

ENTERTAINMENT AND SPORTS LAWYER

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Evil over Good—Bratz Crushes Barbie!

BY EDWIN F. MCPHERSON

The ongoing war between Mattel, Inc. (“Mattel”) and MGA Entertainment, Inc. (“MGA”) over the very successful Bratz dolls was going extremely well for Mattel, the maker of the decades-famous Barbie and Ken dolls. In fact, Mattel had won virtually every battle along the way, ruling after ruling, injunction after injunction, including the penultimate battle of Phase I of a jury trial, which was held in the fall of 2008. On July 22, 2010, the Ninth Circuit Court of Appeals, however, stopped Mattel in its tracks by reversing the jury’s verdict and numerous district court rulings.¹

The Ninth Circuit’s recitation of the facts underlying the case makes it appear that the facts are not all that complicated. The Ninth Circuit court provides, essentially, that in 2000, Mattel employed an individual named Carter Bryant (“Bryant”) in its

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The Battle for the Ownership of Liverpool Football Club

BY DANIEL GEEY

Liverpool Football Club (“LFC” or “the Club”) is one of the iconic names of world soccer. In 2007, the Club was sold by its majority shareholder, David Moores, to George Gillett and Tom Hicks for £218.9 million.¹ Since then, many fans believe that broken promises by Gillett and Hicks (including the lack of a new stadium despite £30 million being spent on plans and approvals) along with dwindling investment in the playing squad have led to the Club’s relative decline. Moreover, many supporters believed that the Club paying a rumored £40 million worth of annual interest on the loans that Gillett and Hicks had taken out to buy the Club was bleeding the club dry and diverting resources away from player investment.

After putting the Club up for sale in 2010, the extraordinary events that unfolded in October 2010 culminated in the three nonowning directors ousting the two legal owners of the club by securing majority board approval for the New England Sports

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INTERVIEW Keenen Ivory Wayans

EDITED BY TIM KAPPEL

This interview of Keenen Ivory Wayans conducted by Peter J. Dekom took place at the ABA’s Forum on the Entertainment and Sports Industries Annual Meeting on October 8, 2010, in Las Vegas.

DEKOM: People use the words “game changer” a lot, and we’re living in the time where there’s technological change, a lot of stuff going on, but a lot of it is cultural game changing. A lot of this is about somebody deciding to do something different, to go to the edge, and one of the great characteristics about the great game changers is they actually don’t have a clue that they’re doing that because they are just being themselves. Keenen Ivory Wayans came from, um, how do I say this? Not exactly the rich part of town. It was a tiny little family of 10. I have some really interesting thoughts here, but I’m not sharing them. Several of those 10 wound up in show biz. I really have some interesting thoughts about that. They had so much money that the way they decided they were going to have new shoes for the kids is when the old shoes had a hole in them. Here’s a guy growing up in an African-American, poor neighborhood in New York City, tough part of town, tough life, but a family that stayed together and

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Message From the Chair

Dear Forum Members:

Greetings! I hope you enjoy this edition of *Entertainment and Sports Lawyer*. Our editor, Vered Yakovee, and her team of student editors do a fantastic job at developing timely and important articles for your benefit. I keep past editions of this publication on my office shelf and find myself referring back to them from time to time. Of course, if you have an idea for an article, please contact Vered or Melissa Ladwig, the ABA staff editor. Writing for this journal is a great way to get your name and expertise before your entertainment and sports colleagues all over the world. It is a great service to all of us who read and enjoy this publication for its valuable content.

The Forum's 2011 webinar broadcast continues to be a very popular way for Forum members to get affordable CLE credits and to gain insight on crucial topics in our industry. We had record numbers of participants for our Beginner's Entertainment Law webinar (January) and our Licensing Music in New Media webinar (February). Please check out the topics remaining for the Forum's 2011 webinar schedule at www.americanbar.org/groups/entertainment_sports/events_cle.html. Try a webinar and drop me a line to let me know what you think.

Three major Forum meetings will occur between now and October. The Second Annual International Legal Symposium on the World of Music, Film, Television, and Sports will take place April 27–29, 2011, at the W Hotel in Miami Beach, Florida. The Miami program will focus on international-related legal issues in our industry and boasts many of the top entertainment and sports practitioners in the world as panelists. The next meeting is the First Annual Nashville Entertainment Law Symposium on June 8, 2011, at the ASCAP Building in Nashville, Tennessee. The Country Music Industry and the Nashville Entertainment Bar will be our hosts as we learn about the latest trends and developments in music and film. This symposium will feature an important panel among some of the top music lawyers who will discuss the future of music deals in new media and technology. Finally, our Forum's Annual Meeting will be in New York at the Grand Hyatt Hotel October 13–15, 2011. The Forum's Annual Meeting is the "must attend" event for all entertainment and sports lawyers (regardless if you are a veteran or a beginner). This event will have numerous CLE programming tracks over three days for attendees to pick and choose topics among all fields in our industry. The Annual Meeting receptions and other social events provide a great networking opportunity and are quite popular among attendees. Please make the effort to check out these three programs. I challenge you to compare equivalent programs for their quality and affordability, and you will see that our Forum provides real value in a friendly and open professional environment.

Like in Nashville and Miami, the Forum is making a targeted effort to conduct programming in key entertainment regions and/or on key thematic topics. We are exploring an annual program for new technology and media and one on the fast-growing gaming industry. If you have an idea for a program in your region or on a particular topic, please contact me or Teresa Ucok of the ABA staff.

The Forum Governing Committee is making a U.S. government-authorized visit to Cuba for research with our legal counterparts in film, music, arts, and sports. The results of that research will be published in this journal in the near future. The series of special articles will provide important insights for practitioners interested in the various legal customs and practices for arts, entertainment, and sports in this communist country.

Finally, the Forum is always interested in persons willing to volunteer to get involved in its programming, membership, sponsorship, and journal. It's a great way to meet new colleagues and to help your professional association. If you are interested, please let us know.

As always, please contact me if you have questions, ideas, and suggestions for the good of our Forum. Thanks.

Kirk T. Schroder
Schroder Fidlow, PLC
Forum Chair



The Golden State for Retired Athletes

Potential Solutions to the Cumulative Trauma Workers' Compensation Claim Problem in California

BY MATTHEW A. FOOTE

Over the past several years, major sports leagues have discovered that cumulative trauma injuries under the California workers' compensation scheme represent a major financial problem. This problem has resulted in thousands of claims per year filed in California by current and former players against teams in the NFL, NBA, MLB, and NHL. Such claims can put a serious dent in profits for teams in the major sports. But California cumulative trauma claims also can be life-threatening for smaller leagues because teams in smaller leagues often have neither the insurance coverage adequate to cover California claims nor the resources to cover large workers' compensation claims out of pocket. This article will briefly describe the cause of the California workers' compensation problem, the ways a smaller league's approach must differ from that of a major league's, and some potential solutions to the problem for smaller leagues.

THE PROBLEM

Cumulative trauma injuries can generally be defined as injuries resulting from overuse or repetitive strain during the course of an employee's career, rather than injuries attributable to specific work-related events (e.g., a slip and fall). The problem of cumulative trauma workers' compensation claims in California is caused by three major factors.

First, unlike other jurisdictions, California allows workers' compensation claims for cumulative trauma injuries.

Second, it is extraordinarily easy for an employee to gain jurisdiction in California, regardless of whether his or her employer is based or largely operates in California. In addition to persons who play for California teams, players have had little trouble gaining jurisdiction in California based on the fact that they live in California, sign contracts while physically in California, have agents or attorneys that live in California, or have any of a host of other loose connections to the state. Therefore, players on

non-California teams traveling to California for games would be entitled to California workers' compensation benefits, even if the players do not compete in the actual games, and the non-California teams would be obligated to defend such claims.

Third, the one-year statute of limitations for California workers' compensation claims is abated until the player is advised of his or her potential California workers' compensation rights. Unfortunately for teams and leagues, the requisite notice of rights that begins the clock ticking cannot be delivered to the player until after the team or league is notified of the injury. Due to the nature of cumulative trauma injuries, a team may not be notified of such an injury until years after the player's career has ended. For example, in a recent noteworthy case heard by the California Workers' Compensation Appeals Board, former player Wesley Carroll filed his claim 15 years after playing seasons with the New Orleans Saints and Cincinnati Bengals.

IT IS EXTRAORDINARILY EASY FOR AN EMPLOYEE TO GAIN JURISDICTION IN CALIFORNIA, REGARDLESS OF WHETHER HIS OR HER EMPLOYER IS BASED OR LARGELY OPERATES IN CALIFORNIA.

These three factors make California an extremely friendly workers' compensation jurisdiction for current and former major league athletes, whose high salaries attract plaintiff's attorneys encouraging them to California claims in droves.

SOME POTENTIAL SOLUTIONS

Short of legislative solutions, which are discussed at the end of this article, there are no perfect approaches to the cumulative trauma workers' compensation claim problem in California. However, there are some measures, described below, that leagues can take to protect their teams from liability. It is important to note that every circumstance has many variables, and leagues should always consult with an attorney and an insurance provider before crafting potential solutions.

League-wide Policy

A single policy for the entire league with an all-states endorsement that covers all teams in every state is one obvious way to shift liability from teams to their insurance carriers. All of the major leagues have such coverage, which alleviates the risk of enormous out-of-pocket costs for teams. However, this magic-bullet solution often may not be available or appealing to smaller leagues. First, leagues must meet specific guidelines to qualify for such league-wide policies, one of which is a certain level of payroll that smaller leagues generally cannot meet. Often, teams in such leagues are forced to seek coverage from their respective states' insurers of last resort, which generally will not cover California claims. Second, league-wide policies are very likely to raise premiums for teams in smaller leagues that may already be operating on tight budgets. Lastly, league-wide policies generally come with deductibles in the neighborhood of \$250,000. For teams in smaller leagues that currently rely on low premiums and very low deductibles to remain profitable, raising cash out of pocket while being exposed to such increased risk levels may not be prudent even if their leagues could meet the requisite guidelines for such league-wide policies.

Strategic Scheduling

One way for teams in leagues without league-wide policies to avoid liability is through the strategic scheduling of games in California. Employers in a few states have a kind of statutory exemption from the California workers' compensation scheme. California Labor

Code § 3600.5 exempts out-of-state employers from California workers' compensation as long as (1) the employer's workers' compensation policy covers injuries to employees sustained in California, and (2) the laws of the other state mirror the "extraterritorial" provisions of California by similarly exempting California employers whose employees are injured in the other state. In short, California is agreeing to protect out-of-state employers from California workers' compensation as long as the employee's claim will be covered by insurance somewhere, and as long as California employers are similarly protected in the other state. In the Carroll case mentioned above, the California Workers' Compensation Appeals Board remanded the case to the lower court to determine if such reciprocity applied. Unfortunately, only a few states, among them Maryland, Ohio, and Washington, have statutes that offer such reciprocity with California.

Additionally, some insurance carriers in states contiguous to California may provide coverage for California claims. Therefore, leagues that can limit away games in California to teams in states that have reciprocity or contiguous-state coverage can mitigate the risk. However, it may be implausible or undesirable for a league to limit its schedule in this way. Additionally, this solution does not address the inevitable occurrence of a play-off game where a team in a state without reciprocity or contiguous-state coverage must travel to California and thus be exposed to a California claim.

Claim Sharing

Another option for smaller leagues is to spread the pain of exposure to California workers' compensation claims by having its teams enter into a claim-sharing agreement. Under such an agreement, the teams agree to share the cost of defending and paying amounts due for claims exceeding a certain agreed-upon out-of-pocket dollar amount. Leagues could view this as a reasonable solution in that no single team faces the possibility of a large claim that could break the team financially. Additionally, under this agreement, teams in smaller leagues are able to keep their low-premium, low-deductible policies with only a small amount of increased risk. However, it may be very difficult for smaller leagues to get teams to agree to share such costs

THE LITTLE WHITE BOOK OF BASEBALL LAW

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due to budget concerns as well as potential unfairness objections if only a few teams play games in California in any given season.

Indemnification

Another potentially successful (at least for leagues and non-California teams) approach to the California workers' compensation issue is to obligate California teams to indemnify non-California teams for expenses incurred due to California workers' compensation claims. Obviously, it may be difficult to get California teams to enter into such an indemnification agreement. But if a league is successful in this regard, it is prudent to require the non-California team to see the claim through to the end before seeking indemnification, to establish an impartial committee within the league to arbitrate matters disputed under the indemnification agreement, and to require non-California teams to make best efforts to secure a policy that covers California claims. In a league with multiple California teams, those teams may wish to enter into a contribution agreement to share the cost of any indemnification, because cumulative trauma will be difficult to pinpoint to specific games against specific teams. Leagues may wish to require California teams to put up an indemnity bond to cover future amounts due under the indemnification agreement, because teams or team owners may be difficult to find or unable to pay many years later.

Forum Selection

Many leagues insert provisions into their form player contracts whereby players agree to bring any and all claims in a specific jurisdiction. This could serve as a deterrent to a player who forgoes the option to bring a California claim based on the belief that he or she is bound by this contract provision. However, under California law, an employee cannot contract away his or her California workers' compensation rights. Nonetheless, even though unenforceable, such provisions are routinely included in hopes of preying upon the unrepresented, or uninformed, players who mistakenly believe they will be bound.

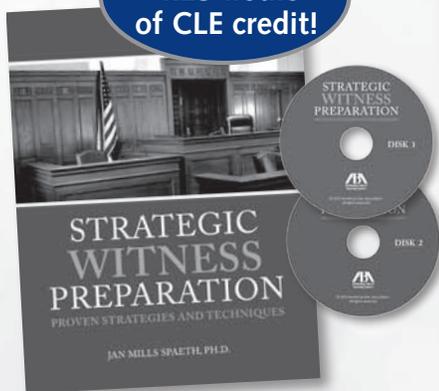
LEGISLATION: THE MOST VIABLE LONG-TERM SOLUTION

The most viable, long-term solution to the California cumulative trauma workers' compensation problem for sports leagues and teams is to lobby to change the California workers' compensation scheme, or to work diligently to get legislation passed so that their respective states have reciprocity with California. Maryland, Ohio, and Washington offer examples of such legislation, and the Carroll case gives hope that such legislation may immunize non-California teams from liability. Until such reasonable legislation is pervasive, professional sports leagues, especially smaller leagues, will be resigned to the piecemeal approaches described above. While this process may be lengthy and could be relatively expensive, the costs are minimal compared to the potential long-term costs of thousands of workers' compensation claims in California for years to come. ❖

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Sex, Violence, and Free Speech

BY JENNY MILANA

CASE HISTORY

In 2005, California banned the sale of violent video games to minors.¹ Video Software Dealers Association and Entertainment Software Association (“ESA”) filed suit in the Federal District Court of California seeking a preliminary injunction to prevent this ban from being enforced.² Video Software Dealers Association merged with Interactive Entertainment Merchants Association in 2006 to form Entertainment Merchants Association (“EMA”).³ EMA is a nonprofit company that represents approximately 600 companies throughout the United States, Canada, and other nations.⁴ EMA members operate approximately 20,000 retail outlets in the United States that sell and/or rent video games.⁵ EMA’s goal is to promote, protect, and provide a forum for the members engaged in the sale, rental, and licensed reproduction of entertainment software such as motion pictures, video games, and sound recordings.⁶ ESA is an association dedicated to representing the interests of publishers of computer and video games across the United States and around the world protecting their legal rights and legislative interests.⁷

