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THE ANTI-CHEATING MOVEMENT: RIDDING ESPORTS OF CHEATS

ERICK ORANTES, AALOK SHARMA AND HABIB ILAHI

Over a hundred years ago, several Chicago White Sox baseball players were credibly accused of tanking against the Cincinnati Reds in the 1919 World Series. Allegedly, a criminal syndicate led by mobster Arnold Rothstein paid those players to deliberately throw the games. A criminal trial later took place; however, all players were acquitted of all charges. Nonetheless, the scandal, which later became known as the Black Sox Scandal, rocked professional baseball for decades.

More recently, some esports titles have encountered their own match-fixing scandals which may become synonymous with the Black Sox.¹ With millions of dollars in wagers in legal and illegal gambling marketplaces, it should come as no surprise that some esports matches are thrown or fixed. Recently, the FBI has conducted probes into Counter Strike Global Offensive (CSGO) teams and tournaments for purported bribery, match fixing and other cheating. Similar to the Black Sox Scandal, criminal syndicates approach gamers to purposefully throw their match for the benefit of the syndicate. The investigation into cheating and fixing in CSGO is ongoing. According to media reports, the illegal activity between syndicates and some players has been going on for quite some time. This type of match fixing results in

considerable harm to game publishers, tournament organizers, leagues, teams, players, coaches, fans, advertisers and sportsbooks.

Since some esports tournaments take place across the globe, criminal enforcement can become complicated. Certainly, global competitions raise the issue of jurisdiction and conflicts of laws. However, for cheating that occurs within the United States, some laws may be used to ferret out cheating in esports. For example, the Sports Bribery Act of 1964 provides for criminal penalties “for any person who carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest.”² Violations of the Sports Bribery Act permit fines and imprisonment for up to five years. To date, the Sports Bribery Act has been used very little by prosecutors. There are less than two dozen reported decisions, with the majority of those cases involving manipulated results in horse racing. Besides federal laws, state law can be used to prosecute criminal conduct. As an example, New Jersey law prohibits “rigging publicly exhibited contest[s].” Under that law, it is a crime to tamper with a sporting event,

including the solicitation or acceptance of benefits for rigging an event. The ultimate goal of this law is to insure integrity so that the outcome is not affected by nefarious conduct.

Increasingly, some believe that recently passed legislation, titled the Rodchenkov Anti-Doping Act of 2019, may assist in the crackdown on cheating in esports. The act was passed to provide criminal enforcement mechanisms to counter cheating or doping. This act was created as a result of the state-sponsored doping scheme employed by the Russian Olympic Committee during the 2014 Olympic Winter Games held in Sochi, Russia. Unlike the Sports Bribery Act or other federal and state laws, the Rodchenkov Act specifically provides for extraterritorial enforcement. Thus, global esports competitions would not escape enforcement by federal prosecutors. Under the Rodchenkov Act, it is unlawful for any person to use a “prohibited method” or “prohibited substance” in any international sports competition. However, the term “prohibited method” relates solely to methods or practices which involve illegal doping. Accordingly, the Rodchenkov Act could be used to crackdown on illegal doping in esports, but it would provide little assistance in rooting out illegal match fixing.

Corruption, match fixing, bribery, and other misconduct has existed in traditional stick-and-ball sports for centuries. Given the meteoric growth in the esports marketplace, it was only a matter of time until this industry faced similar misconduct. While there are a number of tools available to prosecutors to seek out corruption, the most effective methods involve self-governance, and may include rigorous investigations by outside counsel. Due to the irreparable harm that teams and organizations face with this growing threat, the esports marketplace must take protective measures itself and rid itself of cheating.

¹ Other than organized match fixing, esports organizations are focused on eradicating corruption and doping. This conduct is being monitored by some game publishers, governmental authorities, and third parties such as Esports Integrity Coalition (ESIC).

² It's unclear whether the Sports Bribery Act applies to esports. The statute only applies to "sporting contests," which means "a contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence."

ESPORTS TEAMS FACE ENEMY FIRE FROM STATE TALENT AGENCY ACTS

ETHAN SANDERS AND STEVE COSENTINO, CIPP

For decades, there has been an ongoing controversy about whether esports are sports. While some consider this sort of labeling issue trivial, it is critically important in the legal context. Classification rings especially true in the application of the labor and employment laws, as was illustrated in a case involving a prominent gamer, Turner "Tfue" Tenney, and his employer, Faze Clan.

