May-June 2022 • Volume 6, Issue 6

SPORTS FACILITIES and the LAW

How the law affects the sports facilities industry

Mother of 6-Year-Old Hit by Errant Baseball Sues LA Angels, Expert Weighs In

The mother of a 6-year-old boy, who suffered a fractured skull and brain damage when he was accidentally hit by a baseball thrown by a member of the Los Angeles Angels has sued the team for negligence.

The incident occurred on September 15, 2019, when pitcher Keynan Middleton, who was warming up on the field, threw a ball toward another Angels player who missed the catch. The ball struck Bryson, the son of Beatrice Galaz, in the side of the head. Bryson and his father were near the first row of stadium near the dugout, where players typically meet fans and sign autographs well before the opening pitch.

After the incident, Bryson was rushed to the emergency room and placed in critical condition. He ultimately was sent to a children's hospital for monitoring for 2 1/2 days, according to the mother's attorney, Kyle Scott.

Scott went on to note that he has difficulties paying attention and with social interaction. Further, medical exams show abnormal brain activity. Scott told the media that this raises concerns about his longer-term development, especially as school subjects become more complex. In a statement, Galaz said in a statement that her son "has struggled in school. He's simply not the same."

The lawsuit claims the team should

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Some of Lakers' COVID-Related Insurance Claims Are Dismissed

By Jeff Birren, Senior Writer

Sports enterprises across the country regularly purchase insurance to cover various contingencies, including physical damage to their facilities. The Los Angeles Lakers bought insurance in 2019 that covered many things, but in summer, 2019, few could anticipate COVID-19 and the losses it would generate. After the NBA shut down in March 2020, the Lakers filed claims with its insurance carrier, Federal Insurance Company, seeking to recoup millions of dollars in losses. Federal denied the claim, and litigation followed. Recently the United States District Court in Los Angeles dismissed some of the Lakers' claims (L.A. Lakers v. Fed. Ins. Co., CV 21-022881 TJH (MRWx), U.S.D.C., C.D. Cal., (3-17-22)), __ F. Supp. 3d __; 2022 U.S. Dist. LEXIS 51563; 2022 WL 831549.

Background

The Lakers purchased the "all-risk commercial property insurance policy (the "Policy") from Federal in August 2019" (Id. at 2). The Policy covered Staples Center where they play and their Health Training Center. It was in effect from August 1, 2019, to August 1, 2020. Federal was obligated to reimburse the Lakers for lost business income and expenses incurred "caused by or result(ing) from direct physical loss or damage to the property" or impairment of their operations "directly caused by the prohibition of access to" the property but "'the prohibition of access by a civil authority must be the direct result of direct physical loss or damage to the property away from, but within one mile" of the Covered Properties.

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Beyond the Binary: The Non-Binary Athlete

By Holt Hackney

What follows is an interview conducted by Carla Varriale-Barker (she/her/hers), the chair of Segal McCambridge's sports practice group, of Lauren Lubin April (they, them), a non-binary athlete and activist who has been on the forefront of non-binary and transgender advancements in sports and health, academia, film and media, public policy and more for over a decade.

In 2016, Lauren became the first-ever openly non-binary runner to compete in the New York City Marathon, and repeated history in 2019 at the Boston Marathon.

Lauren is the Executive Producer of We Exist: Beyond the Binary, an award-winning documentary that has been part of the curriculum of over 50,000 students in more than 70 countries and is the first full-length feature to explore the life of individuals who exist outside of the gender binary.

Most recently, Lauren founded April Haus, Inc., a consulting company that specializes in building innovative, integrative, and sustainable sport systems beyond the gender binary.

Question: How did you become an athlete/activist advocating on behalf of inclusion of non-binary persons in sports?

Answer: At the beginning and many years ago, my activism spawned from being a frustrated athlete who no longer was willing to wait for the world to "let me in." I started to make small changes locally and in 2015 founded New York City's first non-binary running group, dedicated to meeting the specific needs of non-binary athletes and providing a space for us to participate. The group garnered over 100 participants in the first year alone. Shortly thereafter, I started the "WE RUN" campaign, which advocated for equal space and recognition for non-binary athletes in sports and gained national headlines. This was the turning point of people really taking notice.

Today, my initial frustrations have turned into inspiration as I see the sports world shifting in powerful ways, and congruently my advocacy goals have transformed from the local level to the global stage. I now work with industry leaders across various verticals on building more expansive, integrative, and sustainable sports models and systems for athletes of all gender identities.

Q: What are some of the unique challenges to inclusion for non-binary people in sports?

A: The most obvious challenge non-

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Sports Lawyer Moira O'Connor Discusses Her Experience as Director of Operations at Soldier Field

It wasn't long after we reached out to Moira O'Connor, then Director of Operations at Soldier Field, that she switched jobs.

Thomas has a legal background, which is why we sought her out for an interview feature about her experience with sports facilities.

Fortunately for her, that same legal background opened the door to an attorney at law at Taft Stettinius & Hollister LLP, a law firm out of the Midwest. After nine years on the facilities side, the opportunity to practice law with more regularity was too good to pass up.

Nevertheless, we were still interested in what she had learned, given her unique perspective. What follows is her interview.