The Federal District Court of California granted a temporary injunction and permanently enjoined the law from being enforced, holding that strict scrutiny review applied and under strict scrutiny review, the law was unconstitutional.⁸ While finding that California did have a compelling governmental interest and that its law was not overly broad in defining “violent,” the court found that California did not use the least restrictive means to protect minors from violent video games.⁹ The Ninth Circuit Court of Appeals affirmed the district court’s ruling, holding that strict scrutiny did apply as the state of California’s ban regulated speech content.¹⁰ However, the court held that because the state did not show a causal link between the harms it sought to protect minors from, the state did not meet its burden of showing a compelling governmental interest.¹¹ Even if the state had shown a compelling interest, there were less restrictive means available to achieve that interest.¹² California sought review from the U.S. Supreme Court (“Supreme Court”) under a writ of certiorari, which the Supreme Court accepted, recently heard oral arguments on, and is expected to release a decision in 2011.¹³ The issue pending before the Supreme Court is whether strict scrutiny is the appropriate level of review to be applied and, if it is, whether California must show a direct causation between violent video games and the resulting harm to minors.¹⁴

THE CALIFORNIA LAW

Governor Arnold Schwarzenegger signed into law in 2005 a bill banning the sale or rental of violent video games to anyone

under the age of 18.¹⁵ The law defines violent as any video game that includes “killing, maiming, dismembering or sexually assaulting an image of a human being” in a manner that a reasonable person would find appeals to “a deviant or morbid interest” of minors, is “patently offensive” to prevailing standards of what is suitable for minors, and causes the game—as a whole—to lack “serious, artistic, political or scientific value” for minors.¹⁶ The law requires strict labeling requirements for games considered violent under the definition and allows for a fine of up to \$1,000 per game sold to be charged to any retailer who violates it.¹⁷

Lawmakers enacted the law after reviewing several studies, the majority of which relied heavily on the research of Dr. Craig Anderson, which claims exposure to violent video games is significantly linked to increases in aggressive behavior.¹⁸ However, the Ninth Circuit Court of Appeals found that the research relied upon was based on a correlation, not evidence of causation, and most of the studies suffered significant admitted flaws.¹⁹ Many of the studies cautioned against inferring direct causation and found that there were glaring gaps in video game violence research due to a lack of longitudinal studies.²⁰

THE CURRENT VIDEO GAME REVIEW SYSTEM: THE ENTERTAINMENT SOFTWARE RATING BOARD

The Supreme Court’s decision will consider that there is already a rating system in place for video games. The Entertainment Software Rating Board (“ESRB”), a self-regulating body created by the ESA, assigns video game content ratings, enforces industry-adopted advertising guidelines, and helps ensure responsible online privacy practices for the interactive entertainment software industry.²¹ The ESRB was created in 1994 amid demand from parents for more detailed information about video games.²² After consulting a wide range of child development and academic experts and analyzing other rating systems such as the system used for movies, the ESRB created a system with age-based categories and concise impartial information about the content in the game.²³

THE RATINGS

When rating a game, the ESRB trains its raters and selects adults experienced with children either through work experience, education, or parenthood.²⁴ These ESRB raters are full-time employees of the ESRB, their identities are confidential to prevent outside influences, and they are prohibited from having ties or connections to any individuals or entities in the computer or video game industry.²⁵ When a game is rated, content is examined to provide a guide to consumers to make informed decisions regarding which games are appropriate for their family.²⁶

The system contains two parts.²⁷ On the front of every game is an ESRB rating symbol that suggests an appropriate viewing age range.²⁸ These ratings start with “C” for early childhood ages three and up. The next rating is “E” for everyone six and older. The following rating is “E 10+” for everyone older than 10. “T” is the next rating for teens age 13 and older. The last two ratings are for games typically considered violent: “M” for mature audiences over the age of 17 and “AO” for adults only age 18 and older. The second part of the system is content descriptors placed on the back of the video game box that refer to potentially inappropriate content. There are over 30 different descriptors indicating elements of the game that triggered a particular rating. Some of

these descriptors include sex, violence, language, use of controlled substances, and gambling.²⁹ Online rating summaries that explain the content descriptors in more depth are available in stores and on mobile applications.³⁰

THE RATING PROCESS

Prior to a game being released to the public, all of the game’s content, including nonplayable content, is viewed by three different specially trained raters.³¹ Each rater recommends an appropriate rating category and content descriptors after considering the content.³² Raters consider the game’s interactive features, the reward systems, degrees of player control, and previously rated games to maintain consistency among ratings.³³

Once the three raters reach a consensus on a final rating, ESRB staff review the recommended rating and content descriptors.³⁴ If approved, the publisher is issued a certificate with an official rating assignment and a summary of the rating is finalized thereafter.³⁵ The publisher may either accept the final rating or revise the game’s content and resubmit the game for review.³⁶ Typically, the rating is made public on the ESRB Web site 30 days after assignment.³⁷ Game publishers must also secure ESRB approval of the rating display on the package to ensure that the content has not changed since its prior review.³⁸ Online content that players control or contribute to are not rated, and a warning that an online feature exists must be displayed on the outside of any game to warn parents.³⁹

EFFECTIVENESS OF THE RATING PROCESS

While participation in the rating system is voluntary, most retailers, including large chain stores such as Game Stop and Best Buy, adhere to it and most manufacturers only publish rated games to their video game platforms, making virtually all retail games subject to ESRB ratings.⁴⁰ In 2009, 1,099 games were released.⁴¹ In 2009, the ESRB performed 1,791 game ratings, including re-rated games published in 2009 and unpublished games.⁴² While not every game released is rated, the number of games released without an ESRB rating is small.⁴³ Research indicates that the most popular games sold had ESRB ratings and publishers adhered to industry-adopted advertising and rating display practices for games rated M or above.⁴⁴

The rating system is enforced by contract law.⁴⁵ Violations of the ESRB’s required advertising practices or failures to disclose pertinent material are financially or legally sanctioned.⁴⁶ The ESRB enforcement authority does not extend to retailers; however, virtually all major national retailers and many independent retailers work with the ESRB to enforce its ratings.⁴⁷ A recent study of the Federal Trade Commission (“FTC”) found that national retailers enforced their store policies of refusing to sell M-rated or AO-rated video games to minors 80 percent of the time.⁴⁸ This support amounts to comprehensive industry self-regulation. The ESRB also created the ESRB Retail Council, which educates retailers and initiates more stringent and comprehensive policies among retailers.⁴⁹ This council works to educate customers about the ratings and enforce the ESRB’s recommended prohibition of selling M- or AO-rated games to minors.⁵⁰

According to the ESA’s recent study released in 2009, 92 percent of parents with game consoles in their homes are present when games are purchased or rented.⁵¹ Polled parents report monitoring their children’s game play 94 percent of the time.⁵²

Only 6 percent of 2009's rated games were rated M or above, and in 2008 only 16 percent of video game revenue came from games rated M or above.⁵³ The ESRB and the FTC found that 87 percent of parents were "somewhat" to "very" satisfied with the ratings applied.⁵⁴ In May 2009, 76 percent of surveyed parents said they regularly checked ratings before buying a game.⁵⁵ Studies indicate parents actively use the current rating system.⁵⁶

VIEWPOINTS OF THE PARTIES UNDER SUPREME COURT REVIEW

EMA and ESA claim that violent material is protected speech under the Constitution's First Amendment Right of Free Speech and is protected from government regulation.⁵⁷ In order for California to regulate protected speech, its law must pass strict scrutiny.⁵⁸ EMA and ESA argue that because California's law regulates video game content, the strict scrutiny test applies.⁵⁹ Under strict scrutiny, California must show that it has a compelling interest in regulating video game content.⁶⁰ California must therefore show a direct link to violent behavior in children from playing violent video games.⁶¹ California's law must also be narrowly tailored; California's chosen method of achieving its interest does not needlessly restrict anything else from occurring.⁶² EMA and ESA claim that California fails these tests.⁶³ EMA and ESA claim that the current rating system is effective and that educating parents about available controls and protections is just as effective but much less restrictive.⁶⁴

California's position is that protecting children from violent material is the same as protecting children from obscenity; therefore, it is not infringing on free speech and its actions do not fall under the First Amendment.⁶⁵ California seeks to extend the definition of obscene to include violent content when applied to content available to children.⁶⁶ Obscene material is not constitutionally protected if, under the Miller standard, it depicts sexual conduct; appeals to prurient interest; and has no serious literary, artistic, political, or scientific value.⁶⁷ If California can prevent First Amendment protection of gaming content, a lower level of review will be applied to its arguments.⁶⁸ If California persuades the Supreme Court to apply the "variable obscenity standard" as applied in *Ginsburg v. New York*, the Supreme Court would determine whether it was rational for the California legislature to find that exposure to violent material in video games is harmful to minors.⁶⁹

California also posits that even if strict scrutiny is applied, a direct causal link between violent video game play and the harm to minors is not required.⁷⁰ Under *Turner Broadcasting System, Inc. v. FCC*, a state's judgments must draw reasonable inferences and be based on substantial evidence if they are to be upheld.⁷¹ California argues that the Ninth Circuit Court of Appeals too narrowly applied the *Turner Broadcasting* standard by requiring proof of a direct causal link between violence in games and violence in children.⁷² California claims that requiring this evidence is an insurmountable hurdle, as it is impossible to insulate children from other forms of violent media.⁷³ However, California claims a correlation between playing violent video games and increased aggressive behavior in minors should be sufficient.⁷⁴

Additionally, California states that without force of law, neither the ESRB rating system nor additional parental controls are the most effective means by which to protect children.⁷⁵ California claims its 2005 law is necessary to protect children

from violent video games because making the tools available to parents is not enough.⁷⁶

SUPREME COURT'S LIKELY VIEW OF ARGUMENTS

The Supreme Court will likely find that violent video game content is protected speech under the First Amendment.⁷⁷ Were the Court to expand the definition of "obscene" to include something other than sexual content when applied to children, it would invoke sweeping policy changes. The Supreme Court will not alter the definition of "obscene" for content that is being argued as harmful to children yet is not offensive sexual content and possesses artistic value.⁷⁸ Many video games aim to depict real-life historical events and possess political and artistic value.⁷⁹ The violent content is necessary to express the artistic value and themes of the games. Violent content fails to fit the current definition of "obscene," even if exclusively applied to children.⁸⁰ Consumers regulate the industry with their purchases, and the ESRB's rating system influences society's comfort level. The Supreme Court will not succumb to California's request to include harmful content within "obscene."

Ginsburg is not applicable here, as it applied only to sexual

THE SUPREME COURT'S SUPPORT OF CALIFORNIA'S CURRENT MEANS TO PROTECT CHILDREN FROM THE HARM OF VIOLENT VIDEO GAMES WILL ALSO CREATE SWEEPING POLICY CHANGES THROUGHOUT A NUMBER OF ANCILLARY INDUSTRIES.

content.⁸¹ To incorporate violent content into the definition of "offensive" is a policy rather than a legal decision. The Supreme Court will not make this decision, and it will therefore retain the higher level of review and conclude that violent content is protected speech.⁸² Strict scrutiny will be applied.

Under strict scrutiny review, the Supreme Court will review the studies California claims are substantive evidence and evaluate whether studies isolating children from other violent content are impracticable.⁸³ The Supreme Court will balance the studies done to date and the impractical proof of the effects of violent video games on minors.

California is required to demonstrate that the harm to children is real and not conjectural.⁸⁴ The Supreme Court will determine whether California's legislature drew reasonable inferences from the evidence presented.⁸⁵ This is unlikely because the researchers upon which California relied disclaimed against drawing inferences about direct causation.⁸⁶ Researchers admit additional studies are needed before conclusions such as those formed by California are drawn.⁸⁷ To prevail, California must have studies

that measure additional information and longer periods of violent media exposure on children in order to reach the middle ground the Supreme Court needs to find a compelling state interest.⁸⁸

It is likely California will fail to show a compelling state interest. However, even if such an interest is found, the Supreme Court will likely uphold the lower court's view that less restrictive means exist.⁸⁹ If California's current law is allowed to be enforced, the effects will extend beyond the video game industry in California. Video games are a \$3 billion industry annually.⁹⁰ Currently, each new game is evaluated within the rating system in every country in which the game will be released.⁹¹ The publisher of the video game will design the game with these rating systems in mind and the ratings dictate how the publisher will reach its target audience and the projected revenue from sales.⁹² Failing to achieve each game's target rating affects the target audience, packaging, and labeling requirements of each country's version of the game.⁹³ California's law places an additional burden on all American games sold in California. Allowing California's law to stand will likely lead to other states creating state-specific requirements and penalties.⁹⁴ This could lead to 50 different packaging and labeling requirements for publishers distributing video games in the United States. This may lead to preemption by the federal legislature, but the court will not use this case to cause that result.

During recent oral arguments heard on November 2, 2010, the Supreme Court seemed divided on how it would decide the case.⁹⁵ However, it seemed clear that there are problems with the statute as it is currently written. Justice Anthony Kennedy states that California argues the statute parallels the obscenity categories where there has been societal consensus, yet no such consensus exists for violence, which indicates the statute might be vague.⁹⁶ Justice Samuel Alito and Justice Elena Kagan batted around with the attorney for EMA and ESA several alternatives to the statute with less restrictive means, such as a civil penalty indicating their lack of satisfaction with its current drafting.⁹⁷

The intent of the law and its current meaning are another fatal flaw. The Supreme Court had many problems with the vagueness of the statute, ranging from complying with the law to the definition of a minor.⁹⁸ When Justice Antonin Scalia asked if there was a system so the seller can know which games can be sold and which cannot, the response was no.⁹⁹ Justice Scalia quickly added that California should consider creating one.¹⁰⁰ Justice Alito questioned whether it was possible for video game manufacturers to apply this statute to minors as a class of anyone under 18.¹⁰¹ It seemed likely that the average person would think what was appropriate for a 17-year-old may not be appropriate for a one-year-old.¹⁰²

California's law, which seeks to protect children from viewing violence against humans, would not apply if the human-like creature had any unhuman qualities, such as blue skin.¹⁰³ Justice Sonia Sotomayor specifically mentioned a Vulcan as an example, and California's attorney conceded such content would not fall under the statute.¹⁰⁴ The Supreme Court's support of California's current means to protect children from the harm of violent video games will also create sweeping policy changes throughout a number of ancillary industries. Acknowledging a causal link between violent video games and violence in children will expand the regulation of television, movies, and all other forms of entertainment media children are exposed to.¹⁰⁵ Justice Scalia and Justice Ruth Bader

Ginsburg both asked what was so important about video games.¹⁰⁶ California's attorney responded that the player was an active participant, unlike with movies and books where the reader or viewer is in a passive role.¹⁰⁷ It was quickly pointed out how that argument can be made every time new technology comes out.¹⁰⁸ I wonder when the next state will attempt to regulate 3-D movies. Justice Scalia seemed to agree when he asked California's attorney what was next after violence, drinking and smoking.¹⁰⁹ The Executive Branch of the government is ill-prepared to enforce such flimsy criteria and such sweeping changes.

There are other methods by which to secure retailers' continued participation in the ratings and supporting parents' informed purchase decisions, that is, make the ESRB rating system stronger and more effective.¹¹⁰ Educate parents about the tools available to them so children are exposed to less violent content. A parent is a more effective gatekeeper than the state.