In the *Tenney v. Faze Clan* case, Tfue entered into a gamer agreement with Faze. The agreement required Tfue to train with Faze and to engage in promotional, marketing or social media activities. In exchange for these services, Faze provided Tfue with a monthly fee, a share of income from tournaments, and revenue from merchandise, brand deals or other

activities. However, the relationship between Faze and Tfue quickly soured. Tfue filed multiple complaints alleging that the agreement he entered into with Faze was oppressive, unfair and extraordinarily one-sided.

The legal dispute between Tfue and Faze Clan evolved into litigation across multiple venues in two states. One of Tfue's claims centered around the California Talent Agency Act (TAA).¹ The TAA was passed by the California legislature in 1978 with the goal to squash exploitation of artists by their representatives. The TAA provides for a broad regulatory framework that requires talent agents to obtain an agency license from the California Labor Commission before providing their services.² Talent agents are defined as individuals or corporations

involved in "procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists".³ Under the TAA, "artists" include actors, actresses and "other artists and persons rendering professional services in motion picture, theatrical, radio, television and **other entertainment enterprises**." (emphasis added). Unlicensed talent agencies run the risk of having their contracts voided and being forced to pay back commissions. Importantly, the TAA "regulates conduct, not labels; it is the act of procuring (or soliciting), not the title of one's business, that qualifies one as a talent agent and subjects one to the [TAA] license and related requirements." In addition, application of the TAA could raise fiduciary duty claims.⁴

Esports organizations create a vast portion of their revenue through sponsorship activations and/or by streaming content. In the case of this litigation, Tfue alleged that Faze had procured sponsorship opportunities, and the TAA applied because Tfue was engaged in “other entertainment enterprises.” More specifically, Tfue alleged that Faze “acted as [his] agent in sourcing and negotiating sponsorship deals that would offer [his] services.” If true, the TAA required Faze to obtain a talent agency license. Furthermore, if Faze was acting as Tfue’s agent, then it owed duties of loyalty to Tfue, which included acting in the best interests of Tfue. However, if Tfue was not engaged in “other entertainment enterprises,” because Faze was a sports team, then the TAA would not apply.⁵

The distinction on whether Faze or other esports organizations are sports teams has varying implications. For example, although the Federal Wire Act applies to sports wagering, it

does not apply to other interstate gaming per the First Circuit’s holding in *New Hampshire Lottery Commission v. Rosen*.⁶ However, if esports are not a sport, then gamers and team members may not qualify for P-1 immigration visas, which are reserved for professional athletes.

The litigation between Tfue and Faze ultimately settled without an adjudication of Tfue’s claims under the TAA.⁷ However, this litigation did put esports teams and organizations on notice about properly contracting with and for their gamers. It is important to note that other states maintain similar laws to the California TAA. For example, New York requires agencies to maintain and procure a license when soliciting, recruiting or supplying an employee for employment. In addition, Florida requires agencies to obtain a license when they attempt to procure engagements for individuals in the “production of television, radio, or motion pictures...”

Esports player agreements generally cover a wide variety of activities, from practice requirements to prize money splits. Esports organizations increasingly include streamers who do not compete in esports events, and whose primary relationship with the organization, and principal revenue stream, is through sponsorships and promotions. If a player agreement includes performance in commercial advertisements as an individual and not as a part of a team, as alleged by Tfue, those activities would seem to fall within the scope of talent agency laws. Regardless of the result in the dispute between Tfue and FazeClan, esports organizations should take note of what could very well be an opening salvo in labor disputes with players. Accordingly, teams should carefully prepare and review agreements to avoid costly litigation under state specific laws.

¹ While this article is limited to the TAA, another California labor statute is critically important to esports organizations: the Miller-Ayala Athlete Agents Act (MAA). Under the MAA, unlicensed agents that deal with athletes may also have their contracts voided. While the TAA is limited to talent agencies and artists, the MAA is focused on sports agents and athletes. Under the MAA, sports teams do not need to be licensed if they are negotiating on behalf of themselves.

² The California Labor Commission has exclusive jurisdiction to decide cases brought under the TAA.

³ It is well established that “talent agents act as intermediaries between the buyers and sellers of talent.”

