATTORNEYS AT LAW

NLRB Final Decision

- On April 24, 2014, the NLRB granted Northwestern's Request for Review of the Regional Director's decision.
- On August 17, 2015, the NLRB declined to assert jurisdiction over the college sports and the Northwestern case, effectively ending the unionization efforts.
- The NLRB emphasized that 108 of the 125 FBS teams are public universities over whom the NLRB has no jurisdiction.

TAYLOR PORTER
ATTORNEYS AT LAW

NCAA Student-Athlete Name & Likeness Licensing Litigation

- Formerly known as *O'Bannon v. NCAA* and *Keller v. NCAA*
- Filed in 2009
- The *NCAA Student-Athlete Name & Likeness Licensing Litigation* is an ongoing anti-trust class action in California.
- In it, the plaintiffs object to the use of names and likenesses of former/current student-athletes in archival footage, as avatars, and in photographs and promotions.
- Defendants were the NCAA, EA Sports and CLC

TAYLOR PORTER
ATTORNEYS AT LAW

Status of Name and Likeness Litigation

- On August 8, 2014, Judge Wilken ruled that the NCAA's practice of barring payments to athletes violated antitrust laws. As a remedy, she ordered that the NCAA not enforce rules prohibiting schools from offering full cost-of-attendance scholarships to athletes, and that colleges should be permitted to place as much as $5,000 into a trust for each athlete per year of eligibility.

TAYLOR PORTER
ATTORNEYS AT LAW

Status of Name and Likeness Litigation

- On September 30, 2015, the 9th Circuit partially affirmed and partially reversed Judge Wilken's order.

TAYLOR PORTER
ATTORNEYS AT LAW

Effect of Unionization on Name and Likeness Litigation

- If college athletes negotiate with multiple schools as part of a multi-employer bargaining unit (as unlikely as this may be), it may derail the ongoing anti-trust challenges.

- Courts may preempt challenges to wage restraints that are brought by members of a players union under the "non-statutory labor exemption."

TAYLOR PORTER
ATTORNEYS AT LAW

Scholarship Limitations Litigation

- *Alston v. NCAA; Jenkins v. NCAA; Floyd v. NCAA*

- Numerous actions have been filed alleging that the NCAA and its member institutions have unlawfully conspired to limit the value of scholarship amounts.

- Plaintiffs in these suits allege that the NCAA's limitation on scholarships unlawfully restricts the compensation these athletes could receive in a free market.

- Plaintiffs particularly allege that the NCAA limitation on scholarship amounts unlawfully restricts student-athletes from receiving scholarships that would cover their "full cost of attendance." *Jenkins* goes further, and is the case to watch.

TAYLOR PORTER
ATTORNEYS AT LAW

What is Full Cost of Attendance?

- Athletic scholarships are termed by NCAA as "full grant-in-aid" scholarships. By definition, these scholarships do not cover the "Full Cost of Attendance."
  - Grant-in-aid scholarships cover tuition, room, board, and books
  - "Full Cost of Attendance" includes those expenses along with travel home, computers and other incidental expenses.
  - Previously, student athletes could receive this additional financial aid through Pell Grants based on financial need.

TAYLOR PORTER
ATTORNEYS AT LAW

What is Full Cost of Attendance?

- Smaller colleges, particularly those outside the power five conferences (SEC, Big 10, Big XII, ACC, and Pac-12), claim that they do not receive sufficient revenue from their athletic programs to provide full cost of attendance scholarships.

- In an effort to maintain a level playing field, the NCAA historically has limited scholarships to the current grant-in-aid level.

TAYLOR PORTER
ATTORNEYS AT LAW

What is Full Cost of Attendance?

- At the 2014 NCAA Convention, the presidents from the 65 power conference schools proposed a new governance structure that would give them more power on many issues including the stipend. NCAA Board of Directors approved in August 2014.

- One of the first moves of the "Power Five" conferences was to pass a rule allowing an athletic scholarship to include the each school's calculated full cost of attending college.

TAYLOR PORTER
ATTORNEYS AT LAW

What is Full Cost of Attendance?

- Some schools outside of the Power Five will opt in – NCAA is allowing this at each school's election.

- Some schools have funded some sports, but not others – could raise Title IX and other issues

TAYLOR PORTER
ATTORNEYS AT LAW

What is Full Cost of Attendance?

SEC 2015-16 Cost of Attendance

School	Highest Avg. New Cost / Scholarship	Estimated New Costs	State
Tennessee	$5,666	$1,400,000	Tennessee
Auburn	$5,586	$2,100,000	Alabama
Alabama*	$5,386	Did not provide	Alabama
Mississippi State	$5,156	$1,300,000	Mississippi
Ole Miss	$4,890	$1,370,000	Mississippi
Arkansas	$4,500	$1,200,000	Arkansas
Missouri	$4,290	$1,000,000	Missouri
South Carolina	$4,201	$1,300,000	South Carolina
Florida	$3,830	$1 million	Florida
LSU*	$3,800	Did not respond	Louisiana
Georgia*	$3,746	$950,000	Georgia
Kentucky*	$3,598	$1 million	Kentucky
Texas A&M*	$3,528	$1,000,000	Texas
Vanderbilt	Declined to provide	Declined to provide	Tennessee

Source: CBS Sports

What is Full Cost of Attendance?