California's ability to enforce its law also will be challenged. Patrol of 100 percent of the video game retailers to determine which 20 percent are not enforcing the current voluntary system will be expensive.¹¹¹ Only 16 percent of the games currently on the market are rated higher than "Everyone 10+."¹¹² A more efficient method by which to reach the noncompliant 20 percent of retailers who sell the violent video games that make up 16 percent of all available video games for sale seems to also rest on parents utilizing the current rating system.¹¹³

CONCLUSION

It is unlikely that the Supreme Court will let the California law banning the sale or rental of violent video games stand. However, this is not the last of this issue, as I believe the Supreme Court will declare the statute overbroad, leaving open the ability for the legislature to more narrowly regulate violence in the future. If the Supreme Court allows the law to be enforced, it will give the government another very powerful means by which to regulate our lives and will crush the capstone of our culture by taking away our freedom of speech. ♦

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When Private Clubs and Their Members Go to Court

BY ROBERT D. LANG

One of the growing areas of litigation throughout the country is disputes between private golf clubs and existing or prospective members when individual members are either not accepted by the club of their choice or their membership rights are curtailed or terminated. Perhaps because the decision is so personal to the members, these disputes have the potential to become public and embarrassing litigation for all parties. As some of the cases discussed herein show, it may be possible, and a better alternative for some, to instead avoid lengthy litigation, or stay out of court altogether.

At the present time, many country clubs are feeling increased pressure as a result of the economy. Some clubs have closed, others fight to stay open, while still others have lowered dues, eliminated initiation fees, and offered “special deals” to entice new members.

Under such circumstances, requirements for membership are sometimes relaxed. This creates tension between those members who seek to “uphold standards” and those members who state that, unless new members are admitted, the club will be unable to finance needed renovations, sustain existing operations, and avoid assessments and dues increases.

Disputes also can arise on “new versus old” generation issues. Long-time members, brought up in the classic tradition of private clubs where members are expected to

adhere to certain rules of decorum, may sometimes find it difficult when the club transitions to the modern era and family-centered services. The peace and quiet enjoyment has to be balanced with new members who often want to share their experience with young children who can sometimes innocently disrupt the rules of decorum. When board members are compelled to address the situation by speaking to the parents of the children, the message may not be well received by the new members, and also may not have been conveyed perfectly by the old members. This may result in division within the club, with older members lining up with those members favoring disciplining, and newer members aligning with their friends who also may have young children and are new to the club.

For example, at one well-known country club, high-handicapped older members complained that newly admitted low-handicapped members, in essence, created their own clubs within the club, excluding

older members from weekend games. “We started as a club of gentlemen trying to be golfers,” an older member confided, “now we’re a club of golfers trying to be gentlemen.”¹

Typically, new members in private clubs are accepted by the club’s board after being sponsored by other members. The greater the exclusivity level of the club, the greater the level of “discretion” used by other board members in reviewing the applicant. Becoming a member in some of the most exclusive private clubs may require both affluence and influence.

THE MEMBER AND THE CLUB COULD USE THE FEAR OF HARM-TO-REPUTATION AGAINST EACH OTHER, BELIEVING THAT NEITHER SIDE WILL WANT TO RUN THE RISK OF PUBLICIZING THE DISPUTE.

Significantly, information required for membership application, let alone requirements for membership acceptance, in a private country club is not ordinarily a matter of public record: A private club is under no obligation to divulge its makeup and membership requirements if it remains private.

In order to seek to protect themselves from potential litigation arising out of the rejection of a proposed member, many clubs’ bylaws specifically state that the materials submitted, including whatever recommendation and records of deliberation of members of the committee, be destroyed once a membership decision is reached. That way, it is more difficult for a prospective member to point to any comments or findings by the membership committee that would support a claim against the club arising out of the rejected membership.

Additionally, some clubs now require an affirmative statement by the prospective member in which he or she represents that the information provided to the club is accurate and that, should any of the information furnished to the club be found to be false at any time, now or in the future, that misrepresentation shall constitute grounds for nonadmission or expulsion, depending on the status of the membership application.

The questionnaire or application process may generally provide for written authorization by the prospective member to allow the club to contact and obtain information concerning the prospective members from employers, associates, and friends to verify the truth and accuracy of the information provided. This provision may, in fact, never be utilized by the club. However, the potential applicant, if he or she is aware of some problem in the past that the prospective member did not disclose to the sponsor and may not wish to become public, may hesitate to continue with or may withdraw from the admission process.

Many clubs find ways to avoid the unpleasant task of advising a prospective member, and their sponsor, so the member will not be accepted. One way is for the admission committee to convey the message to the sponsor that the prospective member is unacceptable, which usually results in the withdrawal of the application. Some clubs may add assurance that such withdrawal will happen by including a draconian provision in the bylaws that, if a member proposes a prospective member who is rejected by the club, the sponsor must himself withdraw from the club. Another technique is for the club to simply have a prospective member’s application continue to “pend”—indefinitely. In that way, the club cannot be said to have rejected the member, stating instead, if questioned, that it was still “gathering information.” The net result from either approach is that the applicant and the sponsor get the message that there is a “bad fit,” and the application to join the club is quietly withdrawn.

When a prospective member seeks to gain admittance to a club and is rejected, most individuals take the news and move on, usually to another club. Sometimes, however,

it is hard to accept not being wanted. Should prospective members wish to challenge the rejection in court, their rights and amenities are limited. Because the prospective member was never admitted to the club, he or she has no legal or jural relationship with the club. And not being a member of the club, the individual cannot rely on any contract with the club or seek to take advantage of its bylaws. Further, most clubs typically refer all matters concerning admittance to the prospective member’s sponsor with the interaction taking place between the sponsor and the prospective member, on the one hand, and the club and the sponsor on the other hand. Direct contact between the prospective member and the club is often limited, if not eliminated altogether.

Nevertheless, some prospective members, and also members whose rights to membership are curtailed or suspended, sometimes bring lawsuits to vindicate themselves.

Most clubs’ bylaws contain a provision requiring members to, in essence, behave as gentlemen or ladies, comply with the club’s regulations and rules, and agree not to engage in any conduct that would be injurious to the club. These bylaws typically do not provide specific guidance regarding how to comply with them.

The bylaws typically also have a procedure in place creating a disciplinary committee to handle disputes and complaints made against club members; having the board vote upon any discipline against the member with the member given notice of the vote; and vesting within the board the authority, typically by more than a majority vote, to suspend, restrict, or expel members.

While both sides may be reluctant to put aside their dispute, both the member and the club could use the fear of harm-to-reputation against each other, believing that neither side will want to run the risk of publicizing the dispute. However, an individual who feels wronged may take action against the club and his or her former supposed friends. Once such litigation and its potential appeals are resolved, the reputation of the member and the club are rarely enhanced. Rather, such a topic often becomes the type of social fodder to be discussed over drinks, at dinner, at the links, and at other clubs.

In short, both sides have a strong interest in discretion. However, a potential

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member may choose to litigate a club's rejection for a variety of reasons. These reasons include a potential member's feeling that he or she was treated unfairly or unequally, or simply a potential member's feelings of anger. Other times, a member may feel that membership and club association are critical for good standing in the community, especially where the club is a central hub in a residential development, and the need to obtain membership may be viewed as a more significant asset than it would otherwise.

While confidential arbitration may solve the problem of unwanted publicity, few

WHEN FACED WITH DISCIPLINING MEMBERS, MOST PRIVATE CLUBS AND THEIR LEGAL COUNSEL WILL FIRST EXAMINE THE CLUBS' BYLAWS.

clubs' bylaws compel confidential arbitration or mediation to resolve such disputes. In any event, such a bylaw would not apply to a potential member who is not in a contractual relationship with his or her target club.

These disputes may escalate and can be divisive among club membership, families, as well as relationships built in regular foursomes, double games, bridge and gin games, and long-standing dinner arrangements.

When faced with disciplining members, most private clubs and their legal counsel will first examine the clubs' bylaws. However, unless they have been recently updated, many bylaws date back to the time when disputes were resolved in a "gentlemanly fashion." Even today, many such club disputes are resolved privately, especially after a cooling-off period. However, where formal disciplinary proceedings are commenced and a potential member's application is not successful, or where a member's rights are suspended or terminated, the parties may find themselves in court.

As a generalization, courts are reluctant to interfere with the actions of private clubs in response to members' claims that the club is engaged in discrimination involving race, color, age, sex, or sexual orientation. However, courts will intervene in the internal affairs of a private club where the actions of the club violate the club's own bylaws, regulations, or constitution. Courts will not interfere with the disciplining or expelling of members of private clubs where the action is taken in accordance with its adopted laws and rules and in good faith. However, if the decision by the club is contrary to its laws or rules, or if the club proceeds in a way not authorized by its bylaws, a court may review the ruling by the club and direct a reinstatement of the member if that is warranted.

Where a club member is allowed to be represented by counsel at the club's hearing on possible expulsion, to call witnesses to testify on his or her behalf, and to have his attorney make a summary statement at the hearing, courts will be more inclined to find that the hearing was fair and less of a Star Chamber proceeding where the result was preordained.²

In order for the club's actions to be sustained by a court, the club must be found to have acted reasonably, not just in slavish adherence to its bylaws. For example, in *Dixond v. The Club, Inc.*,³ a club member wanted to inspect the membership lists. The club offered him the right to do so but stated that he could not copy or reproduce the names, addresses, or telephone numbers of club members. The court ruled that the right to inspect was of "questionable value without the right to copy" and granted an injunction requiring the club to furnish plaintiff with a copy of its membership lists, rejecting the club's claim that "dire consequences" would result in the release of its list of members, especially as plaintiff agreed not to use the list for any commercial purpose.

On occasion, comments made by a club member, in furtherance of what he may perceive to be in the best interests of the club, can result in disciplinary proceedings against that member, proving the adage that "no good deed goes unpunished." For example, in *Shumrak v. Broken Sound Club, Inc.*,⁴ plaintiff learned his club was undertaking an evaluation of its general manager. Plaintiff called a member of the club's board to ask whether comments from members were invited. The board member responded that plaintiff could file written comments, which would remain confidential.

Plaintiff then e-mailed comments that made certain accusations against the general manager. That board member then forwarded plaintiff's e-mail to other members of the club and the general manager. The net result was that the president of the board and the general manager filed separate grievances against plaintiff for engaging in conduct likely to endanger the welfare, safety, harmony, and good reputation of the club. Thereafter, plaintiff was suspended and brought suit to vindicate his rights.

Criticizing a club publicly can have consequences for the member who does so. For example, the Phoenix Country Club expelled a member in 2008 for speaking to the *New York Times* regarding that club's policy of prohibiting women in the men's grill room. The member who made the comment, described as an accomplished golfer at the upscale club, was expelled for "multiple violations of club etiquette" based on a bylaw that the club had recently adopted prohibiting "derogatory or otherwise injurious comments in the media" about the club.⁵

In *Pollock v. Crestview Country Club Association*,⁶ plaintiff was expelled from Crestview Country Club Association because of his loud and offensive language while in the Men's Grill. The expulsion occurred after plaintiff had twice received letters of censure for loud and offensive language and, on the occasion resulting in his expulsion, plaintiff admitted cursing out a member that walked into the Men's Grill. Plaintiff challenged the expulsion in court. The district court granted summary judgment to the club and, on appeal, the Court of Appeals of Kansas affirmed. The lower court found that the club had followed its own internal procedures for due process, and

there was no evidence of bad faith on the part of the club, and therefore, the court would not substitute its judgment for that of the Board of Directors of the club.

On appeal, the appellate court affirmed, noting that “[c]ourts generally defer to social clubs on questions of whether a member exhibits appropriate conduct at the club.” Creatively, plaintiff argued that, although he conceded he was unhappy and angry, raised his voice, and cursed at the other member, “his remark was acceptable conduct in the Men’s Grill at Crestview.” The court granted summary judgment, dismissing that claim, because it concluded that it was up to the club, not the court, to make such a determination.

The reluctance by courts to intervene in the decisions by private clubs in disciplining their members is also evident in *Bernstein v. The Players*.⁷ In that case, two members of a club sent a letter to the club’s president questioning certain alleged financial transactions involving a club member and employee, requesting an explanation for the resignation of the club’s former treasurer, and seeking details concerning alleged improper after-hour use of the club’s premises by staff and members. The letter implied that some of these matters involved criminal conduct and that, if the requested information was not provided, legal action would be commenced to obtain it. A subsequent exchange of letters between the members and the club became increasingly strained.

The club thereafter extensively investigated the allegations, and a subcommittee unanimously concluded in a report that there was no substance or validity to any of the charges, and that the claims made by the club members were made recklessly. A response by one of the club members—who was an attorney—was to send a letter to the chairman of the club committee “expressing his shock at the ‘duplicitous and unfair’ comments in the committee’s report and suggested that the committee members resign.” One week later, the club sent written notice that the members would be expelled and thereafter voted to expel the two members.

The club members challenged the committee’s expulsion decision, bringing an Article 78 proceeding under the New York Civil Practice Laws and Rules seeking reinstatement. Judge Fraiman of the

Supreme Court, New York County, denied the Article 78 proceeding, finding no proof that the hearing resulting in expulsion was conducted in bad faith, that the hearing was unfair, or that its determination was fraudulent. The court cited the club’s “thorough and well-reasoned report” and concluded that the club members “had recklessly made baseless charges of criminality against members of the club’s management.” The court therefore did not interfere with the determination, and the reinstatement sought was denied.

Where the private club is also part of a local residential community, courts have taken a closer look where membership in the private club was rescinded because such a private club takes on an added component as a result of its connection with the residence. For example in *Youngblood v. Wilcox*,⁸ plaintiff, a club member and president of the related Home Owners Association, had a dispute with various home owners and the private golf club regarding the responsibility of guard gates serving the community. The dispute escalated, and the plaintiff’s membership in the club was terminated. He claimed that the termination was in retaliation for his proper and lawful activities as president of the Home Owners Association.

The court granted an injunction restraining the club from interfering with plaintiff’s rights as lifetime members of the club. In arguing against the motion, the club pointed out that there were “plenty of other golf courses” available in the area and that plaintiff was still permitted to play at their club as a guest of members. The court rejected that argument, pointing out that “Mission Hills ignores the facts that the Youngbloods had to pay green fees to play at other courses or as guests at the Club and that being dependent on other members for occasional invitations to play at the Club prevented them from enjoying substantial benefits of their life membership.”

In *Caposella v. Pinto*,⁹ the Wykagyl Country Club in New Rochelle, New York,

BECAUSE PRIVATE CLUBS CAN SOMETIMES CONDUCT BUSINESS ON A HANDSHAKE BASIS, DECISIONS CAN BE MADE ON A FAR LESS RIGOROUS AND UNIFORM BASIS THAN FOR MOST CORPORATIONS.

voted to expel plaintiff from its club after he brought a defamation suit against a member of a club committee when the committee member complained that plaintiff had been “rude and abusive” to her. Plaintiff was also facing criminal charges in an unrelated dispute with a truck driver who parked in front of his business. The Supreme Court, Westchester County, granted the club’s motion for summary judgment, dismissing the complaint, and the Appellate Division, Second Department, confirmed, holding that “[i]t is well established that an association may expel a member for a violation of its rules or such conduct as clearly violates the fundamental objectives of the association and, if allowed to continue, would thwart those objectives or bring the association into disrepute.” The court also noted that “[i]t is equally well settled that judicial intervention in the affairs of private associations is limited.” The court found that the charges against plaintiff “were not so trivial as to suggest that the Club’s decision was arbitrarily capricious” and ruled that plaintiff had failed to establish that the club had administered its own rules unfairly or that there was a factual demonstration to support the allegations of bias against the club.

Because private clubs can sometimes conduct business on a handshake basis, with

the Board of Directors serving without remuneration, and because bylaws are often quite like a quilt-work of rules and regulations adopted over time, decisions can be made on a far less rigorous and uniform basis than for most corporations. Technical errors by the club in the grievance process can provide procedural opportunities for those club members who are facing expulsion to challenge the club's termination. Therefore, once the club determines that a member may be subject to disciplinary proceedings, it is imperative that the club consult with its counsel and review the procedures for placing the member on notice of the charges and then ensuring that the club procedures, whatever they may be, are adhered to.