Question: What were your job responsibilities as Director of Operations at Soldier Field?

Answer: As the Director of Operations at Soldier Field I oversaw: Major events; Capital improvement projects; repair and maintenance; facility services/cleaning services; trades; laborers; building systems; grounds maintenance; and subcontractor contracts. Under our management umbrella at Soldier Field, we also managed specialized sport complexes for the Chicago Park District including (3) indoor ice rinks; indoor and outdoor synthetic turf fields; a gymnastics facility; a youth baseball stadium; and a NCAA/Professional rated Hydraulic indoor track and field facility. I oversaw the operations side of those facilities as well.

Q: How did being a lawyer help you in that role?

A: I did four years of law school at night (graduating from the University of Illinois Chicago School of Law in 2017), while working full time for ASM Global. My first role was manager of one of the ice rinks and then two years as the Director of Operations at Soldier Field. From a practical perspective, time management was the most important part of my schedule. Being able to give 100 percent to work and then go to school after work and do the same wouldn't have been as achievable had I not been able to manage my time correctly.

> **"Having my law degree played a major role in Soldier Field being able to successfully apply for Safety Act Certification/Designation 'in-house,' something that was unheard of at the time."**

From a personal perspective, being a younger female in an operations role at an NFL stadium people are quick to discount you and the knowledge you bring into the roll, it provided a level of credibility that I don't think would have been afforded to me if I was not in law school and then subsequently a lawyer.

Most importantly being a lawyer, and even when I was just a law student, it brings a completely different perspective and way of thinking into a stadium operator space. Risk Management and mitigation is always at the forefront of your mind when addressing certain issues. It also was incredibly helpful to have a legal writing background when it came to documentation for the stadium and policy writing- having my law degree played a major role in Soldier Field being able to successfully apply for Safety Act Certification/Designation "in-house", something that was unheard of at the time.

Q: What were the most pressing legal or risk management issues the last few years?

A: Not to state the obvious, but Covid was the biggest risk management/mitigation issue faced the past couple of years. Whether it was writing the protocols for cleaning, stadium entry for staff during quarantine as the stadium still needed to be maintained, to working hand in hand with the team and concessions to plan for a safe stadium re-opening for fans to return. I think any stadium operator at the time can attest that the landscape changed by the day leading up to and during the past couple of seasons regarding protocols. Having my legal background, I was able to not only help write the plans from a legal and operational perspective, but also oversaw the compliance. Having a plan is only as good as its implementation and being able to oversee both sides was directly correlated to my background.

Q: Why did you leave to join a firm?

A: Strangely enough, outside of not working football on Sundays, my day-to-day job with the law firm feels really familiar to me. I do Safety Act applications, minority/women owned business certifications and all of the auditing/compliance that comes with that throughout the country and government relations/strategies. For me I felt if I ever wanted to come back into the sports world or stadium operations world I want to come back and make an impact and really have a seat at whatever table it may be in the future. I felt that at the end of the day, in order to do return I would need to lean more into my legal side and gain that experience to really round out my skill set.

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Tennessee Court of Appeals Deals Final Blow to Initiative that Would Have Created Another Arena in Memphis

The Tennessee Court of Appeals (at Jackson) has affirmed the ruling of a trial court that a group of plaintiffs seeking to build a 6,200-seat arena and other structures lacked standing to pursue a declaratory judgment, which would have prevented the defendants – Memphis Basketball, LLC and others – from blocking the project.

By way of background, in 2014, Elvis Presley Enterprises, Inc., initiated a redevelopment project that involved the celebrated and renowned home of Elvis Presley, and Memphis tourist destination, Graceland. The purposed revitalization plan initially included the construction of a 450-room non-heartbreak hotel, convention and concert facilities, a theater, and a series of upgrades to the museum and archive studio.[1]

To make the Graceland project economically feasible, Elvis Presley Enterprises, Inc. approached the Economic Development Growth Engine for the City of Memphis and Shelby County to request a property tax benefit through its Tax Increment Financing Program (TIF). The Economic Development Growth Engine is a Tennessee non-profit corporation that, among other things, considers applications that promote industrial development.[2] The TIF program, rather than providing for direct funding, allows developers to share in the increased property tax revenues received by the city and county from the surrounding area of the developer's project.[3]

After receiving TIF approval from both the city and the county for its initial revitalization project, Elvis Presley Enterprises, Inc. amended its application to include a 6,200-seat arena.[4] After becoming aware of the changes made by Elvis Presley Enterprises, Inc. to its proposal, Memphis Basketball, LLC, contacted the City of Memphis to assert its position that the granting of a TIF to Elvis Presley Enterprises, Inc. for its proposed arena would violate the 'Non-Participation Provision' of the 'Arena Agreement' between the City of Memphis and Memphis Basketball, LLC.[5] This 'Arena Agreement', signed by the two parties in 2001, requires Memphis Basketball, LLC to pay a rental fee to the city and county, while also covering any and all costs, expenses, and operational losses incurred in order for the Memphis Grizzlies' basketball team to call the FedEx Forum home. In exchange, the 'Arena Agreement' prohibits the City of Memphis from providing tax incentives for facilities that would compete with the FedEx Forum. Specifically, the 'Non-Participation Provision' of the 'Arena Agreement' states:

Non-Participation. During the Term, neither CITY/COUNTY nor any CITY/COUNTY Affiliate shall, without the prior written consent of [Memphis Basketball], design, develop, construct or otherwise

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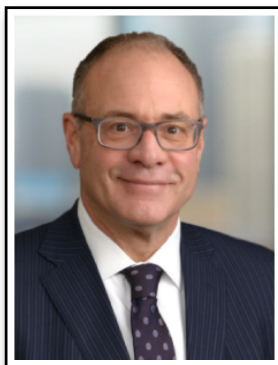

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fund, provide economic or tax benefits or incentives to, or materially participate in the design, development, construction or financing of . . . any new Competing Facility; provided, however, the foregoing provisions shall not be interpreted to prohibit transactions and activities normally and/or routinely engaged in by the (x) planning, building, permitting and engineering departments of CITY/COUNTY in the ordinary course of reviewing and/or approving projects submitted by private developers, or (y) CITY/COUNTY Industrial Development Corporations and/or other CITY/COUNTY Affiliates, the general purpose of which is to encourage private development, in the ordinary course of establishing tax freeze programs, tax incentive programs, PILOT programs and other similar economic programs aimed at encouraging private development.[6]

In addition, the 'Arena Agreement' defines 'Competing Facility' as follows:

Competing Facility means any now existing or new indoor or covered sports or entertainment arena, indoor or covered performance facility or other indoor or covered facility that (i) could compete with the [FedEx Forum] for the booking of any event, or (ii) has or will have a seating capacity of more than 5,000 persons and fewer than 50,000 persons; provided, however, the foregoing provisions shall not apply to any hotel ballrooms, movie theaters or convention and hotel facilities that are not designed or constructed to be able to accommodate or be used as venues for concerts, theatrical shows, public assemblies or sporting events.[7]

After reviewing the language of the 2001 'Arena Agreement', the Economic Development Growth Engine for the City of Memphis and Shelby County decided not to grant Elvis Presley Enterprises, Inc. TIF approval for its new, supplemental project that included the 6,200-seat arena.

Elvis Presley Enterprises, Inc, in November 2017, filed suit against the City of Memphis, Shelby County, and Memphis Basketball, LLC, requesting the court to find on its behalf a declaratory judgment, intentional interference of business relations, together with any and all other injunctive and equitable relief.

The three named defendants moved the court to dismiss the plaintiff's claims. The Chancery Court agreed with the defendants, finding that plaintiff, Elvis Presley Enterprises, Inc. lacked standing because it failed to exhaust all administrative remedies before filing its lawsuit. Subsequent to the Chancery Court's ruling, however, both the Economic Development Growth Engine for the City of Memphis and Shelby County and the County Commission approved Elvis Pressley Enterprises, Inc.'s application for the amended TIF, which included the 6,200-seat arena. This approval was contingent, however, on either a court order or an agreement by the parties to the original 'Arena Agreement' (i.e. The City of Memphis and Memphis Basketball, LLC) that the Elvis Presley Enterprises, Inc. revitalization project did not violate their contract.[8]

As a result of the Economic Development Growth Engine for the City of Memphis and Shelby County's contingent

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Segal McCambridge welcomes
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approval, Elvis Presley Enterprises, Inc., on June 9, 2018, instigated a second lawsuit against the same three defendants, seeking a declaratory judgment that the TIF does not violate the "Arena Agreement" between the City of Memphis and Memphis Basketball. The Chancery Court, upon a motion to dismiss filed by the defendants, again dismissed the plaintiff's lawsuit for a lack of standing. The Court of Appeals affirmed, finding that the second lawsuit filed by Elvis Presley Enterprises, Inc. was barred by the legal concept of res judicata.[9] The Tennessee Supreme Court granted an appeal on this issue.

The doctrine of res judicata is a rule that bars a second suit between the same parties on the same claim with respect to all issues which were, or could have been, litigated in the former suit.[10] (It is a rule of rest, and it promotes finality in litigation, prevents inconsistent or contradictory judgments, conserves judicial resources, and protects litigants from the cost and vexation of multiple lawsuits.) A party asserting a defense of res judicata must demonstrate to the court (1) that the underlying judgment was rendered by a court of competent jurisdiction; (2) that the same parties or their privies were involved in both suits; (3) that the same claim or cause of action was asserted in both suits; and (4) that the underlying judgment was final and on the merits.[11]

The Tennessee Supreme Court determined that the doctrine of res judicata was not applicable to the parties in this matter because the dismissal of the prior lawsuit for failure to exhaust administrative remedies did not constitute an adjudication on the merits. Therefore, since the second suit was not barred by the doctrine of res judicata, the Tennessee Supreme Court remanded the case back to the Court of Appeals for consideration of the standing issue.

As mentioned above, the appeals court found the plaintiffs lacked standing, pursuant to Tenn. Code Ann. § 29-14-107(a) (2012).

The applicable standing analysis had to consider the plaintiffs' relationship to the "Arena Agreement," and the plaintiffs had to show that they were either a party to or a third-party beneficiary of the "Arena Agreement," according to the panel.