⁴ The TAA does not provide for a fiduciary duty claim; however, California courts and administrative bodies have implied one exists. See *Jones v. William Morris Agency*, No. TAC 16396, 2012 WL 5359503 (discussing “the agent assumes a fiduciary duty to act loyally for the principals’ benefit in all matters connected with the agency relationship.”)

⁵ However, as noted *supra*, if the TAA does not apply, then it’s possible that the MAA applies, which contains similar provisions, penalties, and fines for violations.

⁶ *New Hampshire Lottery Comm’n v. Rosen*, 986 F.3d 38, 62 (1st Cir. 2021) (“the Wire Act applies only to interstate wire communications related to sporting events or contests”).

⁷ In a multijurisdictional wrinkle, the California Superior Court ruled that because of a choice of law provision in the gamer agreement, the merits of the lawsuit were required to be heard in a New York Court. However, the Court also held that Tfue could not waive his rights under the TAA, and that any further proceedings in New York relating to the TAA would likely need to be determined under California law.

A DOLLAR AND A DREAM: STUDENT-ATHLETE COMPENSATION IN THE AFTERMATH OF U.S. SUPREME COURT'S *ALSTON* DECISION

NICCI WARR AND JUDITH ARAUJO

Since 2009, the National Collegiate Athletic Association (NCAA) has faced numerous lawsuits from student-athletes alleging that it unlawfully restrained trade by rules on compensating student-athletes. The latest ruling in *NCAA v. Alston*, however, has served as the most consequential ruling to the NCAA's amateurism model and resulted in a monumental shift in the opportunities for compensation for student-athletes.

THE O'BANNON DECISION LAID GROUNDWORK FOR SUBJECTING NCAA RULES TO ANTITRUST LAWS

In 2009, former University of California, Los Angeles (UCLA) basketball star Edward O'Bannon sued the NCAA and the Collegiate Licensing Company. The crux of O'Bannon's complaint was that the NCAA's amateurism rules, which disallowed O'Bannon from controlling his name, image and likeness (NIL), amounted to a violation of antitrust law. *O'Bannon v. NCAA*, 802 F.3d 1049, 1058 (9th Cir. 2015). After a fourteen-day bench trial, the court agreed that the NCAA behaved as a monopsony, in that there is only one buyer (the NCAA) for a particular set of goods (the labor and NIL), and that the colleges agree to set the price for those goods at \$0.

Id. Analyzing the NCAA's conduct under the rule of reason,¹ the court found that the NCAA had engaged in anticompetitive conduct that was subject to antitrust law. *Id.* at 1079. To remedy this, the court found that the NCAA member schools could offer additional award grants up to the full cost of attendance.² *Id.* The court, however, did not believe that payments "untethered to educational expenses" were permissible, as those rules were vital to the NCAA's amateurism model. *Id.* at 1078-79.

THE ALSTON DECISION DEALS SERIOUS BLOW TO AMATEURISM RULES

After the Ninth Circuit's ruling in *O'Bannon*, several lawsuits arose that challenged the NCAA's amateurism model; these lawsuits were consolidated into *NCAA v. Alston*, 141 S.Ct. 2141 (2021). Fundamentally, the student-athletes in *Alston* – current and former student-athletes who played football and basketball – challenged NCAA rules limiting education-related benefits as violating antitrust law, namely, Section 1 of the Sherman Act. *Id.* at 2147. Ultimately, the Court concluded that these NCAA rules were an unreasonable restraint of trade and suggested other alternatives that would preserve the NCAA's goals of maintaining

amateurism. These less restrictive alternatives included (1) allowing the NCAA to continue to limit grant-in-aid to the full cost of attendance; (2) allowing the NCAA to continue to limit compensation and benefits unrelated to education; but (3) enjoining the NCAA limits on compensation and benefits related to education for student-athletes playing football or basketball at Division 1 schools. *Id.* at 2153, 2164-65. The Court noted that this included "allowing schools to offer scholarships for 'graduate degrees' or 'vocational school' and to pay for things like 'computers' and 'tutoring.'" *Id.* at 2165. The Court also invited the NCAA to designate what constitutes compensation or benefits "related to education." *Id.*