Courts have shown a degree of latitude when clubs admittedly do not follow their procedures in disciplining their members, provided the club acts in good faith. For example, in *Garvey v. The Seattle Tennis Club*,¹⁰ when disciplining a member, a club originally noted in its minutes from the Board of Trustees meeting that the expulsion of the member was by a majority vote. When counsel for the expelled member objected and pointed out that the vote to expel required a three-quarters majority, and not a simple majority, the club then edited the minutes to reflect that the vote, was, in fact, unanimous.

The member then challenged the decision by the club, claiming that the failure to comply with the bylaws, as indicated in the initial minutes of the proceedings, prevented the club from expelling the member. The lower court granted summary judgment in favor of the country club. On appeal, the Court of Appeals of Washington affirmed, holding, “[i]n effect, the Garveys claimed that the error in initiating the proceedings cannot be cured and that they are immune from expulsion thereafter. We disagree. Not surprisingly, no authority is cited to support such a position. There is, however, substantial authority that a private club has the power to remedy procedural errors committed at initial proceedings in subsequent actions.”

Those clubs that believe that their decisions on membership are not subject to judicial review and the club has unfettered discretion in deciding what conduct is grounds for expulsion find that overreaching will result in judicial intervention protecting the member. For example, in *Sterner v. Saugatuck Harbor Yacht, Inc.*,¹¹ the plaintiff club member, a New York lawyer, found his path on the ramp connecting the dock from the yacht club to the shore blocked because of a truck parked on the ramp by a junior member of the club, whose father was a member of the Board of Governors. When the junior member did not move the truck, plaintiff “climbed over the truck, stepping in the bed of the truck, on the cab, the hood and thence to shore.” When the ensuing dispute over the damage to the truck could not be resolved, the board notified plaintiff that a hearing would be held to see whether his actions constituted conduct detrimental to the welfare and interests of the club within the meaning of the bylaws warranting sanctions. Plaintiff countercharged against the junior member, the club, and the father.

At the subsequent hearing, the club dismissed the countercharges, found that plaintiff's conduct constituted conduct detrimental to the club, and voted to expel plaintiff from the club.

The trial judge denied the request for injunction. On appeal, the injunction was granted, with the court holding that the grounds for expulsion for conduct detrimental to the club “although susceptible of a range of application, may not be given unreasonable application.” The court found that the remedy—expulsion—was unreasonable, adopting the lower court's observation finding it “incredible that the Board of Governors allowed itself to become involved in a matter concerning a private disagreement between members over the amount of damages. Once having been involved, it appears even more astonishing that anything more than mild censure or at most, a short period of suspension, should have been considered by way of resolution.”

When a club chooses to discipline a member, it must scrupulously adhere to its own internal procedures, bylaws, and prior courses of action, as the failure to do so provides an opportunity by the club member to challenge the termination as being in violation of the club's own procedures and policies. For example, in *Aluisi v. Fort Washington Golf and Country Club*,¹² the private club chose to discipline a member for having made “vulgar, filthy and demeaning remarks in the presence of women club members in the area between the Pro Shop and Grill Room.” The club duly gave notice to the member of its intention to discipline. At the expulsion hearing, the club member appeared and denied the charges, although he did admit telling his wife that the women “were

a bunch of old hags.” The women who complained about the subject incident stated they were fearful of the club member and therefore wished to remain anonymous. The board decided to keep the names of those witnesses privileged and confidential and not identify the witnesses to the club member.

At the hearing, the club member requested the names of the witnesses and complained that he did not know the names of the complainants. A member of the board explained that their identities were being kept confidential because “[t]hey're scared of death of you, Terry.”

After the board went into closed session to decide the matter, they also considered 10 other complaints against the plaintiff, including threats of physical violence against board members and other club members and allegations that the member drove his golf cart into people on the course if they “irritated him.”

After the board unanimously voted to expel the club member, he filed suit seeking an injunction against the expulsion. The trial court granted the injunction and, on appeal, the injunction was sustained.

In granting the injunction, the court noted that the club had failed to give the member the names of the complaining witnesses and had failed to tell him that his prior misdeeds and other claims would be considered. Because the club member was not advised that these additional claims were considered, his “defense did not put into issue . . . [those claims]. The board's consideration in closed session of unnoticed and undocumented matters regarding which [he] had no opportunity to respond to clearly deprived him of a procedurally fair hearing.”

The lesson from *Aluisi* is that, if a club intends to base its membership decision regarding an existing member on any instance of alleged improper conduct, notification that all of the relevant claims and issues will be considered has to be given to the club member. In addition, although the club tried to protect some of its members from fear of physical violence by not disclosing their names, once the club decided to base its decision, at least in part, on their testimony, the names of those other club members had to be disclosed.

Kupersmith v. Winged Foot Golf Club is the classic case of a prospective member not learning “when to leave

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well enough alone” when rejected by a club. In that case, plaintiff, aspiring to be a member of Winged Foot, a renowned golf club, claimed that the club and 10 members conspired against him and formed a cabal to humiliate him when he sought admission. In addition to the social humiliation, plaintiff claimed that he lost business opportunities resulting in \$1 million in damages and that plaintiff was now shunned by other Winged Foot members.

Plaintiff brought a number of claims against the club and its members, all of which were dismissed. The claim against Winged Foot, based on a breach of contract and implied covenant of good faith and fair dealing, was dismissed because plaintiff had no contractual relationship with Winged Foot or any of its members and, therefore, plaintiff could not rely on any breach of the club’s bylaws, rules, regulations, and procedures on admission.

Because plaintiff claimed that he was wrongfully denied admission due to an alleged

TECHNICAL ERRORS BY THE CLUB IN THE GRIEVANCE PROCESS CAN PROVIDE PROCEDURAL OPPORTUNITIES FOR THOSE CLUB MEMBERS WHO ARE FACING EXPULSION TO CHALLENGE THE CLUB’S TERMINATION.

false letter campaign by members, that “dirty laundry” was detailed in the decision by Judge Rudolph of the New York State Supreme Court, Westchester County, dismissing the complaint.¹³ As a result, those reading the decision could learn of allegations that plaintiff was self-centered; ill-mannered; overbearing; obnoxious; brash; rude; aggressive; pompous; condescending; arrogant; divisive; abrasive; self-absorbed; lacking in integrity; having no social graces; and had a boorish behavior, sometimes accompanied with examples of his behavior at other clubs. The court dismissed the claim of defamation, holding that the letters from the members to the club making these accusations against plaintiff were subject to a qualified privilege and therefore were nonactionable opinions of the members of a private club.

The saga did not end there. Instead, plaintiff brought a motion for reargument and renewal on the decision granting defendants’ motion to dismiss, and also sought to have the court recuse itself on the grounds that the judge’s daughter was a former business competitor of plaintiff. It was alleged that, on at least two occasions, while the motion to dismiss was *sub judice*, children of the judge played golf at Winged Foot and had interaction with members at the golf club, members who are current friends of the family members of the court. Therefore, plaintiff alleged those club members related to the family members of the court stood to be damaged financially should plaintiff’s action be allowed to go forward, creating a bias in the court.

The court granted reargument but, on reargument, adhered to its decision to dismiss. The court denied the motion to recuse and pointed out that “[n]either this court, nor my spouse, nor my children, nor any family member of this Court is or ever has been a member of Winged Foot.” The court found that the conclusions of plaintiff’s counsel were “baseless, insulting, and undignified and degrading to the Court in violation of DR 7106(c)(6),” stating:

This unwarranted intrusion into the personal life of this jurist, my history and my family can only be intended to intimidate the Court in the administration of justice. It cannot be tolerated in the civil practice of law, and the ethics of same must be determined by those charged to

review the professional responsibility of attorneys who practice before the Bar.¹⁴

After plaintiff appealed, the Second Department unanimously affirmed,¹⁵ holding that the complaint failed to state a cause of action and there was no basis for recusal.

Kupersmith demonstrates one potential downfall of such litigation: Grievances, and the club’s response to grievances, may become fodder for public discourse. As all of the aforementioned lawsuits show, it is possible for no true winner to emerge when prospective members take their disputes with private clubs to court. Chevy Chase as Ty Webb may have said it best in *Caddyshack* when he tried to diffuse yet another confrontation between Ted Knight as Judge Smalls and Rodney Dangerfield as Al Czervik. Chevy Chase said: “We can handle this in private. Let’s go to your office. I’ll make some drinks for us all. We’ll talk about it.” Good advice. ♦

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ENDNOTES

1. *Exclusive, But Still a Duffer’s Delight*, N.Y. TIMES, Feb. 11, 2006, at sec. C, col. 1.
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3. 408 So. 76 (Ala. 1981).
4. 2005 Fla. App. LEXIS 21 (2005).
5. *Phoenix Club Expels Member over His Press Interview*, N.Y. TIMES, July 31, 2008.
6. 205 P.3d 1283 (Kan. Ct. App. 2009).
7. 120 Misc. 2d 998, 466 N.Y.S.2d 897 (Sup. Ct. N.Y. Co. 1983).
8. 207 Cal. App. 3d 1368, 255 Cal. Rptr. 527 (1989).
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11. 188 Conn. 531, 450 A.2d 369 (1982).
12. 36 Cal. App. 4th 799, 42 Cal. Rptr. 2d 761 (1995).
13. 9 Misc. 3d 1123, N.Y.S.2d 808 (Sup. Ct. Westchester Co. 2005).
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Decision: Sporting Event Ticket Holders Lack Standing to Sue Based on Alleged Cheating by Coach, Team

BY RICHARD BUCKLEY

Note from the editors: This piece was originally published in the summer 2010 issue, unfortunately with the incorrect title, which did not accurately capture the article's content.

On May 19, 2010, the U.S. Court of Appeals for the Third Circuit issued its opinion in *Mayer v. Belichick*, 605 F.3d 223 (3rd Cir. 2010), affirming the dismissal of Carl Mayer's lawsuit against the National Football League ("NFL"), the New England Patriots, and head coach Bill Belichick arising out of "Spygate."

The underlying facts of "Spygate" are well known. During a September 9, 2007, game between the New York Jets and the Patriots at Giants Stadium in East Rutherford, New Jersey, an employee of the Patriots was caught videotaping signals being given by the Jets' coaches—a violation of NFL rules. Ultimately, it was determined that this incident was part of a "scheme" dating back to 2000 when Belichick became the Patriots' head coach.

Mayer, a New York Jets season ticket holder, asserted individual and class claims on behalf of a nationwide class ("[a]ll New York Jets season ticket-holders and other ticket-holders who purchased tickets to games between the New York Jets and the New England Patriots in Giants stadium since Bill Belichick became the head coach of the New England Patriots in 2000") and a similarly styled state subclass. Among other things, Mayer alleged that the Patriots and Belichick interfered with ticket-holders' contractual relations, committed common law fraud, violated state consumer protection law, violated state law prohibiting deceptive business practices, and violated state and federal racketeering laws. Against the NFL, Mayer alleged that the NFL's destruction of the videotapes was a breach of contract. On behalf of himself and the putative class and subclass, Mayer sought, *inter alia*, actual damages of \$61.6 million, which, under the Racketeer Influenced and Corrupt Organizations Act (or RICO Act) and the New Jersey Consumer Fraud Act, could have been trebled to a total of \$184.8 million.

In March 2009, the U.S. District Court for the District of New Jersey granted defendants' motions to dismiss, ruling that "Plaintiff has not asserted an actionable injury insofar as he states that upon presentation of his ticket at Giants Stadium, he was permitted entry, and he was able to view a football game between the New York Jets and the New England Patriots." See *Mayer v. Belichick*, 2009 WL 792088 (D. N.J.) at *2. In so ruling, the district court quoted *In re 2005 United States Grand Prix*, 2006 WL 1663841 (S.D. Ind. 2006) (as cited in *Bowers v. Federation Internationale de L'Automobile*, 461 F. Supp. 2d 855 (S.D. Ind. 2006)) for the proposition that "[t]he uniform weight of established case law holds that a failure to satisfy the subjective expectations of spectators at a sporting event is not actionable under law."

The district court also relied on *Bowers v. Federation Internationale de L'Automobile*, 489 F.3d 316 (7th Cir. 2007), wherein it was held that "[M]ost states agree that the seller contracts only to admit the plaintiff to its property at a given time. The plaintiff buys the ticket, of course, in order to see an event that is scheduled to occur on the ticket-seller's grounds, but the seller does not contract to provide the spectacle, only to license the plaintiff to enter and 'view whatever event transpire[s].'" *Mayer*, 2009 WL 792088 at *3 (citing *Bowers*, *supra*, at 321).

On appeal, the Third Circuit agreed with the district court's focus on what it deemed to be the dispositive question—"whether or not [Mayer] stated an actionable

injury (or, in other words, a legally protected right or interest) arising out of the alleged 'dishonest' videotaping program undertaken by the Patriots and the NFL team's head coach." *Mayer v. Belichick*, 605 F.3d at 230. The Third Circuit found that "[a]t best, [Mayer] possessed nothing more than a contractual right to a seat from which to watch an NFL game between the Jets and the Patriots, and this right was clearly honored." *Id.*

The Third Circuit found it unnecessary to conclude that ticket-holders possess "nothing more than a license to enter and view whatever event, if any, happens to transpire," noting that, in the "Spygate" context, "Mayer undeniably saw football games played by two NFL teams." See *id.* at 236 (emphasis by the court). The Third Circuit held open the possibility for a different result where the subject matter of the ticketed event is not delivered (examples used by the appellate court included when games are cancelled, when replacement players are used during a strike, or when something absurd occurs (i.e., professional football players decide to play basketball)). See *id.* The Third Circuit also noted the perils of giving disgruntled fans standing to sue in court when an event is marred by rules, infractions, blown calls, dishonesty, or cheating. See *id.* at 236–37.

Had the Third Circuit determined that Mayer had stated cognizable claims, such a ruling may have opened the floodgates for similarly rooted litigation that, potentially, could have led to devastating consequences for sports business clients.

It is interesting to consider how the Third Circuit would apply its reasoning to other, currently evolving situations (hypothetically, and for example, a suit by ticket-holders to college sporting events where, after the fact, wins are vacated by the National Collegiate Athletics Association ("NCAA") as part of a punishment for rule violations). ♦

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PROFILE

Gabriel Abaroa Jr.

BY CYNTHIA SANCHEZ

On most days, Gabriel Abaroa Jr., president and CEO of the Latin Academy of Recording Arts & Sciences (the “Latin Recording Academy”), an international, U.S.-based organization dedicated to improving the quality of life and cultural condition for Latin music and its makers, starts his workday at 7:30 a.m. and usually leaves his office at 8:30 p.m. when his wife calls reminding him that it is time to come home. Today, Abaroa will surely arrive home later than usual, as he has graciously agreed to speak with me while in the midst of gearing up for the Latin Grammys, scheduled to take place on November 11, 2010, in Las Vegas.

Abaroa was born and raised in Mexico City and is the eldest of six children. He describes all eight members of the Abaroa family, including his mother and father, as “musical.” Abaroa recalls that his musical journey began one Christmas morning when he and his siblings woke up to find that instead of toys, Santa Claus had left them a drum set, a bass, speakers, an electric guitar, and a keyboard. From that day on, he and his entire family began to perform and record music together.