"They were not a party to the contract, and their complaint contained no allegation that they were a third-party beneficiary," the panel wrote. "Furthermore, the plaintiffs were not conferred standing via a county resolution. Looking at the plain language of the resolution, it did not create an agency relationship," a requirement for standing.

Elvis Presley Enterprises, Inc. v. City of Memphis; Court of Appeals of Tennessee, At Jackson; No. W2019-00299-COA-R3-CV; 3/23/22

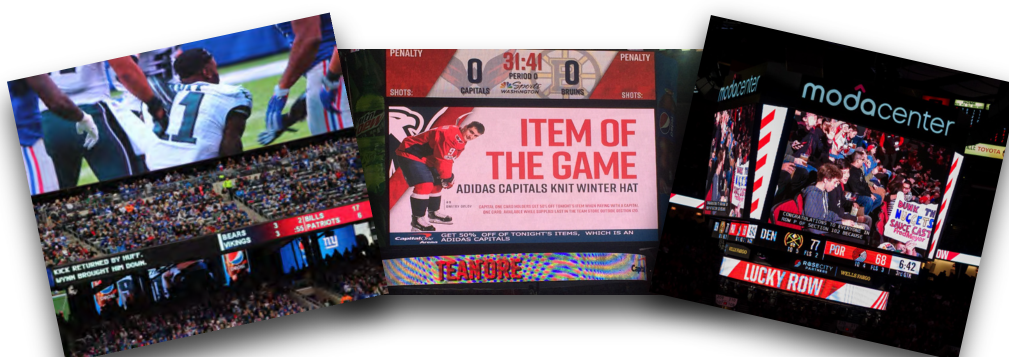
Attorneys of Record: Clarence A. Wilbon and J. Bennett Fox, Jr., Memphis, Tennessee, for the appellants, Elvis Presley Enterprises, Inc.; Guesthouse at Graceland, LLC; and EPPF, LLC.

Jonathan P. Lakey and John J. Cook, Memphis, Tennessee, for the appellee, City of Memphis.

Bruce D. Brooke, Memphis, Tennessee, for the appellee, Shelby County, Tennessee.

David Wade, Clayton C. Purdom, and Rebecca K. Hinds, Memphis, Tennessee, for the appellee, Memphis Basketball, LLC.

Keep Everybody in the Game



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Court Grants Summary Judgement for Amusement Park in Slip and Fall Case

The Supreme Court, Suffolk County has granted summary judgment to the defendant in a slip and fall accident at the Splish Splash at Adventureland water park.

The plaintiff is an adult who stepped into a pool and struck her foot on a suction grate, sustaining a Lisfranc fracture and other injuries.

The suction grate that she struck was a federally mandated device that is required by the Virginia Graeme Baker Pool and Spa Service Act (the "VGBA"). After a child died from an accident whereby she was entrapped under water due to a suction device, Congress enacted the VGBA in response to the accident (and the advocacy of the child's mother). The VGBA's purpose was to enhance the safe use of pools, spas, and hot tubs by mandating equipment like grates for suction devices to prevent entrapment.

In this case, the water park and its experts established that Splish Splash provided the VGBA-mandated suction grates and that there were no defective or dangerous conditions based on any of the theories advanced by plaintiff. Rather, the evidence established that the plaintiff entered the pool by walking through an ADA-compliant ramp and stepping onto a peninsula abutting the pool. The plaintiff fell forward into the water. She did not observe any foreign substances, material or debris that could have caused her to slip and fall and the pool was clean at all times relevant to the alleged accident. The peninsula was also clean and made of slip-resistant material. After the accident, the plaintiff admitted to the aquatics manager that she stepped into the pool, did not use the nearby stairs, and "stepped wrong" into the pool.

The court was not persuaded by the plaintiff's opposition, including the affidavit of a previously undisclosed expert and belated claims that the peninsula was too narrow. The court noted "… even today the plaintiff simply states she sipped without any identifiable condition giving rise to even an inference of negligence on the part of the defendant…" The court determined that plaintiff filed to raise a material question of fact and granted summary judgment, dismissing the negligence action.

The defendant was represented by Antigone Tzakis and Carla Varriale-Barker, of Segal McCambridge. Varriale-Barker is the Chairperson of Segal McCambridge's Sports Recreation & Entertainment Practice Group.

Making Racetrack Noise Bearable with Physics

Although racetracks can be fun for communities, they usually come with very high levels of noise that can sour nearby neighborhoods to the experience.

During the 182nd meeting of the Acoustical Society of America, Bonnie Schnitta, from SoundSense LLC, discussed her efforts to reduce the noise in a Michigan neighborhood from a nearby raceway. The session, "Actions and mathematical modeling that will bring noise levels from a racetrack or raceway to a level the community will accept," took place May 23 at the Sheraton Denver Downtown Hotel.

Raceways can produce noise from many kinds of vehicles, such as race cars, street race cars, racing motorcycles, go-karts, monster trucks, and cheering spectators. Schnitta and her team examined several different types of barriers, including berms, acoustic barriers, or dense foliage, to block that noise from reaching surrounding houses and businesses.

"We have found that using a berm at a safe distance from the raceway track is the most economical method, although an acoustic collapsible barrier works well too," said Schnitta. "It typically takes a 200-foot depth of foliage to equal one acoustic fence or berm."