- Meanwhile, as discussed, numerous scholarship limitation antitrust suits have been filed throughout the country.

- By allowing the power conferences to provide additional benefits, the NCAA may be able to avoid future issues in these cases.

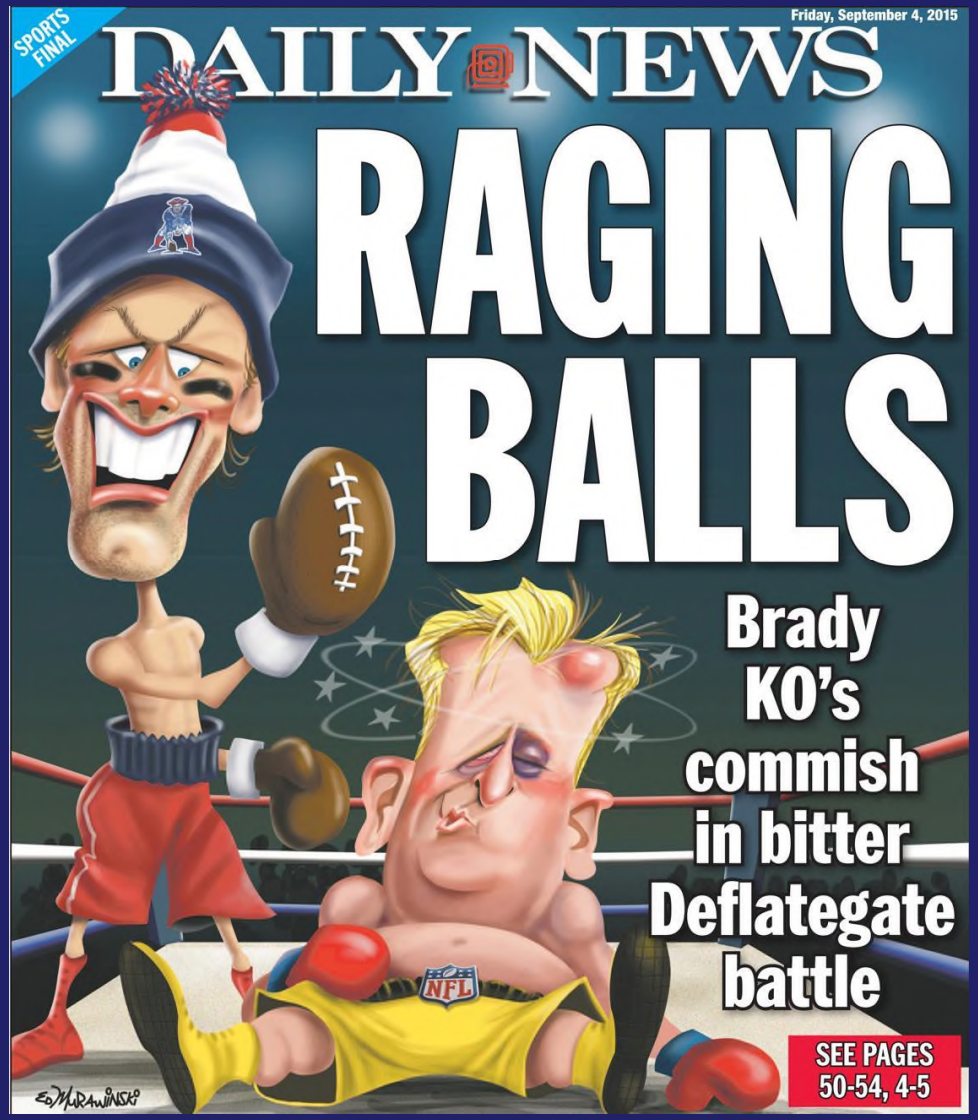
- At the same time, by allowing the richer schools to give more expansive scholarships, the NCAA fears that it may undermine competitive balance.

TAYLOR PORTER
ATTORNEYS AT LAW

Litigation and Developments

TAYLOR PORTER
ATTORNEYS AT LAW

Deflategate



TAYLOR PORTER
ATTORNEYS AT LAW

Deflategate

- After the 2015 AFC Championship Game (which the Patriots won 45-7 over the Colts), reports came out that some of the game balls were under-inflated.