As years went by, Abaroa realized that music was taking more time than originally planned. The family was touring the country and recording jingles. So, one day, Abaroa turned to his father and said, “It is time to take life seriously. We all love music, but we are not prepared to face our needs with music.” Thus, Abaroa convinced each of his siblings to enroll in college as a means to safeguard their futures. Abaroa himself practiced what he preached, and upon graduating from college, enrolled in law school. On the other hand, after graduating from college, each of his siblings went back to music. According to Abaroa, he was the “stubborn” one and decided not to follow suit and instead finish his legal studies; he takes pride in always accomplishing his goals.

Upon graduating from law school, Abaroa started working in the advertising department of Procter & Gamble (“P&G”) in Mexico City. However, his heart was always in three places at the same time: law, marketing, and music. He always valued the role that marketing and advertising played in the entertainment industry. Therefore, Abaroa decided to include the concept of brand management in his legal work. He started his own private practice by bringing in “young, fresh attorneys to service specific clients.” As he put it, he would scout “legal jewels,” bring them into his firm, and pair them with clients that he thought best suited their personalities and credentials. By this point, Abaroa’s siblings were completely immersed in the music scene. Naturally, they—and their friends—started to ask for his legal help, and “for better or for worse, [Abaroa] went back to music.”

As a result of the work that Abaroa was performing and supervising at his law firm, he began to interact more and more with the major Latin record labels in Mexico, which were just starting to encounter “a huge piracy problem.” The record labels felt that they ran the risk of being “overwhelmed and overtaken by the pirates,” and so, before long, they invited Abaroa to put together

a strategy to combat piracy and then asked him to implement it. Abaroa began this monumental task by identifying the resources available to the record labels to fight piracy, as well as the areas that needed improvement. When he looked to the legislation of that time, he found it to be outdated and “benevolent” to copyright infringers, and in desperate need of reform.

At the same time, Abaroa and the labels began to partner in the fight against piracy with publishers, songwriters, and the Recording Industry Association of America (“RIAA”). According to Abaroa’s estimates, 2 million units of pirated product were being seized per year in Latin America. As a basis of comparison, in other parts of the world, only a few thousand copies of pirated product were being seized annually. Abaroa took note of this great discrepancy. The heads of the respective record labels noticed as well. Accordingly, they asked Abaroa to continue the fight by opening up an office in Miami, Florida, and, subsequently, in Buenos Aires, Argentina; Sao Paulo, Brazil; Santiago, Chile; Lima, Peru; Bogota, Colombia; Caracas, Venezuela; and Mexico City. Hence, the International Federation of the Phonographic Industry (“IFPI Latin America”) was born, a trade association dedicated to promoting the value of recorded music, safeguarding the rights of record producers, and expanding the commercial uses of recorded music. Abaroa began to recruit and train other attorneys, private investigators, and enforcement officials in various Latin American countries to start conducting seizing operations against pirates. “We were doing pioneer work. It was a huge operation,” as he described it.

Abaroa was eventually successful in helping get more copyright-friendly legislation passed throughout most of Latin America as a natural consequence of NAFTA (North American Free Trade Agreement) negotiations and the WIPO (World Intellectual Property Organization) treaties. Unfortunately, however, when it came time to start to fully implement this new legislation, Abaroa did not have the energy that he felt he required to really succeed. After eight arduous years, he was “burnt out” and decided to leave IFPI, but not before helping secure a successor, Raul Vazquez, who Abaroa describes as a “most talented professional . . . who is at the top of his field.” In the end, Abaroa was able to leave IFPI Latin America with the satisfaction that he was leaving a good organization in the hands of a person he admired and a most capable individual.

After leaving the company that he helped form, which he described as his “baby,” Abaroa shifted his focus to other aspects of the music industry. In particular, he started to become interested in new methods of delivering music. He happened to meet an “electronics wizard” who explained to him that Japan was three years ahead of the world in this area. So, Abaroa packed his suitcases and flew to Japan with this friend to learn more first hand. Upon returning to the United States, they, along with some other entrepreneurs, founded Wireless Latin Entertainment (“Latin Garage”), whose initial concept was to tackle the emerging Latin Music ringtone market in the United States. Once again, Abaroa had everything he loved at work: law, marketing, and music. Today, the Latin Garage continues to evolve and Abaroa chairs the Board of Directors.

Never satisfied with his accomplishments, Abaroa continued his quest of looking for the next big thing that would “benefit music.” Once again, he found it by participating as a volunteer (pro bono—as most of the organization’s members do) in activi-

ties of the still-forming Latin Recording Academy. Hence, it was no surprise that when a group of 14 individuals were invited to explore the possibility of forming a new Board of Trustees of the Latin Recording Academy, he was elated to be part of the mix. He always knew that one of the strongest elements that connects all Latinos—and all groups of people for that matter—is music. For that reason, Abaroa believed that the strengthening of the Latin Recording Academy was a “great way to symbolize this and a great way to bring all of us together.” As a writer, producer, and performer of music, he was already involved with The Recording Academy and The Latin Recording Academy as a voting member. It seemed natural that Abaroa would also be involved in following the steps initiated by the founders of the organization, where many of his brothers, Mauricio Abaroa in particular, participated as founders as well.

During the incorporation of the “new” Board of Trustees, Abaroa was elected [] its first vice-chair. He credits his knowledge of corporate governance as a consequence of his law degree as the probable reason for his election. The members of the board found it reassuring that Abaroa knew about law and legislation. To this day, this work continues on a pro bono basis. The volunteer practice continues with the fourth generation of trustees devoting energy, knowledge, and passion to help set the goals of the organization. He says all of them do it for the “love of music.” That is also the reason that when he was invited to become the president of the Latin Recording Academy in 2003, he immediately accepted. It was a position he foresaw lasting approximately one year. Seven years later—in August 2010, and with the same ever-present passion for his work—Abaroa became president and CEO of the Latin Recording Academy.

Abaroa recognizes that the time when he will need to pass the baton to “new blood, new energy is coming.” For now, however, he continues to give all of himself to his work, as evidenced by the accomplishments during his tenure at the Latin Recording Academy: moving swiftly and softly the Latin Grammy Awards telecast from CBS to Univision (giving the show and its new

home record-breaking ratings every year since); hosting the Latin Grammys in different cities, such as Los Angeles, Miami, New York, Houston, and Las Vegas; making the Latin Grammy Awards a point of reference within the music community both domestically and worldwide; expanding the Latin Grammy brand internationally with special educational programs, panels, and musical showcases produced in various cities and countries throughout the world; implementing a number of programs domestically that bring awareness to Latin music and its creators, including the Latin Grammy Intimate Concerts at the Grammy Museum; activating the Latin Grammy in the Schools program, which unites musicians and music professionals with high school students to educate them on various facets of the music industry; increasing the Latin Recording Academy’s membership; launching a biweekly newsletter aimed at keeping members informed of upcoming events, recaps, and accomplishments; and introducing a new and successful social media plan, including the creation of official pages on Facebook and Twitter.

Clearly, Abaroa, working under the direction of the Board of Trustees, continues to contribute a great deal to the music industry. In view of that, when asked what he would say to his colleagues to motivate them to do their part, especially during a time of transition for the music industry, he responds with a question: “Define colleagues.” He explains that he considers attorneys, musicians, and businessmen his colleagues. Nonetheless, he is quick to point out that his answer would be the same for *all* individuals, colleagues or not: “Treat music with respect, and treat those who dream and take risks and use their imagination and put themselves on stage to entertain people also with respect. I am sure the Queen of Soul would agree.” ♦

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Evil over Good—Bratz Crushes Barbie!

CONTINUED FROM PAGE 1

Barbie Collectibles department. Bryant designed fashion and hairstyles for some of the high-end Barbie dolls. While at Mattel, Bryant had an idea for a line of dolls that would be much edgier than Barbie, with a “bad girl” image, which he called “Bratz.”

He pitched the idea for this line to MGA, one of Mattel’s competitors, while he was still with Mattel. Subsequently, he was asked to meet with the CEO of MGA. He brought some preliminary sketches of four dolls, named Zoe, Lupe, Hallidae, and Jade.² He also brought with him a crude dummy that was constructed out of a doll head from a Mattel bin, Barbie’s body, and Ken’s boots.

Bryant signed a consulting agreement with MGA on the same day that he gave Mattel two weeks’ notice. During his last two weeks at Mattel, Bryant worked with MGA to develop the Bratz concept and to help create a preliminary Bratz “sculpt,” which is a “mannequin-like plastic doll body without skin coloring, face paint, hair, or clothing.”³ Those ideas ultimately became the bases for a line of MGA dolls called “Bratz” that became phenomenally successful, generating revenue of approximately \$1 billion in “interest-adjusted” profit.⁴

ALTHOUGH MATTEL SOUGHT MORE THAN \$1 BILLION IN COPYRIGHT DAMAGES, THE JURY AWARDED ONLY \$10 MILLION.

However, the parties, in their briefs, make it clear that the facts are much more complicated: both that Bryant’s use of Mattel’s facilities, including other employees, and that MGA’s complicity in the alleged misappropriation from Mattel may have been much more extensive than the Ninth Circuit describes. The facts according to Mattel are as follows:

Mattel hired Bryant in 1995⁵ as a designer in the Barbie group. He left Mattel for a short time in early 1998 and moved to Missouri, but then returned to Mattel in late 1998. When he returned, his job was to design clothing and accessories for Mattel’s exclusive Barbie Collectibles department.⁶

While employed by Mattel, Bryant came up with an idea for a line of dolls that would be much edgier than Barbie, with a “bad girl” image, which he called “Bratz.”⁷ In 2000, Bryant pitched an idea to one of Mattel’s competitors, MGA. He was then called in to meet with the CEO of the company. He brought some preliminary sketches of four dolls, named Zoe, Lupe, Hallidae, and Jade.⁸

As noted earlier, Bryant signed a consulting agreement with MGA on the same day that he gave Mattel two weeks’ notice. However, according to Mattel, the relationship long predated the agreement. The agreement was “dated as of September 18, 2000,” and it required Bryant to work on Bratz for MGA on a “top priority basis.” One of MGA’s former executives testified that Bryant was working with MGA by early summer 2000.⁹

In fact, according to Mattel, while Bryant was working with MGA, he used Mattel employees and resources to develop Bratz, placed dozens of calls to MGA from Mattel’s premises, and sent faxes to MGA using Mattel’s facilities. MGA made numerous payments to Bryant and other Mattel employees while Bryant was still employed by Mattel. Bryant used these Mattel employees to assist him with the project, never revealing that the project was for a competitor.¹⁰

However, Mattel claims that it was revealed at trial that information withheld from

other Mattel employees was not the only concealment orchestrated by Bryant and MGA. Mattel claims that Isaac Larian repeatedly identified himself as the creator of Bratz and forbade any discussion of Bryant’s involvement with Bratz outside of MGA. One year after Bryant left Mattel, Larian sent an e-mail to MGA employees mandating that “[t]here must be no mention about Mattel or any of their properties, Carter, any MGA Bratz arts, etc.”¹¹

According to Mattel, Larian also directed an MGA executive to white out a Mattel fax header on Bryant’s faxed, signed MGA agreement in order to hide the fact that Bryant faxed the agreement to MGA from Mattel. Moreover, Bryant installed and used a program called “Evidence Eliminator” on his own computers just a few days before they were to be accessed and imaged pursuant to the district court’s order.¹²

While Bryant was working for both companies, he worked with MGA to develop the Bratz concept, which included, as noted above, helping to create a preliminary Bratz sculpt, which became the basis for the Bratz dolls that generated approximately \$1 billion in interest-adjusted profit. MGA’s version of the facts is essentially as follows:

In late August 2000, Bryant met with MGA and showed its representatives some sketches and descriptions of “four edgy, hip, multiethnic dolls called ‘Bratz.’” They were described as a “group of friends who are very . . . cool, maybe kind of popular,” wearing “clothing that was trendy but not necessarily fancy,” and had attitudes that were “very, well, non-Barbie.”¹³ He then mocked up a “primitive Bratz ‘dummy doll’” with help from some of his coworkers at Mattel by putting a plastic head that he retrieved from the trash at Mattel on a Barbie body and adding Ken army boots.¹⁴

Once it was interested in Bryant’s design, MGA’s president asked Bryant if he had come up with the idea and materials on his own and on his own time, to which Bryant responded in the affirmative, claiming that he created the drawings in 1998, during the period in which he was not employed by Mattel. Bryant made a contractual warranty that he was not violating any contractual obligation by conveying the drawings to MGA, and he agreed to indemnify the company



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with respect to claims of ownership of the Bratz concept or the drawings.¹⁵

MGA also insisted that Bryant quit his job with Mattel as soon as he signed an agreement with MGA, to which Bryant agreed. However, instead of quitting immediately, Bryant gave Mattel two weeks' notice on the day that he signed his agreement with MGA.¹⁶

MGA further claims that Bryant told MGA: "Here's my idea. Just take it and run with it," which is exactly what MGA did, even before the agreement with Bryant was signed. MGA converted Bryant's sketches into a sculpt and hired a freelance sculptor, who created the first prototype. MGA continued to develop the product over the next several months, creating more sculpts and instituting dozens of successive changes. With each sculpt, "the dolls morphed farther and farther away from the images" in the original drawings, and extensive changes were made to the doll's age (19 or 20 to 11 to 13), body structure (appropriate to the change in age), head shape (more "humanistic" and less "cartoonish"), facial features (more natural, modest, and appropriate for younger girls), facial structure (chin and temples were added, with emphasized brows and jaws and defined and raised cheekbones), ears (smaller and closer to the heads), nose (more substantial than the original dot, and, later, more rounded and less triangular), eyes (no eye detail over time), lips (smaller, but more definition with corners of the mouths rounded), face color, and hair.

What both sides agree upon is that the Bratz dolls became phenomenally successful. With success, of course, comes litigation, and this particular dispute has been fought as hard and as mercilessly as any. Mattel claimed that Bryant violated his employment agreement by disclosing his idea to MGA, instead of taking the concept to Mattel and assigning Mattel the rights thereto. Mattel further claimed that it owns the copyrights to Bryant's preliminary sketches and sculpt, and that the Bratz dolls infringed that copyright. Lastly, Mattel maintains that, because MGA wrongfully acquired the ideas for the names "Bratz" and "Jade," the Bratz trademarks should be transferred from MGA to Mattel.

At the trial of Phase I of the case, which involved the ownership of the Bratz line, the jury found that Bryant was employed by Mattel when he created the "Bratz" and "Jade" names and preliminary sketches and sculpt. The jury also found that MGA had interfered with Bryant's Mattel employment agreement and had aided and abetted its breach. The jury issued a general verdict finding MGA liable for copyright infringement with respect to Bryant's preliminary Bratz works. However, although Mattel sought more than \$1 billion in copyright damages, the jury awarded only \$10 million.

The district court thereafter made equitable rulings based on the jury's verdict. With respect to the state law violations, the court imposed a constructive trust over all of MGA's Bratz-related trademarks. The imposition of a constructive trust included the terms "Bratz" and "Jade," which had the effect of transferring the entire "Bratz trademark portfolio" to Mattel, including dolls, video games, and *Bratz: The Movie*. In fact, the court issued an Unfair Competition Law ("UCL") injunction pursuant to Business & Professions Code § 17200 and a declaratory judgment with respect to MGA's right to the Bratz trademarks.

With respect to the copyright verdict, the court issued an injunction prohibiting MGA from producing and/or marketing virtually every Bratz female fashion doll, including the original four dolls and subsequent generations, and other doll characters, as well as any future dolls that are substantially similar to the copyrighted works.

CONSTRUCTIVE TRUST

The Ninth Circuit first discussed the propriety of the constructive trust that was so harshly imposed by Judge Larson of the lower court. The district court held that Bryant's employment agreement with Mattel had assigned all of his ideas to Mattel, and specifically instructed the jury as such. The jury's sole responsibility, therefore, was to determine which ideas Bryant had conceived while he was employed by Mattel.