The team mathematically modeled a Michigan raceway, paying special attention to sections of the track where vehicles typically accelerate, producing the most noise. From there, the sound was mitigated with strategically placed berms. The goal was to reduce the sound heard in the surrounding neighborhood to at most 5 decibels above background levels.

Schnitta said the most effective solution to raceway noise might even be social in nature. The raceway made an agreement with a nearby church to suspend operations during the services in combination with acoustic treatment and said the best strategy is diplomatic with the mathematical-driven solution set used in the discussion.

"I have found that no matter what the noise problem is, if there is a civil conversation between the source of the noise and the receiver, an agreeable outcome comes more quickly," said Schnitta. "Sometimes, a simple offer of free admission to see what all the 'noise' is about can make a difference."

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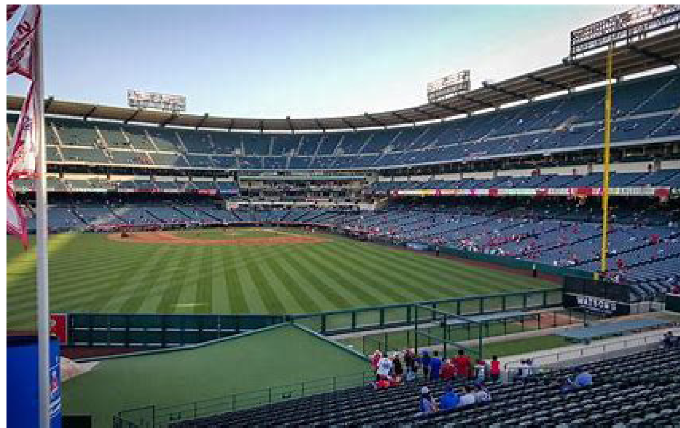
Anaheim City Council Votes to void Angel Stadium of Anaheim Agreement

Anaheim's City Council unanimously voted on May 24to void a 2020 agreement to sell Angel Stadium of Anaheim and development around it.

The vote follows the May 16 notice of a federal investigation into former mayor Harry Sidhu stemming from actions he may have taken related to the stadium site proposal. Sidhu resigned as mayor on May 23. "The stadium proposal was evaluated and approved on its merits," said Mayor Pro Tem Trevor O'Neil, who is handling the duties of mayor per Anaheim's city charter. "However, knowing that there may have been an element of corruption that brought the final product to us, we cannot move forward in good conscience." The action directs the city attorney to immediately void the stadium site sale and notify buyer SRB Management LLC, made up of Angels Baseball owner Arte Moreno and family. Anaheim notified SRB Management of the City Council decision.



"(I)n the best interests of the Angels and the residents of Anaheim, the city believes the (purchase and sale agreement) is void as a matter of law and public policy," the letter reads. "Given these extraordinary and deeply disturbing circumstances, the city requests that SRB and the Angels join with the city in acknowledging that the PSA is void." The letter can be read here. The Council action would also start a legal process that will involve filing a motion for declaratory judgment in Orange County Superior Court based on concerns of conflict of interest and that the transaction was not at arm's length.

The Council action also ends a process that started with 2019 negotiations and resulted in a set of agreements approved in September and October 2020.

The agreements had called for selling the city-owned stadium and 151 acres of land for $320 million, paid partly in cash and partly as affordable housing and a park built on the stadium site.

Updated sale and development agreements, reflecting a now-paused settlement with the state of California related to issues raised about the Surplus Land Act, were expected to go before the City Council in June in what would have been the final step before the close of a stadium site sale.

Based on the City Council's action, the city will no longer take action to sell the stadium and develop the surrounding land as previously approved.

A lease for the Angels to play at Angel Stadium continues through 2029 with three three-year extensions though 2038.

Documents related to the federal investigation can be viewed here.

Black-Owned Bank to Finance Redesign of Baltimore Arena

The National Black Bank Foundation (NBBF) has announced that a Baltimore-based Black-owned bank is participating in the multi-million dollar syndicated loan to reimagine the iconic Baltimore Arena into a world-class sports and entertainment venue.

Harbor Bank of Maryland, an FDIC-designated Minority Depository Institution (MDI) and State of Maryland chartered commercial bank that has provided capital to the Greater Baltimore Market since 1982, will provide financing alongside syndicate leader Trust Bank to Oak View Group (OVG) for its historic renovation of the Arena. OVG, the global venue development, advisory, and investment company for the sports and live entertainment industries, will fund the Arena's total reconstruction cost in exchange for a long-term lease of the facility.

The newly-refreshed Arena will allow Baltimore to compete for more events, driving significant economic activity for the local economy. The project is anticipated to create 500 construction jobs. Committed to prioritizing participation from small, local, and diverse businesses throughout the construction process, OVG has set a goal to award 27% and 10% of construction subcontracts to Minority Business Enterprises (MBE) and Women's Business Enterprises (WBE), respectively.

"It's important to OVG that we continue to find equitable ways to fund our projects with diverse partners from the communities we do business in," said Francesca Bodie, president of business development, Oak View Group. "It's our hope this level of economic engagement helps further close the racial wealth gap while strengthening, supporting, and building up the community so there are greater opportunities for all."