The unanimous (9-0) decision, authored by Justice Gorsuch, focused on the rules and analysis applied by the district court in rejecting the NCAA's cap on education-related benefits. The student-athletes did not renew their challenge to NCAA rules limiting non-education-related benefits, which was therefore not examined. *Id.* at 2154. The Court affirmed the district court's subsection of the NCAA's compensation restrictions to antitrust scrutiny under a rule of reason test. *Id.* at 2155. The Court rejected the NCAA's assertion that the lower courts should have applied an extremely

deferential standard to the NCAA as a joint venture. *Id.* Skeptical of that assertion, but assuming it nonetheless, the court found that the monopoly power wielded by the NCAA merited a standard rule of reason, fact-specific analysis. *Id.* The Court then rejected the NCAA's assertion that *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), expressly permitted the NCAA's compensation restrictions, finding the relied-upon language to be non-binding dicta. *Id.* at 2167. Although the NCAA stressed that, as a "non-commercial" entity focused on furthering the "societally important non-commercial objective of 'higher education,'" it should receive a special dispensation from antitrust law, the Court rejected this notion and directed the NCAA to Congress with such a request. *Id.* at 2158-59.

Regarding the application of the rule of reason test, the Court held that the NCAA's claim—that the lower courts had improperly required the NCAA to show that its rules constituted the "least restrictive means" when evaluating compensation restrictions—was meritless and that the lower court had only held the restrictions unlawful after finding them "patently and inexplicitly stricter than is necessary." *Id.* at 2162. The NCAA further contended that the lower courts should have deferred to its definition of amateurism instead of impermissibly redefining it. *Id.* at 2162-63. The Court responded by stating that "a party can[not] declare a restraint 'immune from § 1 scrutiny' by relabeling a restraint as a product feature." *Id.* at 2163. While the Court did generally

agree with the NCAA's concern about lower court action inadvertently hindering competition, as opposed to fostering it, it ultimately found that the district court had appropriately weighed this concern when drafting its injunction. *Id.* Given the continued leeway afforded to the NCAA through the district court's injunction, the Court affirmed the lower court's action to achieve the same pro-competitive benefits using substantiality less restrictive alternatives. *Id.* at 2164-65.

Justice Kavanaugh's concurring opinion took things a step further, finding that the NCAA's other, unchallenged rules governing student-athlete compensation would also very likely be found to violate the Sherman Act. *Id.* at 2167. Kavanaugh poignantly attacked the NCAA's primary assertion that the allure of collegiate athletics is that the athletes are unpaid amateurs, and changing that dynamic would diminish the product. *Id.* Instead, Kavanaugh equated the argument to: restaurant owners cutting the pay of chefs "on the theory that 'customers prefer' to eat from low-paid cooks;" law firms conspiring to limit "lawyers' salaries in the name of providing legal services out of a 'love of the law;'" hospitals capping "nurses' income to create a 'purer' form of helping the sick;" news organizations "join[ing] forces to curtail pay to reporters to preserve a 'tradition' of public-minded journalism;" and movie studios slashing "benefits to camera crews to kindle a 'spirit of amateurism' in Hollywood." *Id.* at 2167.

Although Kavanaugh expressed skepticism about the lawfulness of

the remaining NCAA compensation restrictions, he also raised some difficult questions should courts strike down these other rules. *Id.* at 2168. How would such a shift affect non-revenue raising sports? Could some sports secure compensation while others are excluded? How would any compensation regime comply with Title IX? Could a salary cap be instituted to preserve competitive balance? Kavanaugh concluded by acknowledging the important place that collegiate sports have come to occupy within our society and suggests Congress take up reforming antitrust laws or that the NCAA and the student-athletes enter into a collective bargaining agreement similar to those existing among professional athletes and their respective leagues. *Id.* at 2168-69.

THE NCAA RESPONDS TO MOUNTING PRESSURE BY REVISING NAME, IMAGE, AND LIKENESS POLICY

On June 30, 2021, nine days after the *Alston* decision was issued and in light of efforts in several states to enact student-athlete NIL laws, the NCAA adopted an interim policy permitting student-athletes to benefit from their NIL, which went into effect on July 1, 2021. Under this policy, all student-athletes can take advantage of their NIL, so long as their activities are consistent with the laws of the state where their respective schools are located. To this end, student-athletes are also allowed to engage professional services providers for NIL activities. The NCAA clarified that



student-athletes must report any NIL activities to their schools and that the NCAA rules related to pay-to-play and improper recruiting inducements remain in place.