The court of appeals noted that a constructive trust would only be appropriate if the employment agreement assigned Bryant's *ideas* for "Bratz" and "Jade" in the first place. Although the agreement purported to assign "inventions" (and other things) that were conceived by Bryant while employed by Mattel, it did not specifically mention *ideas*. The Ninth Circuit concluded that the agreement could be construed to cover ideas, but it also could be construed *not* to cover ideas. The agreement was therefore ambigu-

ous in that regard. Thus, the court of appeals held that the district court erred in finding no ambiguity in the language of the agreement, and essentially finding that the agreement covered ideas as a matter of law.¹⁷

Once the ambiguity was found, the district court was required to resolve the issue by allowing the jury to examine extrinsic evidence of the interpretation of the agreement, but it did not do so. At various stages in Phase I of the litigation, conflicting evidence was adduced concerning the issue, but the evidence was never presented to the jury for its required determination of credibility. That issue, like so many others, is now to be determined by the jury on remand.¹⁸

The Ninth Circuit went on to discuss the law of constructive trusts, which generally allows the beneficiary of the trust to profit from any enhancement in value of the trust property. The court used as an example a \$100,000 house that is wrongfully acquired and subsequently appreciates to \$200,000. The rightful owner is entitled to the enhanced value of the property. "It is simple equity that a wrongdoer should disgorge his fraudulent enrichment."¹⁹

However, the Ninth Circuit noted that, when the value of the property increases significantly because of the defendant's own efforts, a constructive trust that passes on that profit is improper. The court likens that situation to one in which an artist acquires paints by fraud and then uses them to paint a valuable portrait; the rightful owner of the paints clearly would not be entitled to the proceeds of the sale of the painting.²⁰

According to the Ninth Circuit, even if MGA misappropriated certain ideas, "it added tremendous value by turning the ideas into products and, eventually, a popular and highly profitable brand."²¹ Even though Bryant's ideas may have been significant, the Ninth Circuit found that MGA's hard work and creativity dwarfs the value of those original ideas.²² The court speculated that the jury reached a similar conclusion when it awarded Mattel only 1 percent of MGA's more than \$1 billion in "interest-adjusted profit."²³

According to the Ninth Circuit, it is not fair to transfer ownership of "this billion dollar brand" just because it started with "two misappropriated names," when the value of the brand is "overwhelmingly

the result of MGA's legitimate efforts."²⁴ The lower court's imposition of the constructive trust forced "MGA to hand over its sweat equity," which the Ninth Circuit held to be an abuse of discretion.²⁵

COPYRIGHT INFRINGEMENT

The Ninth Circuit went on to discuss the copyright infringement verdict. In order for there to be an infringement of Mattel's copyright, Mattel had to have owned a copyright in the first place. There was no question that the employment agreement covered inventions such as Bryant's Bratz drawings and sculpt. However, MGA argued that the agreement did not assign the copyright in those works because they were created outside the scope of Bryant's employment with Mattel and on his own time.²⁶

The district court held, again as a matter of law, that the agreement pertained to anything created by the employee during the time period covered by the agreement, irrespective of the employee's duties, and irrespective of when, during that time period, he or she created the work. As such, there was no question in the district court's mind that Mattel owned the copyright to the earlier works, and thus the lower court instructed the jury that any and all dolls that were "substantially similar" to the sketches and sculpt were infringements.²⁷

During the jury's deliberations, the jury asked the judge if it could find infringement as to the first generation of Bratz dolls and no others, to which the court responded in the affirmative. The jury then returned a general verdict finding MGA liable for copyright infringement but awarded Mattel only \$10 million in copyright damages. Nevertheless, the district court thought it was unclear which dolls or how many dolls the jury found infringing, so it made its own determination that the vast majority of Bratz dolls were infringing. As a result, Judge Larson enjoined MGA from producing those dolls or any other substantially similar ones.²⁸

The Ninth Circuit held that the phrase in Bryant's employment agreement "at any time during my employment" is ambiguous. The phrase could refer to every second of every minute during the time period, or only in the scope of employment during work hours, or something in between.²⁹

The Ninth Circuit also held that, because the agreement was ambiguous, and there was, again, extrinsic evidence to support each position that should have been presented to the jury, the district court erred by granting summary judgment to Mattel on the issue. On remand, the jury is tasked with deciding whether Bryant's agreement assigned works that were created outside of the scope of his employment with Mattel to Mattel, and, if so, whether the creation of his sketches and sculpt fell outside of the scope of his employment (which it certainly appears to have done, given Bryant's employment as a clothing and hairstyle designer for Mattel dolls).³⁰

Although the district court's error was, according to the Ninth Circuit, sufficient for it to vacate the copyright injunction, which it ultimately did, the court determined that if, on remand, the jury ultimately determines that Mattel owns a copyright that MGA infringed, it would have to discuss the *scope* of the injunction in any case. The Ninth Circuit therefore went on to discuss the copyright claim in general and the scope of the injunction.³¹

THE DISTRICT COURT HELD THAT BRYANT'S EMPLOYMENT AGREEMENT WITH MATTEL HAD ASSIGNED ALL OF HIS IDEAS TO MATTEL.

The court noted that, even if Mattel owns Bryant's preliminary drawings and sculpt, the copyright would only cover the particular *expression* of the "bratty-doll idea," and not the idea itself. In what may be the key to the entire case, the court of appeals made it quite clear that "MGA was free to look at Bryant's sketches and say, 'Good idea! We want to create bratty dolls too.'"³²

The Ninth Circuit then discussed the extrinsic and intrinsic tests for infringement, examining first whether the similar elements are protectable or unprotectable, and then, by the jury, whether an ordinary, reasonable observer would consider the copyrighted work and the challenged work to be substantially similar.³³

The district court had determined, through the extrinsic test, that the common items were protectable, and that, therefore, *substantial similarity* was the appropriate test for infringement. In determining equitable relief, the lower court decided that the two Bratz sculpts and the vast majority of the Bratz female fashion dolls were substantially similar to Mattel's works. The court then imposed an injunction prohibiting any further infringement of such works.³⁴

DOLL SCULPT

With respect to the doll sculpt, the Ninth Circuit determined that the district court erroneously applied the substantial similarity standard. Although, as Mattel argued, there are countless ways that one can depict an exaggerated human figure, the court of appeals found that "[t]he expression of an attractive young, female fashion doll with exaggerated proportions is . . . highly constrained." Because of this narrow range of expression, the copyright protection to be afforded to the sculpt is "only thin copyright protection against virtually identical copying."³⁵

BRATZ SKETCHES

With respect to the Bratz sketches, the district court had enjoined MGA from marketing or producing almost every Bratz female fashion doll, including second-generation dolls, because it held that they were substantially similar to the preliminary sketches.³⁶ Although MGA argued that the district court erred by applying the substantial

similarity standard, the court of appeals disagreed with MGA and held that the lower court did not err in “affording the doll sketches broad copyright protection against substantially similar works.”³⁷

However, the Ninth Circuit did hold that the district court erred when it failed to exclude the unprotectable elements of Bryant’s sketches in its substantial similarity analysis. Although the district court had ruled that the doll’s “particularized, synergistic compilation and expression of the human form and anatomy that expresses a unique style and conveys a distinct look or attitude” is protectable, the Ninth Circuit made it clear that “fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing” are all unprotectable ideas over which Mattel clearly does not own a “monopoly.”³⁸

The court of appeals therefore held that, although the substantial similarity standard was appropriate, the similarity must be between protectable elements. There must be a similarity in *expression*, and not of *ideas*. According to the Ninth Circuit, the key question is whether the works are substantially similar “beyond the fact that they depict the same idea.” There can be no finding of substantial similarity just because the dolls and the sketches depict “young, stylish girls with big heads and an attitude.”³⁹

The Ninth Circuit then noted that it might have been reasonable for the district court to rule that some of the Bratz dolls, but not the vast majority, were substantially similar to the sketches, unless the court was relying on similarities in idea.⁴⁰

Because of this error by the district court and its error in ruling that the employment agreement assigned Bryant’s ideas as a matter of law, the Ninth Circuit held that the district court abused its discretion in transferring the entire Bratz trademark portfolio to Mattel. The court therefore vacated the constructive trust, the UCL injunction, and the declaratory judgment concerning the trademarks. The Ninth Circuit welcomed the district court’s imposition of a narrower constructive trust, but only if the jury ultimately determines that Mattel owns Bryant’s ideas.⁴¹

The Ninth Circuit established a fairly onerous test for Mattel on remand.

For Mattel to obtain any injunction, it will have to prove either that Bryant’s employment agreement assigns works made outside of the scope of employment or that Bryant’s sketches and sculpt were not made outside of the scope of his employment. Then, it will have to prove either that the Bratz sculpts are virtually identical to the preliminary sculpt or that the Bratz dolls are substantially similar to Bryant’s sketches, without regard to similarities in unprotectable ideas.⁴²

It appears, particularly in light of the court’s brief recitation of the basic facts, without addressing the most damaging facts of MGA’s apparent complicity in Bryant’s defection, that the Ninth Circuit is less persuaded by Bryant’s and MGA’s initial actions and much more persuaded by Mattel’s apparent inaction while MGA made Bratz into a phenomenal success, only later to attempt to capitalize on that success. In any event, based on the Ninth Circuit’s comments, guidelines, and instructions, it is going to be extremely difficult for Mattel to recapture even a semblance of the injunction that the district court issued. At least with respect to the constructive trust/trademark portion of the case, only the U.S. Supreme Court will be able to save MGA now. ♦

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ENDNOTES

1. *Mattel, Inc. v. MGA Entm’t, Inc., et al.*, Nos. 09-55673, 09-55812, 2009 U.S. App. LEXIS 29187 (9th Cir. July 22, 2010).

2. Ultimately, MGA abandoned all of those names except for “Jade,” naming the other three original dolls “Chloe,” “Yasmin,” and “Sasha.”

3. *Mattel*, 2009 U.S. App. LEXIS 29187, at 3.

4. *Id.* at 13.

5. *Mattel, Inc.’s Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal (“Mattel AB”)* at 7, *Mattel, Inc. v. MGA Entm’t, Inc., et al.*, Nos. 09-55673, 09-55812 (9th Cir. July 22, 2010).

6. *Id.*

7. Although MGA and Bryant claim that Bryant created his first drawings of his Bratz concept during the eight months in 1998 in which he was not employed by Mattel, there was considerable

evidence to the contrary presented at trial. Some of that evidence included that (1) forensic examination of his drawings were on pages that were torn from a notebook of other drawings that he created in 1999; (2) although Bryant insisted that Bratz was inspired by a 1998 Steve Madden advertisement, his designs had more in common with a 1999 Steve Madden ad; and (3) Bryant gave the Bratz sculptor the 1999 advertisement when she prepared the sculpts in 2000. *Id.* at 12–13.

8. *See* note 2, *supra*.

9. *Mattel AB*, *supra* note 5, at 9.

10. *Id.* at 9–10. Although Mattel asserts this in its Answering Brief, it is difficult to imagine how these employees could not know that the project was for “a competitor” if they were receiving checks from MGA.

11. *Id.* at 11.

12. *Id.* at 12.

13. Opening Brief for Appellants MGA Entertainment, Inc., MGA Entertainment HK, Ltd., and Isaac Larian (“MGA OB”), at 7–8, *Mattel, Inc. v. MGA Entm’t, Inc., et al.*, Nos. 09-55673, 09-55812 (9th Cir. July 22, 2010).

14. *Id.* at 8.

15. *Id.* at 8–9.

16. *Id.* at 9.

17. *Mattel, Inc. v. MGA Entm’t, Inc., et al.*, Nos. 09-55673, 09-55812, 2009 U.S. App. LEXIS 29187, at 7–8 (9th Cir. July 22, 2010).

18. *Id.* at 9–10.

19. *Id.* at 11 (citing *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965)).

20. *Id.* at 12 (citing *Janigan*, 344 F.2d at 787).

21. *Id.*

22. *Id.*

23. *Id.* at 13.

24. *Id.*

25. *Id.* at 13.

26. *Id.* at 14.

27. *Id.* at 15.

28. *Id.*

29. *Id.* at 17–18.

30. *Id.* at 18–19.

31. *Id.* at 19.

32. *Id.* at 19–20.

33. *Id.* at 21–22.

34. *Id.* at 23.

35. *Id.* at 25–26.

36. *Id.* at 26–27.

37. *Id.* at 28.

38. *Id.* at 29–30.

39. *Id.* at 30–31.

40. *Id.* at 31–32.

41. *Id.* at 32.

42. *Id.* at 33–34.

A black and white photograph of the Nashville skyline at night. The image shows several illuminated skyscrapers and buildings, with their lights reflecting on a body of water in the foreground. The text is overlaid on the right side of the image.

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JUNE 8, 2011

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The Battle for the Ownership of Liverpool Football Club

CONTINUED FROM PAGE 1

Ventures (“NESV”) takeover. Prior to the sale being finalized, various court actions were brought in the United Kingdom and United States. This article aims to peel back the legal arguments in order to understand the underlying basis and significance of one of the most significant weeks in the Club’s history.

BACKGROUND

LFC’s corporate structure before the NESV takeover can be seen in the diagram on the right. From April 2010, the boards of Kop Football (Holdings) Limited (“KFHL”) and Kop Football Limited (“KFL”) were comprised of the owners (Gillett and Hicks) plus the nonowning directors (Martin Broughton (as chairman), Christian Purslow, and Ian Ayre). Liverpool Football and Athletic Grounds Limited (“LFAGL”) was loaned £297 million in 2007 by banks Royal Bank of Scotland (“RBS”) and Wells Fargo. In April 2010, RBS made it clear that it would only extend its loan facility until October 15, 2010, having already been entitled to call in the loan before that date. RBS consented to this further grace period of six months from April 2010 so that a sale of the Club could be finalized. In order to secure further commercial leverage over the owners, two vital changes to the decision-making capabilities of the KFHL and KFL boards were drafted and executed in a Corporate Governance Side Letter (“Side Letter”). The stipulations of the Side Letter removed the power of the owners to appoint additional representatives to the KFHL and KFL boards while reconfiguring the Club’s board to enable Purslow and Ayre to be appointed directors of the KFHL and KFL boards. As we now know, this had the effect of outnumbering the owners when a board decision on the sale of the Club was made.

The initial High Court case arose based on a board meeting that was scheduled for October 5, 2010, to discuss two finalized bids to acquire the Club. Shortly before the board meeting commenced, Broughton received a letter from the owners providing resolutions that the nonowning directors, Purslow and Ayre, had been removed as directors of KFHL and KFL and replaced by Mack Hicks Jr. and Lori Kay McCutcheon. A reconstituted board would have given the owners the ability to veto any sale that they considered an undervaluation of the Club. The nonowning directors believed that the resolutions put forward by the owners were not valid and were in clear breach of the Side Letter.

The board meeting was then delayed for an hour (the owners wanted a one-week adjournment). Once the delayed board meeting recommenced (at which the owners were not present), the nonowning directors decided to continue the negotiations with both remaining bidders, and on October 6 reached an agreement with NESV.

RBS then brought the action before the High Court in order to obtain a declaratory judgment on the ability of the nonowning directors to enter into the purchase agreement with NESV. The declaratory judgment of the Court was to ensure that the nonowning directors had the legal power to authorize the sale. The Court, by confirming their authority, would enable the sale to occur. RBS had to make the application due to its Side Letter, which had been entered into with the owners.