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Mother of 6-Year-Old Hit by Errant Baseball Sues LA Angels

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have had more netting along the side of the field. Further, it suggests players shouldn't throw balls during warmups in areas where spectators have been encouraged to come early to meet players, while unwittingly placing themselves in danger.

"MLB has had a policy for years to install more on the field screening during batting practice as a way to reduce injuries to both players and fans," noted Gil Fried, a University of West Florida sports law professor, who is also an expert in such matters. "This could easily be minimized now with more screen installed in most stadiums and having players throw towards the outfield wall or towards the infield rather than towards the stands."

Some of Lakers' COVID-Related Insurance Claims Are Dismissed

Continued from page 1

In March 2020 some of the Lakers' tested positive for COVID-19. On March 11, the NBA suspended its season due to COVID-19. Five days later the Los Angeles Public Health Officer prohibited gatherings of more than 50 people. On March 19, Governor Newsom issued an order "which required Californians to shelter at home." Violations were a misdemeanor.

As a result of Staples' closure, the Lakers claimed that "they lost tens of millions of dollars in revenue." They also alleged that the "presence of Virus particles on fixtures and building systems caused physical alterations to the Covered Properties." This happened when "Virus particles landed on, and adhered to, surfaces such as fabric seats, elevator buttons, and air ducts, causing a physical and chemical reaction that transformed the surfaces into vectors of viral spread called fomites."

The Lakers consequently upgraded the

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Covered Properties by adding "new air filters, touchless light switches, toilets, and sinks; sleeves or coasting for high-touch surfaces; and plexiglass dividers" (Id. at 3). The Lakers alleged that the Covered Properties "were not usable until those upgrades were completed," and, the five Metro stations fans use to go to Staples, also had physical loss or damage due to COVID-19.

In June 2020 the Los Angeles Heath Officer allowed professional sports teams to reopen their facilities for training and events. Spectators were still banned. The Lakers consulted with the Health Officer and "made extensive and costly changes to procedures and protocols that enabled them to resume training." In April 2021, spectators were again allowed to attend live events.

The Lakers sued for declaratory judgment, breach of contract, a "Civil Authority" claim, and breach of the covenant of good faith and fair dealing on March 15, 2021. The Lakers are represented by Proskauer Rose's New York and Los Angeles offices. Federal responded with a motion to dismiss the complaint. It is represented by Daniel Petrocelli at O'Melveny and Myers. In August 2021 the Court granted the motion to dismiss without prejudice, "after concluding that the Lakers' allegations of direct physical loss or damages at the Covered Properties were mere legal conclusions couched as factual allegations, and therefore, were insufficient to state a claim." The Lakers filed their First Amended Complaint ("FAC") on October 6, 2021. It had the same claims but added factual allegations. It also relied on a recent case from the California Court of Appeal. Federal responded with another motion to dismiss.

The Court's Statement of the Law

Senior Judge Terry Hatter began by stating that a plaintiff "must allege enough facts to allow the Court to draw a reasonable inference that the defendant is liable for the misconduct alleged." It must "accept all allegations" in the complaint as true "and draw all reasonable inferences in the plaintiff's favor" but it is "not bound to accept as true a legal conclusion couched as a factual allegation."

The Lakers were required to "establish the validity of its three insurance claims." The parties agreed that the Lakers' claims had to have "a direct physical loss or damage to the property" (Id. at 3-4), and it was the Lakers' burden to establish that. The policy did not "define direct physical loss or damage" so the Court construed those terms, applying the normal rules of contractual interpretation. The Court's goal is to give effect to the parties' mutual intent, while using the contractual terms' "ordinary and popular meaning." If the terms are ambiguous, the Court interprets the terms "to protect the insured's objectively reasonable expectations" (Id. at 4).

A recent California Court of Appeal decision "is squarely on point here." That opinion used an online dictionary that defined "physical" as "having material existence; perceptible especially through the senses and subject to the laws of nature."

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That dictionary defined the term "direct" as "characterized by close logical, casual, or consequential relationship." It defined "damage" as "the loss or harm resulting from injury to the property." A plaintiff making such claims "must plead a casual connection between any physical alteration to that property, and any detrimental economic impact between that plaintiff claimed to have suffered."

Property Damage Claim

The issue was "whether the Virus caused direct physical damage or loss" to the Covered Properties (Id. at 5). The Lakers alleged that the Virus physically "altered surfaces at the Covered Properties by changing their chemical and physical properties" that in turn "required cleaning or replacement" before such properties were safe again. The Lakers seek "coverage for the cost of cleaning or replacing those allegedly damaged surfaces." Since the Lakers alleged physical alteration and that those alterations caused detrimental economic impact, the Court found that the Lakers had stated a claim for declaratory judgment and breach of contract.

Business Interruption Claim

This claim "depends on whether the Virus caused direct physical damage or loss that, in turn, caused the interruption of its business operations." If so, the policy required Federal to "pay for the actual business income loss (and extra expenses] you incur due to the actual impairment of your operations… during the period of restoration." Federal asserted that the policy did not apply because the Virus did not cause "impairment to the property."

