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MORALITY CLAUSES IN CONTRACTS ARE ESCAPE HATCHES FOR STREAMING SPONSORS

AALOK SHARMA

To the surprise of viewers and fans, while livestreaming Call of Duty on Twitch, Miami Heat Center Meyers Leonard made an anti-Semitic slur and used vulgar language, and video of Leonard making these comments on his livestream went viral. Leonard was disciplined by the NBA, which included a one-week ban and a \$50,000 fine. Later, Leonard was traded to the Oklahoma Thunder after being reprimanded, and was then waived following the trade deadline.

While Leonard's actions are reprehensible, his conduct is not an outlier in the streaming marketplace. Rather, Leonard's actions are common in the streaming industry, which has struggled with instances of racism and misogyny. In the summer of 2020, the *New York Times* published a [news report](#) which described dozens of instances of misconduct, including sexual harassment. Dozens of streamers told stories about how they faced a toxic environment, and in many cases, the offenders faced real-world ramifications. At least one talent agency CEO stepped down, before his agency shut down completely. The report caused massive outrage in the industry. Furthermore, The *New York Times* noted that instances of misconduct caused friction among corporate sponsors and brands in the streaming marketplace.

These types of misbehavior can have monetary consequences for streamers, including professional basketball players like Meyers Leonard. In contracts between streamers, brands, teams or sponsors, including a morality clause will quickly allow for disassociation from the offending party. These clauses are intended to protect the name, or brand recognition of the sponsor, team or company.¹ Indeed, corporate brands and sponsors are the first to face public pressure, including boycotts for misdeeds of their athletes. This can lead to substantial exposure to revenue and established goodwill.

Accordingly, morality clauses have become a common feature in talent agreements and sponsorship agreements. Across the sports and entertainment industries, morality clauses maintain the same language and framework, which typically prohibit conduct that brings a party "into disrepute, scandal, contempt, or ridicule, which shocks, insults, or offends a substantial portion of the community or reflects unfavorably upon any of the parties." Morality clauses have been frequently litigated, and included scenarios where individuals used profane language in public, sold narcotics, or posted controversial statements on Twitter. Generally, courts have held that morality clauses are valid and

enforceable, and the nonperformance under the clause excuses further performance from parties. In lay terms, when there is breach of the morality clause, a brand or company can terminate the contract and remove itself from any further obligations from the bad actor. Given that sponsorships are a critical base of any streamer's source of revenue, the loss of a sponsorship can be financially devastating.

Depending on the sophistication of the contracting parties, a brand or sponsor may desire a vague and broad morality clause, as it will afford some latitude to terminate the contract for cause. A streamer, however, should ask for more definite language about what actions may run afoul of the clause. Generally speaking, when morality clauses are fully litigated, the definiteness of the contract terms will be determinative of the outcome, and any ambiguity may extend the case well into discovery, or trial. This can be time consuming and expensive for all parties.

The streaming industry is growing exponentially, and it is encountering many legal difficulties that others have already faced. The familiar morality clause will continue to be a pivotal negotiating tool as additional brands and corporate sponsors enter the streaming marketplace.

¹ In limited instances, the parties may negotiate for a reverse morality clause, which allows for termination if there is scandalous conduct from the brand, company, or sponsor. These reverse morality clauses were meant to protect the reputation of the athlete from misbehavior or unethical conduct from a brand, company, or sponsor.

BIOMETRICS IN THE BALLPARK – HOW TEAMS AND LEAGUES CAN MITIGATE DATA COLLECTION RISK

STEVE COSENTINO, CIPP AND ETHAN SANDERS

At select ballparks across the country, fans can speed through security screen procedures using thumbprint scans. Sports venues from Madison Square Garden to CenturyLink Field now use biometrics to enhance game day experience. Major League Baseball in particular has led the charge with biometric ticketing through fingerprinting. Biometric security platforms from CLEAR process game entry at 13 of the 30 MLB ballparks. After swiftly entering the stadium, fans can purchase their favorite beverage or hotdog with the same thumbprint scan that is tied to the fan's credit card and biometric data profile.

Understandably, many professional sports teams and leagues prefer the use of biometric data in their ballparks for a variety of reasons. It reduces the risk of theft by concessionaires, it confirms that an adult is of legal age to purchase alcoholic beverages, and it shortens wait times at concession stands. One of the most beneficial uses of this data, however, lies in a better fan experience. By tying transactions together using a common purchasing device, teams can better understand their consumers' buying preferences. This data allows teams to provide their guests with the items they want when they want them.

Amid concerns about the commercialization and use of biometric

data, Illinois enacted the Biometric Information Privacy Act (BIPA) in 2008, requiring that private entities establish a retention schedule for biometric data, and providing guidelines for the deletion of biometric data. Under BIPA, individuals must consent to businesses obtaining their biometric data, and businesses must disclose their use and retention policies.

The BIPA has been around for a while but has only started to garner more attention recently with the proliferation of litigation taking advantage of BIPA's private right of action. The Six Flags theme park lost a BIPA claim resulting in a ruling that even technical violations of BIPA's requirements may be actionable. *Rosenbach v. Six Flags Entertainment Corp.* No. 123186 (Ill. Jan. 25, 2019). In February of 2020, Facebook undertook a \$550 million settlement concerning allegations that the social media giant violated BIPA through its service that tagged Facebook user photos using face-matching software. That settlement was later rejected by Judge James Donato who approved a larger \$650 million settlement this month. The year 2020 also saw a proliferation of BIPA lawsuits.