UNCOVERED INFORMATION

Before discussing each case in turn, there were a number of interesting points made in the various court hearings and documents:

- Barclays Capital (“Bar Cap”), which had been advising the Club on its sale, had contacted 130 interested parties, 27 of which Bar Cap sent further details to, and 13 of which entered into nondisclosure agreements. Two finalized bids were then forthcoming, one from NESV and the other from Meriton.
- Two minority stake proposals (one for £125 million and the other for £110 million) were put to the owners in early 2010. The higher bid was withdrawn and the smaller bid, allegedly by the Rhone Group, was rejected.
- The owners claimed there were numerous bids for the Club including

LFC Corporate Structure Prior to NESV Takeover



- ◆ one in July 2010 valuing the Club at £615 million and
- ◆ a \$275 million equity investment by GSO (a subsidiary of Blackstone).

What is not elaborated on is why neither bid came to fruition.

- The owners claimed a gross player transfer spend of £257 million and a net spend of £139 million. The owners valued the Club at between \$600 million and \$1.03 billion, and the £250 million purchase price by NESV was less than half of the fair market value for the Club, “leaving the owners with nothing.”
- The owners alleged that one of the nonowning directors, the finance director (Phillip Nash) or Keith Edelman (who was appointed as board supervisor by RBS), purposefully leaked confidential information to the media and fans about the GSO bid.
- The owners made a number of pot shots labeling the whole sale “an epic

swindle at the hands of rogue corporate directors,” that the nonowning directors were “acting merely as pawns of RBS,” and Broughton as “a mere puppet for RBS.”

- The owners actually admitted (per paragraph 36 of the High Court judgment) that reconstituting the board was contrary to the Side Letter with RBS.
- In the application requesting the Texas temporary restraining order, the owners asserted that RBS had been conspiring with the nonowning directors in using its global influence to prevent the owners from (1) recovering their investment in the club, and (2) “sharing in the substantial appreciation in value” of the Club (code for not allowing the owners to make a profit).
- The barrister for the owners in the High Court stated that RBS “has long been in a position to serve demand and enforce its security . . . there is no issue that events of default have occurred entitling the bank to do so.” It is particularly important that counsel for the owners admitted that RBS could have put the Club into administration long before the court proceedings.

In effect, RBS was looking after the interests of the Club’s fans, as putting the Club into administration would have resulted in a nine-point deduction under the English Premier League rules. It would obviously also have been the case that a club with nine fewer points could almost certainly be out of the running for a place in the Champions League. The system of relegation and promotion of clubs based on the allocation of points to wins, draws, and losses (and being put into administration) could have resulted in Liverpool being at risk of demotion out of the English Premier League. Though this was unlikely even with the nine-point deduction, lost opportunities would reduce the Club’s revenue and would make LFC less valuable as an asset to sell with the unlikely relegation possibility also costing the club £10s of millions in lost revenue. RBS and the fans, in effect, had similar objectives: Find a new owner to pay off the debt and avoid administration.

- On October 4, 2010, Hicks received a letter of interest from a potential purchaser willing to purchase the Club for up to £400 million, plus another investor around the time of the court cases willing to offer up to £400 million. The owners allege that Broughton did not consider either offer (presumably because the deadline for considering the offers had passed and any further due diligence delay may have held up proceedings for some time).

THE COURT CASES

There are two High Court judgments, sandwiched by one Texas restraining order.

High Court Case 1

RBS wanted the Court to issue an injunction in order to restore Purslow and Ayre to the relevant Club holding company boards. By doing this, Purslow, Ayre, and Broughton would be able to outvote the two owners three to two. RBS argued that the owners had breached the Side Letter by removing Purslow and Ayre.

The Court concluded that there was no seriously arguable defense to RBS’s claim for breach of the Side Letter. The Court believed that the owners could have participated in the October 5 board meeting in order to consider the rival bids, but chose not to. Justice Floyd put the issue rather well in explaining that

[t]he true position is that in order to secure additional loan facilities, the owners have released absolute control of the sale process which they are now seeking to regain. When it appeared that the sale was going forward on a basis which they considered unfavourable to them they sought to renege on that agreement and effect a veto which [the side letter] was designed . . . to prevent.

RBS was awarded the mandatory injunction, which confirmed that Purslow and Ayre had been restored to the relevant LFC boards.

Just to confuse things, the owners, at the same hearing, also made an additional application to prevent the acquisition of KFL by NESV. The owners’ basic argument was that they claimed the nonowning directors did not have the authority to enter into the sale agreement with NESV. The judge, however, decided that once he had ruled that the KFHL and KFL boards should be reconstituted so that Purslow and Ayre could vote

on the proposed sale, the Court should not interfere in the decision-making ability of the board. Therefore, it was not for the Court to stop the sale going ahead; it was for the Court to rule on whether the owners had illegally reconstituted the board (which would have the practical effect of frustrating the sale). The judge could not have been more definitive in stating that “in view of the harm that an injunction would cause . . . it would be entirely wrong . . . to grant the owners the injunctive relief sought. . . .”

The owners’ request to appeal to the Court of Appeal was rejected by Justice Floyd, and it appeared no steps were taken to seek permission directly from the Court of Appeal.

Texas Showdown

The next twist is reported to have occurred at 21:35 on October 13, London time (the same day as the first High Court judgment) when RBS’s lawyers received a letter from the owners enclosing a temporary restraining order (“TRO”) granted by a Dallas court.

The gist of the TRO was to stall the nonowning directors from entering into the sale agreement with NESV (although it was rumored that another bidder was still under consideration by the nonowning directors). The TRO claimed that the nonowning directors

- had breached their duties as directors by conspiring to sell the Club at a price well below market value;
- had colluded with each other to exclude the owners from the sale process; and
- were about to finalize an improper deal, despite higher offers.

The TRO thus granted temporary relief to the owners in order to prevent irreparable harm. The TRO forbid the sale of the club to NESV. The order also accompanied a claim for damages approaching \$1 billion. How such a claim is to be substantiated will no doubt be a court battle for another day.

High Court Take 2

The second High Court hearing the following day was brought by RBS to stop the TRO from taking effect. Lawyers for the owners do not appear to have been present at the hearing. It would be

fair to say that Justice Floyd was not best pleased that the owners had not mentioned their intention to start proceedings in the Texas court at any time during the English proceedings. Newspaper, Twitter, and Internet reports speculated that the TRO was a delaying tactic to enable the owners to sell their shares to Mill Financial, which would then, in turn, pay off the RBS debt.

Justice Floyd was also critical of the wording of the application by the owners for the Texas TRO. Justice Floyd pointed out that the TRO application failed to mention that the owners had commenced proceedings in the English courts that had been unsuccessful and that the owners' appointees to the board (Hicks Jr. and McCutcheon) had been removed and the original boards reconstituted. He believed that the description of the English court proceedings given to the Texas court by the owners was "wholly inadequate." RBS's lawyers believed the suit was "an attempt to obtain by another route relief which the owners had been expressly refused by the English court." The judge went even further to disparage the owners' conduct as "unconscionable." Justice Floyd agreed with RBS for the second time in two days.

Tough stuff from Justice Floyd. Apart from the owners losing the support of the directors whom they appointed (Purslow, Broughton, and Ayre), the fans, the media, and the general public, they even managed to incur the wrath of a High Court judge.

The actual order directed the owners, not the Texas court, to stop the abusive activities started in bad faith by the owners with the purpose of obstructing proceedings. The next morning, the Texas proceedings were withdrawn, enabling NESV to complete the sale.

PRAISE WHERE IT IS DUE

RBS could have called in its loans much earlier, but it did not. All the public angst about RBS being majority owned by the British taxpayer and giving the owners numerous lifelines should now be put in the context of what RBS has achieved for the Club. Not only did RBS squeeze out the former owners by signing the Side Letter that gave the KFHL and KFL boards, not the owners, control over the Club's fate, but it should be applauded for not sending the Club nine points further into the mire. From what the former owners have alleged, it also appears that RBS was quite insistent on not wanting the Club to remain in the hands of Gillett and Hicks. Gillett and Hicks have alleged that they had the money, but it was not accepted by RBS. Court documents suggest that RBS informed potential investors in correspondence that they would only approve a deal "if there was no return to equity" for the owners.

Whatever the true picture, RBS went to the Court, at no little expense, to enforce the Side Letter, to enable the reconstituted board to accept the subsequent NESV bid, and for NESV to pay it the money RBS was due.

It also took a strong chairman and nonowning directors to take on Gillett and Hicks. Robust legal advice always helps, but Broughton accomplished all that he said he would. "I will run this sale process in the right way, for the benefit of the Club and its fans."² What could not be foreseen was that the chairman and two nonowning directors would have the ultimate power to veto Gillett and Hicks. This squeezed the power from the owners and conveyed it to the whole board. RBS must have truly had them over a barrel for the owners to allow such a dilution of their voting powers. Instead of Gillett and Hicks leading the sales process and demanding the biggest return they could find, bidders understood that if they paid off the debt hanging over the Club and the nonowning directors consented to the bid because there were no higher finalized offers, there appeared little the owners could do to stop the sale.

Broughton has certainly not minced his words about his former employers, either. Here are a few choice snippets:³

- the past owners committed "flagrant abuses of their undertakings";
- "at the last moment when it does not pay them enough, they have chosen not to do it [sell]"; and
- the refusal to sell represented "one last throw of the dice" that could leave a "negative legacy" and "a very bad taste."

By being allowed to run the auction process safe in the knowledge that the owners could be outvoted and could not veto a sale, Broughton and the nonowning directors

have given the Club the best possible outcome: wiping off the debt, rewarding Gillett and Hicks with nothing, and allowing NESV to spend more on the Club than on rewarding its former owners. LFC was bought in 2007 for £218.9 million. It was sold in 2010 for around £250–300 million, depending on which court documents you believe. How the previous owners must regret not accepting the Rhone Group proposal now.

THE FUTURE

Without wanting to spoil the party, it does however remain to be seen how NESV is funding the acquisition. It is all good and well to answer "pounds" to the question of how NESV will be purchasing the Club, but the real question yet to be sufficiently answered is how much debt NESV will have to take on to fund the purchase. I think it is a moot point where the debt lies, as the interest payments will still need to be financed somehow. It would be naïve to believe even NESV had £300 million in cash in its bank account for a rainy day.

But, if NESV's track record with the Red Sox is anything to go by, I may just be seduced enough to put aside my (cynical) legal perspective and believe that the club I support may now have the owners to allow the Club to use its revenues to compete effectively again. ❖

Daniel Geey is a solicitor at Field Fisher Waterhouse LLP in London and advises entities wishing to invest in the football industry, specifically in relation to ownership criteria, conflicts of interest, multiple club ownership, and third-party player ownership. His personal Web site, www.danielgeey.com, includes all his published football law articles, and he can be found on twitter at www.twitter.com/footballlaw.

ENDNOTES

1. See Daniel Geey, *The Takeover Code: Liverpool FC Case Study*, WORLD SPORTS L. REP. 13 (Mar. 2007), <http://www.danielgeey.com/UserFiles/FootballLawLiverpoolOwnershipTakeover.pdf>.
2. Daniel Geey, *The Liverpool Investment Conundrum*, TOMKINS TIMES (May 3, 2010), <http://tomkinstimes.com/2010/05/the-liverpool-investment-conundrum>.
3. See David Conn, *Tom Hicks's Aggression and Refusal to Go Quietly Shock "Liverpool Three"*, GUARDIAN.CO.UK (Oct. 14, 2010), <http://www.guardian.co.uk/football/2010/oct/14/tom-hicks-liverpool>; *Liverpool Owners Dismay Chairman*, BBC NEWS (Oct. 6, 2010), <http://www.bbc.co.uk/news/business-11485742>.

Interview: Keenen Ivory Wayans

CONTINUED FROM PAGE 1



Image by Victoria Myers

created some of the most incredible entertainment the industry has ever experienced. If you know Keenen, you know that he's like the *pater familia*. He's the dude that runs the family. He's the boss. And he's the boss because he wasn't the oldest, the second oldest. It's because he's actually one of the smartest human beings that I've ever known in my life. He could probably, if he'd been born in a slightly different time and a different place, he would have been a professor of philosophy at Yale University—but then his students might not have understood his complexities and indelible tone. He also works out like a maniac and doesn't eat meat. His body is a temple and he's looking for worshipers, especially cute ones. (laughter)

DEKOM: He attended Tuskegee University in Alabama and became a member of their first intercollegiate fraternity for African Americans, Alpha Phi Alpha, and he dropped out senior year to become a true professional. Okay, he became a comedian and he wandered around as the unemployable, acting-impaired human being that he truly is and basically showed up on a number of television programs that even he wishes he could forget, until one day an opportunity came out for him to do something that was targeted at the niche African-American audience of Fox. It was called *In Living Color*. (applause)

DEKOM: It was one of the most extraordinary cutting-edge programs ever made, and a number of folks who came out of that show became superstars, from Jim Carrey, Jamie Foxx, David Alan Grier, to the Fly Girls that became superstars; and maybe you liked it, maybe you "hated it." (I can't do it as well.) The bottom line, "hated it" became part of our lexicon. It's how we expressed opinions. It's how we reviewed our own movies and different content from a most extraordinary perspective. Keenen was known as an actor and a performer. He's also a director, writer, producer (where he tends to spend his efforts these days), but if you think he gave up with that little TV show *In Living Color*, he didn't. He was involved as a writer, producer, director on things like *Hollywood Shuffle*, *Eddie Murphy Raw*, *I'm Gonna Git You Sucka*, *The Five Heartbeats*, *A Low Down Dirty Shame*, and *Don't Be a Menace to South Central While Drinking Your Juice in the Hood*. I'm amazed I did that without stuttering. Now this one, I don't know how you picked the name of the show, the *Keenen Ivory Wayans Show*. . . . How did you figure that one out? You love the *Scary Movie* series, *White Chicks*, *Little Man*, *Dance Flick*, and come on up here, Keenen, let's find out the truth about who you really are. (applause)

DEKOM: How hard could that be? Let's go back to your crazy roots.

WAYANS: Sure.

DEKOM: Growing up in New York: Way too many people in way too little space. I want to know, what was life like? How did humor keep that family going? And how did you become so great and so talented? Where did that humor come from?

WAYANS: Well, I think humor was the only thing that was abundant. You know, everything else . . . I mean, we were so . . . You know the joke? "We were so poor . . ." We really were that poor, you know? I'll give you an example: My dad's best year, he got a job at Guinness Harp. His best year he made \$12,000. There were 12 of us. You divide that, that's \$1,000 per person, to last 365 days. So, about \$2.50 per day. I mean, that's room, board, clothes, food, you know. There were starving kids in Africa doing better than us. So, for us, I mean, it's like, that's how we survived was we just found humor.

DEKOM: Any particular nasty moments stick out that are embarrassing or humiliating that you'd like to share with us?

WAYANS: In regards to being poor? Well, no, I mean, everything . . . like I said, if you got a whoopin', jokes would happen when you were done, you know. People were doing impressions of your screams. Every part of the day was just, like I said, was just about, you know, finding . . . when you're a kid, especially, you don't really know your circumstances. It just is. You just accept it, and I think that that has helped me throughout life is that I'm really good at just accepting what the circumstances are.

DEKOM: Obviously you were going to go to college. You had a goal. What was your goal at college? What did you want to be?