This interim NIL policy contemplates that the NCAA will work with Congress to enact a federal law related to student-athletes and their NIL. In allowing student-athletes to be compensated for their NIL, the NCAA has deviated sharply from its prior views on amateurism, which were met with increasing disfavor in legislatures and courts. Unsurprisingly, schools, students, and others in the market immediately started to capitalize on these new opportunities. Still, as Justice Kavanaugh hinted in his *Alston* concurrence, there are many lingering questions, and the short- and long-term effects of compensating certain student-athletes remain to be seen.

¹ The rule of reason is a three-step test which requires: (1) plaintiff to prove that there is a restraint that produces an anticompetitive effect in a relevant market; (2) defendant to show evidence of the procompetitive effects of the restraint; and (3) plaintiff to show less restrictive means for achieving the legitimate objectives.

² In 2014, the NCAA amended its bylaws to permit the largest schools (i.e., the "Power Five") to offer grant-in-aid up to the total cost of attendance at each school, including tuition, fees, room and board, books, and other related expenses.

THE LINE UP

01

\$200M. As further proof that biometric data markets will continue to grow, human performance company WHOOP announced that it had raised \$200 million in a Series F round with a company valuation at \$3.6 billion. WHOOP plans to invest in additional research and development into future wearable technologies.

In addition, WHOOP disclosed that it would extend its services “to a greater audience, taking fan and athlete engagement to a new level through biometric data visualization.” In previous issues of *At the Corners*, we have noted that biometric privacy statutes may impose regulatory hurdles that could impede growth as biometric data companies seek to monetize data.

02

\$450M. In 2013, Orlando was awarded an MLS expansion team for \$70 million. That team later became

Orlando FC, and was part of a portfolio of sports properties owned by Flávio Augusto. Eight years later, the Wilf family purchased that entire portfolio for a rumored sum of \$400 to \$450 million. As part of the sale, the Wilfs also acquired the women’s Orlando Pride, Exploria Stadium, and an academy system. The price reflects the burgeoning valuation of MLS clubs, which includes the recent purchase price of \$325 million spent by David Tepper for Charlotte FC.

04

20 Licenses. On April 15, Governor Doug Ducey of Arizona signed into law House Bill 2772, which approved

electronic keno, mobile games, fantasy sports wagering and sports wagering. Now, however, the Yavapai Prescott tribe has filed suit in state court seeking to restrain and enjoin the new legislation. The litigation, if successful, would potentially halt legalized sports wagering in the Grand Canyon State. The crux of the Tribe’s lawsuit deals with the number of licenses available for sports wagering. Under HB 2772, 10 licenses have been allocated for all professional sports franchises, yet only 10 licenses have been set aside for tribal entities. While equitable on its face (i.e., 20 licenses split 50/50), the tribes allege that there are 21 recognized tribes, and therefore tribal entities have less than a 50% chance of successfully obtaining a sports wagering license. The ongoing litigation is demonstrative of the complexities of expanding sports wagering, especially in those jurisdictions with tribal casinos.

03

3 x 3.5 inches. During the 2022-23 season, NHL clubs will be able to partner

with advertisers by displaying logos on jersey patches, measuring 3 by 3.5 inches. The location of the logo will be decided by the team. Displaying logo patches is not new to the sports industry. Last year, NHL teams began offering space to advertisers on player helmets. Historically, the NBA has offered jersey patches to advertisers since the 2016 season. It is estimated that the NBA program raised over \$150 in revenue since that time. NBA teams receive anywhere between \$5M to \$20M per year depending on the team.

05

30. By the end of 2023, there are expected to be 30 teams in Major League Soccer. However,

there is uncertainty about the location of the 30th team. It has long been expected that Sacramento FC would be granted rights to operate a MLS franchise in Northern California. That opportunity seems to be in doubt as the primary investor, Ron Burkle, has allegedly withdrawn from a group of investors. Burkle, who co-owns part of the Pittsburgh Penguins, has been sued by M.A. Mortenson and CAA Icon for unpaid fees in anticipation of constructing a new stadium. The lawsuit details the challenges in MLS’s goal in building soccer-specific stadiums for new franchises. It is expected that the ongoing litigation may jeopardize whether professional soccer lands in Sacramento. MLS is looking at other opportunities, which include Las Vegas.

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