The FAC stated that Staples was originally closed "due to a litany of blanket NBA and government measures." The Lakers cleaned Staples, but it was closed by government order and despite the cleaning, it "still could not have reopened until the State of California allowed it to reopen on April 15, 2021" (Id. at 6). The Lakers argued that it was the physical alterations from the Virus that brought on those orders, but those orders were not limited to Staples, but "closed everything in the City of Los Angeles save for a few exempt essential and emergency services."

Furthermore, several of those orders stated that their purpose was "to stem or slow the spread of COVID-19" within Los Angeles. The stated goal was "the preservation public health, not private property." Consequently, "there is no casual chain connecting the Virus-related physical alteration" at the Covered Properties "to the properties' closure." The closure originated with government orders and "not from any alterations to the Covered Properties." Had the virus never made it to Staples it nevertheless would have been closed due to government order. Thus, the Lakers "did not and cannot, plausibly plead that the interruption of their business operations was due to direct physical damage or loss" at their properties, so the Lakers "did not, and cannot, state a claim for declaratory judgment and breach of contract relate to the Business Interruption Clause" (Id. at 6-7).

Civil Authority Claim

This claim required the Lakers to plead that its business operations were "interrupted because nearby Metro stations experienced direct physical damage and loss" and were consequently closed by a civil authority (Id. at 7). The property had to be within one mile of the Lakers' Covered Properties. The government orders that closed the relevant Los Angeles Metro stations "were aimed at limiting the viral spread in the community, not at mitigating property damage at a specific facility." The order stated that "it was prompted by Virus-related property damage, it applied to the entire City of Los Angeles" and therefore would have closed the relevant Metro stations "even if the Virus had never been present there." The Court "cannot assume that the Stay at Home Order was issued in response to direct physical loss or damage at the Metro stations." The Lakers "cannot plausibly plead that the interruption of their business operations" was due to physical damage or loss at those stations. Consequently, "the Lakers did not, and cannot, state a claim for declaratory judgment and breach of contract related to the Civil Authority Clause."

Bad Faith Claim

The implied covenant of good faith and fair dealing "obligates an insurer to, inter alia, make a thorough investigation of the insured's claim." The Lakers "alleged that Federal sent a form denial letter instead of thoroughly investigating the tendered claim" (Id. at 8). For the Property Damage claim, the Lakers stated a claim for breach of the covenant. However, with the Business Interruption and Civil Authority claims, "because Federal rightfully denied those claims" it "did not act in bad faith."

The Court's Conclusion

The Court granted the motion, "in part, with prejudice, to the extent that the claims are based on the Business Interruption Clause and Civil Authority Clause of the Policy." It denied the motion "to the extent claims are based on the Property Damage Clause of the Policy" and the related bad faith claim (Id.).

Conclusion

This scenario could be repeated in jurisdictions across the country as professional teams and college athletic departments seek to recoup billions of dollars in losses brought on by COVID-19. Insurers should carefully read the relevant policies before summarily rejecting claims to avoid facing tort claims for breach of the covenant of good faith and fair dealing. Insureds should also read the policies carefully before filing baseless claims that lead to further losses, including the defendant's court costs.

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Beyond the Binary: The Non-Binary Athlete

Continued from page 2

binary people face is the current binary sports model and subsequent sport systems. By default, this model is designed to exclude non-binary athletes entirely from the get go, making it the core issue we face in sports and society at large. As a result, the current sports model perpetuates a myriad of other unique challenges for non-binary folks who are trying to participate in and navigate an industry not designed for us in the first place; or retrofitted to fit us as an afterthought. Challenges can range from fundamental barriers, such as the lack of entry and/or access to sports in accordance to our gender identity, to more nuanced exclusions such as the lack of proper policies, facilities, and/or safety measures in place to support full participation.

To give a specific example, I will share an experience that is uniquely guaranteed to all non-binary athletes trying to engage with a binary industry and world. Before participation even begins, non-binary athletes are faced with the very real, personal, and vulnerable ultimatum of how and/or if participation will occur. The how — enroll as one of two gender options you are not, thus forcing problematic and unnatural conformity as a requirement for admission — or do not participate, which is the if. Both options are difficult to maneuver, potentially detrimental in either direction, and categorically alienating; especially when asked upon a child which, statically, is when most people enter sports. It is important to recognize that when non-binary people do enter sports, they are often doing so as the most vulnerable group yet discernibly the most courageous.

Q: What are some examples stakeholders can implement to foster a truly inclusive environment for non-binary people?

A: Invest in education - I talk more about this later, but education is the most important step, and should be the first step, in fostering a truly inclusive environment.

Mentality before motion - Sustainable inclusion is a mindset above anything else, and starts with developing integrative thinking before implementing action. One key to shifting the mentality is to embed inclusivity as a core value of "who we are," which automatically centralizes inclusivity as "how we operate." Again, approaching inclusivity from beginning rather than retrofitting.

Community Engagement - Actively seek and/or strengthen your relationships with the gender diverse community, and the community at large. Many clients are surprised to learn of thriving gender diverse clubs, groups, teams, etc. already existing within their community waiting to be tapped. Reach out to these groups to let them know your inclusivity efforts, invite them to participate in your events, and connect with them to learn about best practices and how to better serve.

Diversify your stakeholders - Have non-binary representation in your leadership, especially when it comes to critical decision-making that will impact the non-binary community. Diversity not only showcases that your environment truly is inclusive from the top down, but also counteracts any propensities to Affinity Bias and Confirmation Bias.