- The NFL commissioned an investigation by Ted Wells resulting in a report issued on May 6, 2015. The Wells Report found that it was more probable than not that Patriots personnel deliberately deflated footballs during the AFC Championship Game, and that Brady was "at least generally aware" of the rules violations. Brady refused to provide his emails, texts, or phone records.

TAYLOR PORTER
ATTORNEYS AT LAW

Deflategate

- On May 11, 2015, Commissioner Roger Goodell handed down punishments including a four-game suspension for Tom Brady.

- On May 15, 2015, Tom Brady appeals his suspension to the arbitrator . . . Roger Goodell. Per the NFL collective bargaining agreement, Goodell has the power to "serve as hearing officer in any appeal involving conduct detrimental to the integrity of the game."

- On June 28, 2015, the NFL announces that Brady's suspension will not be reduced.

- Brady filed suit in the U.S. District Court for the Southern District of New York to vacate that arbitration award.

TAYLOR PORTER
ATTORNEYS AT LAW

Deflategate

- The NFL moved to confirm the arbitration award in the U.S. District Court for the Southern District of New York, and Brady filed a cross-motion to vacate the award.

- On September 3, 2015, Judge Richard Berman vacated the arbitration award citing "several significant legal deficiencies" in the league's handling of the controversy.

- "While the CBA grants the person who occupies the position of Commissioner the ability to judiciously and fairly exercise the designated power of that position, the union did not agree to attempts to unfairly, illegally exercise that power."

TAYLOR PORTER
ATTORNEYS AT LAW

Deflategate – 2nd Circuit Appeal

- On April 25, 2016, the 2nd Circuit reversed Judge Berman's ruling, adopting a highly deferential review of Goodell's authority in the context of a CBA that is itself deferential to Goodell.

- "Even if an arbitrator makes mistakes of fact or law," Judge Barrington Parker wrote, "we may not disturb an award so long as he acted within the bounds of his bargained-for authority."

TAYLOR PORTER
ATTORNEYS AT LAW

Miscellaneous Issues in Other Sports

TAYLOR PORTER
ATTORNEYS AT LAW

Senne v. Major League Baseball

- Three former minor league baseball players have filed suit against Major League Baseball in California alleging that their wages violate the Fair Labor Standards Act.

- While most minor leaguers earn between $3,000 and $7,500 for a five-month season, the minimum salary in Major League Baseball is $500,000. The complaint notes that many minor league players earn less than the federal poverty level. The complaint also asserts that the players work 60-70 hours per week and, when taking into account inflation, earn less than they did in 1976.

- Minor league baseball players are not represented by a union.

TAYLOR PORTER
ATTORNEYS AT LAW

New Jersey Sports Betting

- On June 23, 2014, the United States Supreme Court declined to review New Jersey's plea to have the Professional and Amateur Sports Protection Act ("PASPA"), which put a ban on federal sports betting, overturned.

- In 1992, Congress passed PASPA, which prohibited sports betting except in four states: Nevada, Delaware, Montana, and Oregon.

- New Jersey was given an opportunity to join the exempted four states, but the state had originally refused.

TAYLOR PORTER
ATTORNEYS AT LAW

New Jersey Sports Betting

- In 2011, New Jersey residents voted in favor of a referendum that supported sports wagering. In response to the new legislation, the NCAA, NFL, NBA, NHL, and MLB filed a lawsuit in a federal district court asking a judge to issue an injunction blocking state officials from moving forward with their plan to legalize sports wagering.

- The judge agreed and issued the injunction.

- On appeal, the Third Circuit Court of Appeals in Philadelphia, Pennsylvania upheld the injunction.

TAYLOR PORTER
ATTORNEYS AT LAW

Assumption of the Risk of Flying Hotdogs?

- According to the Missouri Supreme Court, an attendee at a baseball game does not assume the risk of being hit in the eye with a flying hotdog.

- In *Coomer v. Kansas City Royals Baseball Corporation,* a fan was hit in the eye by a hotdog thrown by the Royals mascot Sluggerrr.

TAYLOR PORTER
ATTORNEYS AT LAW

Assumption of the Risk of Flying Hotdogs?

- At the trial court, the jury, instructed on assumption of the risk as a defense, found in favor of the Royals.

- According to the Supreme Court, whether a risk is inherent in watching a sporting event is a question of law, and being injured by a flying tube of mystery meat is not one of the inherent risks of watching a baseball game.

  – Unlike being hit by a bat or a ball that goes into the stands, "[t]he risk of being injured by Sluggerrr's hotdog toss . . . is not an unavoidable risk of watching the Royals play baseball."

TAYLOR PORTER
ATTORNEYS AT LAW

Q&A

For any further questions, feel free to contact me:

Bob Barton

Partner, Executive Committee
Adjunct Professor, LSU Law
bob.barton@taylorporter.com
225.381.0215

*Special thanks to our Associate Trey Tumminello III for his assistance on preparing this presentation

TAYLOR PORTER
ATTORNEYS AT LAW