WAYANS: My goal was really just to get out of the projects. I mean, I went to school for engineering. I had no idea what engineering was. I just happened to be good at math and I was offered a scholarship from a school that I just randomly applied to and I got down there and, you know, life is funny because I always dreamed of being a comedian. I saw Richard Pryor on TV when I was about eight- or nine-years-old, and he was on the *Dinah Shore Show*, and he was doing a bit about getting beat up by a bully at school, and I had just

experienced it and I saw him on TV. He was talking about getting beat up by a bully and how the bully will beat you up before he even puts his hands on you and he'd just threaten you across the room like this and he's doing all this stuff and I'm sitting there like, I just experienced this and I started laughing and it just clicked. I was like, I want to be like this guy. I want to be able to take all of this that is perceived as pain and make it funny. It wasn't that heavy in that moment. I knew right then that's what I wanted to do, and so even when I went to college it was only because I didn't know how to be a comedian. And, again, like I said, life is very funny. I go to Tuskegee Institute in Alabama, which is 2,000 miles away from where I grew up, and I meet a guy, a classmate of mine, who sees me basically doing standup. I spent most of my time around the fountain making people laugh, doing impressions of people in New York and all these funny characters, and he said to me, you know, when you go back home, you should check out The Improv. And I was like, "What is The Improv?" He told me it's a comedy club, and he said, "You know, Richard Pryor started there." He didn't have to say anything other than Richard Pryor. I went back home and I auditioned at The Improv. Now, the irony is it took me going 2,000 miles away to find out about a club that was literally one mile from my house. So, you know, it was . . . my reason for going to college was to find out about The Improv at the end of the day.

THERE WERE STARVING KIDS IN AFRICA DOING BETTER THAN US.

DEKOM: Insert clever question here. Okay. Um, so you start appearing in clubs. Obviously, your popularity is beginning to take off. You had some specials that came out of that. You had guest appearances on television. How the hell did someone trust you with an entire show? How did that happen and what was their . . . What was in their head and what was in your head?

WAYANS: Okay. Well, there was a little bit of a journey to get to that spot. Before, before *In Living Color*, I had done a movie with a friend of mine, Robert Townsend, called *Hollywood Shuffle*, and that was the first thing that kind of got a little bit of attention for me and that was, I think, sort of the quintessential example of poverty and ignorance coming together in that when you're poor, you have great ingenuity. You just do stuff, there's no . . . There's no such thing as "can't," you know. So, if a friend of mine got a skateboard and my mother couldn't buy me a skateboard, we took wheels off a shopping cart and a piece of wood and nailed them on and we had a skateboard. And *Hollywood Shuffle* was a movie that was made with that kind of ingenuity. The money for the movie came from credit cards. We didn't have any money, but we had this idea and Robert happened to get a credit card in the mail. It said it would give him a \$2,000 limit. And so it was like, how many of these can we apply for? And that's what we did. We just applied for credit cards. We figured if the movie bombed then hey, you know, we'd file bankruptcy because we had nothing to lose. That was literally our plan, and so we were able to make this little movie, and the movie was very successful, and that's what got my next film and then ultimately the attention of people at Fox. So, my second movie was *I'm Gonna Git You Sucka*, and some executives had come to see it and I thought they were film executives. They were actually television executives and they invited me to come meet with them. Initially, I didn't want to do TV. I wanted to do more movies, and the one thing they said to me was, "We're a new TV network and we're

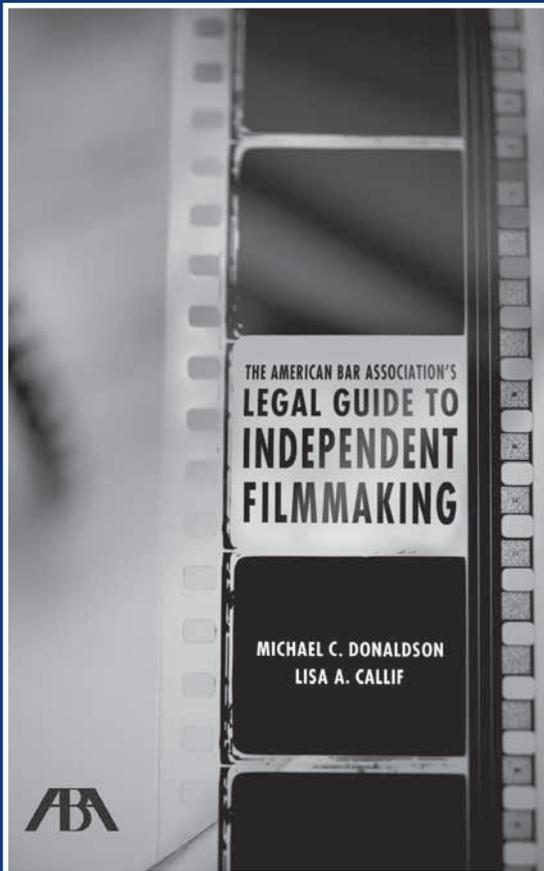
willing to take a chance and we will let you do anything." That's what they said. You can do anything you want to do. We really want to shake it up and, um, I had always loved *Saturday Night Live* and actually had auditioned for *Saturday Night Live* and didn't get chosen and so payback was a bitch. But that, that's really what happened. They wanted to do something different. They wanted to get noticed and they thought, you know, that my humor was irreverent enough to do that.

DEKOM: And yet, somehow, when television meets with irreverence, there are always problems. Problems. You have, let's see what we call them: Clearance, lawyers, Standards and Practices, and Roo Roo (*whispers* Rupert Murdoch). I can't say the name. Other people. How in this promise of freedom did they try and limit their promise of freedom?

WAYANS: Well, we shot the pilot and in the pilot there were, let's see . . . the "Homeboyz Shopping Network," "Men on Film" was a *Star Trek* parody that was a parody of the *Wrath of Khan*. We called it the "Wrath of Farrakhan." And those three they actually wanted me to take out of the pilot and I sat down with the head of the network and he was like, you know, "we don't . . . we're not really sure . . ." They started backtracking after the "anything." Then it was like, well, we're not sure about this and it's interesting because I wasn't . . . I didn't think that anything was sort of that edgy. I, my whole sort of comedy education was, you know, Monty Python and Richard Pryor and George Carlin and Freddie Prinze. It was very diverse and, and I didn't think . . . I always thought that I could make people laugh outside of my culture. I didn't think that my humor was going to offend people. I was really confident of that and they were really afraid and I said, "You know, I don't want to fool the audience. I don't want them to think one thing and then next week they tune in and it's something else." I said that let's just kick the door in, you know? If they like it, they'll let me stay. If not, then, you know, I'd rather go out on my own terms. So, Peter Chernin, who was head of the network, I sat with him and he said, "Keenen, I'm telling you it's going to be a risk." And then, the pilot aired. It took almost a year before they put the pilot on. They were that nervous. They were, I mean . . . I'll give you . . .

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I'll tell you a story. I was brought in and I met a panel of people that I would swear were the CIA. You know like certain people wear a suit a certain way and you just know. This guy, he's from somewhere, you know, and it was just like six guys, very sort of that CIA dress, and they interviewed me and they were telling me how they had screened the show and they were talking to me about the audience reaction, but they weren't talking about laughter. They were telling me how it made people feel and I was like, wow. That's really heavy research right there for some jokes, you know? And I remember the guy said to me, so what do you think of the show and I said, "I think the show is going to be great. I think it's going to be really fun and I think it's going to be revolutionary." And at that sound everybody went, "Revolutionary?" It was a little scary, but I guess . . . I guess they felt that I was not trying to overthrow the country.

IF A FRIEND OF MINE GOT A SKATEBOARD AND MY MOTHER COULDN'T BUY ME A SKATEBOARD, WE TOOK WHEELS OFF A SHOPPING CART AND A PIECE OF WOOD AND NAILED THEM ON AND WE HAD A SKATEBOARD.

DEKOM: You didn't want to? But you did. In a strange way, you overthrew television. In terms of breaking out from, you know, here's you coming from an African-American, cloistered community and you went so completely mainstream. How do you do that?

WAYANS: Well because I was, again . . . In *The Improv*, I was part of a very special class of comedians, and I'm very proud of all the people that I started out with. On any given night, you would have saw [sic] myself, uh, Jay Leno, um, David Letterman, Bill Maher, Jerry Seinfeld, Larry Miller, Eddie Murphy, all of us were in the clubs during that time and part of our, um, sort of code in the club was that no one could do the other person's joke. So, if you were a comedian and you came into the club and you did a bit that Jerry Seinfeld did, you were taken on the side and told, "Hey, that's Jerry Seinfeld's joke. You can't do that." And growing up in that kind of environment forced everybody to develop their own voice. So, all the people I listed, none of us are the same as comedians. There's no crossover. And we all played to the same audience, so I'm, I'm black and Jerry's Jewish and Jay's Italian and ethnicity doesn't matter. We all played to the same audience so, um, even though I was African American, I learned how to translate my experience and that's where I think that, um, education paid off throughout my entire career, just learning how to translate.

DEKOM: One of the things that you shared with me a while ago at a lunch and I thought it was pretty profound was advice you got from then-HBO programming head who is now at Starz, Chris Albrecht, and he gave you some advice, and I thought it was just so mind bogglingly cool that maybe you could, like, tell us what it was and how it influenced you.

WAYANS: Well, what Chris told me, uh, besides never wear red pants and an afro pick in my hair . . . He said when you, when you talk about, when you go on stage, he said never say "yours" and "ours." Always say "my" and "mine." He said that the more specific you are, the more relatable you'll be, and he gave me an example. He said if you go on stage and you say, "All mothers do this," then what happens is the audience sits there and starts to question, "Does my mother do that?" Where, if you go on stage and you say, "My mother does this," then everybody goes, "Yeah. My mother does that too" or they just think it's funny that your mother did that. So, you know, it's little things

like that is what helped me, like I said, to translate my experience.

DEKOM: One of the extraordinary things that Keenen did in my own understanding of our industry is I've written basically a book and I didn't understand my own theory and I said basically we live in a world of super hyper accelerated change and, as a result, movie stars, you know, basically are not what's next, what kids are looking for, but I can't explain Adam Sandler. I can't explain why some of these players are popular, and Keenen explained to me that if you're a comedian or character actor, you are creating a new character and therefore what's next is not, you know, the same thing, it's the character the comedian creates, which brings me to my next question. How did you wind up deciding to start off to make movies? You were in movies, but what really defined you in motion picture space was writing and directing. Tell me about how that happened and why you actually thought you could do it and how you did it.

WAYANS: Well, I mean, that, that came just out of necessity. Um, you know, as you mentioned earlier, I initially came out and was auditioning and it was always, you know, *Thug 1*, you know, *Scared Black Guy 2*; those were the only roles out there, and I had dreams of, you know, being an action hero and just playing all kinds of parts. And that's sort of what spawned, our frustration is what spawned *Hollywood Shuffle* and the writing part of it, again, ingenuity. I had no idea how to write a movie and neither did Robert, but what we did know was how to act and how to make characters, so the way we wrote ours was we set up a video camera and we laid out a bunch of different clothing and we acted out every scene that we had in our head and each piece of clothes we put on was a different, going to a different character, and then we watched the videotape back and kept what we thought was good and that was it and so, you know, it was, we made up our own way to write. I mean it was, you know, it was a skateboard with shopping cart wheels on a piece of board, you know, it was the same mentality.

DEKOM: So, nothing has changed?

WAYANS: No. No. I, yeah, nothing has changed.

DEKOM: As you are looking at it, clearly there is a transition going on in

the world. We're dealing with the demise of the smaller film. If you tried to do *Hollywood Shuffle* today, you probably wouldn't even have the ability to get someone to look at it because there are four or five thousand movies made every year. We have DVD markets. We have international markets. We have Internet delivery. How does all of this change affect your creative choices, your creative abilities, and how you operate in the Hollywood structure?

WAYANS: Well, see, the change is not on the creative. The creative is forever because somebody has to create the content. It really is just what format am I going to create in. So, for me the change is not as frightening as it is for the infrastructures that exist now that have spent hundreds of years building themselves. Um, but I will say that the quicker these companies embrace change, the easier it will be, because I think the problem right now is that they're stuck in the idea of, well, how can you make a movie for \$100 million, you know, and you can't monetize it. Well, don't make the movie for \$100 million, you know? Well, the long form is dead. Well, then start making 20-minute movies. I mean, you know, you just have to just go with what, what is the consumer looking for right now? It's whatever they're willing to pay for is what you give them, so if they want short form, I can make a movie in 15 minutes. That's great, you know? And if your production cost on that movie was \$100,000, I'm sure you could monetize that so it's really just wrapping your head around change, embracing that it's here and there's nothing you can do about it. Once you redefine your economics, you'll be fine.

DEKOM: In terms of the change, what is it you're working on now? What are you . . . you've got television . . .

WAYANS: A \$100 million movie.

DEKOM: With a laugh track? What are you doing?

WAYANS: No, I'm actually doing, working on a project at Sony called *It Takes a Village*, and it's, um, it is a mainstream movie. It's kind of having fun with all these women who are going out and adopting babies from other countries.

DEKOM: Inconceivable.

WAYANS: In this particular project, the woman, um, adopts a child and, um, is told that the chief has to approve. She

adopts from this village and, uh, she goes home and gets the call that the baby is coming and when she gets to the airport, the baby is there and the entire village. So, the chief has to approve so they've come to stay with her until they decide she's ready to be a mom.

DEKOM: We've left a few minutes for questions from the audience, so if any of you have any embarrassing or humiliating or otherwise disgusting questions, keep them to yourself. If you have something else, now's the time to ask. Come on up here so we can actually have you speak in my microphone.

WOMAN: It's really not a provocative question. Um, you spoke earlier about growing up with the entire family being really poor. At what point did you realize that you made it, and what was the first thing that you bought yourself and not had to share?

WAYANS: The answer to both of those are the same. I bought my mother a house. A funny story . . . I had this old car and, um, because you asked about the first thing I bought myself. I had this old Toyota Celica and I was driving around and Eddie Murphy was hanging out with me one day and he said, "Why do you still have this car?" He literally got on the roof of my car and stomped onto the hood and walked, stomping dents into the already dented car and he goes, "When are you going to get rid of this?" And he goes, "Now go buy a new car." And I told him, I said, "As long as my family is in the projects, I will not drive around in a new car." So, I didn't until I got my mom out.

SO, I TOLD MY GRANDMOTHER I WANTED TO BE A COMEDIAN AND SHE LOOKED AT ME AND SHE SAID, "BABY, I'VE KNOWN YOU YOUR WHOLE LIFE. YOU NEVER SAID NOTHING FUNNY."

DEKOM: Uh, did you fix the car?

WAYANS: No, I actually gave it to him.

DEKOM: Uh, anybody else? Lon Sobel?

MAN: You're, you're talking to a whole group full of lawyers. Let me ask, what do you perceive the role of the lawyer as, within the entertainment industry? What do we do that's useful and helpful, and what could we do that would be more useful and helpful than what we're doing?

WAYANS: Uh, my best experiences with lawyers, this being one (indicating Dekom), has been when a lawyer thinks outside the box. A lot of times you get into a negotiation and you're not getting what you want, and a lot of times your lawyer will just tell you, "your options are take it or leave it." So, you know, if you want it, that's it. To me, a good lawyer will say, "So, you're not going to get any more here. So, there's no more cash to be had. There's no more back-end to be had. But here are 10 other ancillary areas that maybe we can carve a piece out of that you can participate in that will compensate for the less money up front." And so, when someone approaches a deal with a bigger picture view than you have, that's a real asset.

DEKOM: Just sort of a side note to that—when someone cites precedent to you, they don't want it enough. Um, we have time for one more question.

WOMAN: Were your parents supportive, um, you know, while you were growing up, if you expressed interest in becoming an entertainer? How did they support you?

WAYANS: Was my family supportive? So, I told my grandmother I wanted to be a comedian and she looked at me and she said, "Baby, I've known you your whole life. You never said nothing funny." Is that it?

DEKOM: Everybody, thank you so much. Keenen, thank you. ❖

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