Provide gender neutral facilities and/or spaces - This enables and assures people of all gender identities with the ability to occupy spaces equally, and subsequently fosters an overall sense of safety and belonging for people of all gender identities.

Develop nondiscrimination policies and guidelines - This can range from implementing more inclusive HR and hiring practices, to incorporating protective measures around proper pronoun usage and gender identity, to developing more inclusive communication (both internal and external facing), to having clear guidelines on safety and confidentiality.

Q: Why does this sort of attention to creating an inclusive environment for non-binary athletes matter in the sports industry?

A: It matters because we matter. Put simply, we exist and exclusion is no longer the solution. Everyone deserves a right to play but non-binary athletes cannot play as themselves in an industry that has not changed for generations. The binary sports model is outdated and does not support modern times nor the next generation of gender diverse athletes who will be occupying sports and ultimately become key stakeholders. If unwilling to change, then at best the industry falls behind, and at worst perpetuates a dangerous environment for anyone who challenges the status quo.

It honestly boils down to if you do or do not believe that we exist; that we deserve our rights. It is that simple. And given the current socio-political climate,

the time for individual and collective action has never been greater.

Q: Why now? Is there a "zeitgeist" moment whereby, legally and culturally, LGTBQIA+ athletes seem to have become such a focus?

A: As we know, LGBTQIA+ athletes have been advocating for equal rights, representation, and inclusion for decades. I, myself, have been advocating specifically for non-binary inclusion for over a decade — the majority of those years have fallen on deaf ears. It is only in the past few years that our culture and society have taken extra interest and stock in what LGBTQIA+ athletes have been fighting for all this time. On both sides of the coin may I add.

At this moment, we have absolutely reached a legal and political zeitgeist. The intense political and legal focus on LGBTQIA+ athletes is a direct mirror of the recent rise of LGBTQIA+ people and activism into mainstream culture and society, as well as the collective power of our community and allies. It is no mystery. As a result of LBGTQIA+ progress, we are seeing transgender and non-binary rights being used as political wedge juxtaposed to progressive societal and cultural shifts beyond the binary.

No matter which way you slice it, we have surpassed the point of "if" we exist to now "how" do we exist; the most significant question in my opinion.

Q: Can you highlight some inclusion success stories with organizations and stakeholders you have worked with?

A: Working alongside stakeholders, there are now over 1,500 running races nationwide that offer non-binary registration and participation; with more and more races extending their efforts to build out equal prize money, top finisher awards, and other integrative offerings. This is a truly remarkable success considering that just a few years ago there were zero races offering non-binary participation. There is a massive groundswell and appetite for inclusion in the running world specifically.

I am particularly proud of my partnership with New York Road Runners (NYRR), and the organization's commitment to full-scale non-binary inclusion. For the past year, we have been working together on the implementation of a non-binary gender identification division for all NYRR races, including the New York City Marathon—making it the first major marathon to enact a non-binary division all the way up to the elite level. This work is not only leaving an imprint on **the sports landscape but is also setting th**e gold standard for others to follow.

Q: How are non-binary athletes impacted by the wave of anti-trans legislation we have seen proliferating in the U.S.?

A: Sports are a microcosm of a much larger societal paradigm that is happening and, to be clear, the wave of anti-trans bills in youth sports is not just about sports; for instance, the numerous proposed and/or passed laws banning transgender youth from access to life-saving healthcare. Sports are the Trojan horse for certain lawmakers' attempt to systemically disenfranchise and/or criminalize all non-cisgender people (and in some cases families, doctors, and allies too) through unconstitutional legislation far beyond the playing field. As non-binary athletes who fall into the non-cisgender umbrella, we are deeply and directly impacted by the implications of these bills on and off the field.

Q: How important a role does education play-can you suggest some resources?

A: Education is the first and most important step to driving integrative and sustainable inclusion. I would go so far as saying that without a foundation of basic education, well-intended inclusivity efforts will collapse at some point. Invest in education because it will empower you, inform the work, and illuminate long term solutions.

Education can take many forms. You can bring on an expert like myself and/or participate in topic-based training sessions.

Here are a few good resources to explore:

Athlete Ally
transathlete.com
Lambda Legal
Human Rights Campaign

Relevance to Sports Facilities

Carla Varriale-Barker offered the following in terms of relevance to sports facilities: "A sports facility needs to consider people who identify as nonbinary in order to create a truly inclusive environment aside from potential legal ramifications, a sports facility should be mindful of its customer base. Last year, The Williams Institute released a study that more than 1.2 million people identify as nonbinary, particularly young people. That is not an insignificant number of potential participants and patrons. It makes sense to create a respectful and welcoming environment from a legal point of view."

Carla Varriale-Barker(she/her) is the Chairperson of Segal McCambridge's Sports Recreation & Entertainment Practice Group. She is also an adjunct professor at Columbia University's Sports Management Program, where she teaches Sports Law and Ethics. Carla's litigation practice includes the representation of athletes and the defense of sexual abuse and sexual misconduct matters. She is also a member of the firm's Diversity Equity and Inclusion Committee and also serves on the Strategic Planning Committee. She can be reached at cvarriale@smsm.com

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