A year later, Texas passed the Capture or Use of Biometric Identifier Act (CUBI), imposing similar requirements

for notice, consent, prohibitions on disclosures, and mandatory security measures. CUBI does include some exceptions to the selling and disclosure of biometrics. Certain exceptions track similar provisions in Illinois' BIPA, such as disclosures required by law; however, Texas' CUBI also includes a specific exception for "purposes of identification in cases of disappearance or death." See *id.* at (c)(1)(A). But even though Texas' CUBI may leave out some of the standout features of Illinois' BIPA—i.e., attorney general-filed suits in lieu of the private right of action—CUBI does impose civil penalties of up to \$25,000 per violation.

Washington passed H.B. 1493 in 2017 establishing data security requirements for biometric data. The Washington law, however, contains a very useful and broad "security exemption," which excludes those persons that collect, capture, enroll or store biometric identifiers in furtherance of a security purpose.

Some states have amended their data breach notification and response laws to address biometric data. Louisiana added biometrics to its data breach law in 2018. New York amended its data-breach notification in 2019 with the Stop Hacks and Improve

Electronic Data Security (SHIELD) Act. The SHIELD Act does not contain a private right of action but it does add biometric information to the list of data elements that when combined with personal information trigger a data breach notification obligation. Likewise, Arkansas passed legislation in 2019 called the Personal Information Protection Act (PIPA) changing its definition of personal information in its breach-response laws to include biometric data.

Finally, 2020 brought new biometric privacy laws in Oregon, Arizona and California. Oregon broadened its Consumer Information Protection Act (OCIPA) to include biometrics in the definition of personal information. Arizona made similar additions in its Data Security Breaches Law. California passed the California Consumer Privacy Act (CCPA), which treats biometric information as an express category of Personal Information requiring data security protections and data subject access and deletion rights.

When analyzing the impact of these biometric data privacy laws on sports operations, organizations should consider the definitions of biometric data under the applicable laws. For example, the definition of biometric data under the CCPA is broader than under Illinois' BIPA. The CCPA

definition includes imagery of the iris/retina, fingerprint, hand/palm and face from which an identifier template can be extracted, as well as sleep, health or exercise data that contain identifying information, or with other identifying data, to establish individual identity. Cal. Civ. Code § 1798.140(b). BIPA defines "biometric identifier" to mean "a retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry." 740 ILCS 14/10. However, in a way, BIPA is broader than the CCPA because it has a definition for "biometric identifier" that means "information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." Under BIPA, digital representations of biometric identifiers, such as a randomized number used to represent a facial image, are also covered by the statute even if the image is deleted.

Sports teams face two key challenges in implementing biometrics in their venues. Consent is required under certain laws such as BIPA, and the consequences of violating BIPA can be a costly private lawsuit. Many other laws such as CCPA have data subject access, deletion and opt-out rights that need to be integrated into any biometrics application along with well-constructed mobile friendly privacy policies.

In every case, the paramount concern is information security. With millions of pieces of personal information being exposed in a number of large high profile data breaches in recent years, data elements such as contact information and even social security numbers are widely and inexpensively available on the black market. Biometric information has not reached that level of public availability. Security is certainly a balancing act for sports organizations, and while facial recognition and biometric scanning systems at parks may help reduce petty crimes and even terrorist threats at such public venues, the risk of massive data breaches and identity theft is high. Unlike traditional data breaches, breaches of biometric data are more severe, as there is no way to replace such data. As reported by the BBC, unlike text passwords or credit card information, "biometric information such as fingerprints could never be made private again once lost."

As sports franchises continue to look for advantages to increase revenue and boost fan engagement, sharper teams that focus on data security and privacy in their biometrics programs will benefit from the secure use of robust fan data enabling them to move to the top of the standings for fan experience wins.

THE FIRST CIRCUIT RULES THAT THE WIRE ACT APPLIES TO SPORTS BETTING ONLY

AALOK SHARMA

We have analyzed the Federal Wire Act on several occasions, and have noted that it is one of the greatest impediments to the expansion of legalized interstate sports wagering. The Wire Act, an archaic statute signed into law in the 1960s by President Kennedy, was specifically designed to clamp down on organized crime. The statute specifically states:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

Accordingly, the Wire Act has been a hurdle as many bets or wagers are processed or placed via a wire communication facility (i.e., through the internet). Much, however, has changed since the 1960s. Along with the invention of the internet, and the Supreme Court's decision in *Murphy*, legalized sports wagering has exploded with dozens of states enacting legislation. Many sports books in those states have received hundreds of millions of dollars in wagers, and have paid millions more in the form of

tax revenue. Of course, state budgets hampered by the pandemic needed this additional tax revenue. Moreover, some states realized that the convenience of mobile wagering contributed towards more wagering volume, and have since expanded rules and regulations surrounding online wagering. However, the Wire Act has remained an obstacle, and will continue to be one until Congress addresses this outmoded law. Recently, the First Circuit Court of Appeals ruled in *New Hampshire Lottery Commission v. Rosen* that the Federal Wire Act is to be narrowly applied to bets or wagers that on any sporting event or contest", and that its provisions do not apply broadly to other forms of wagering. While a boon for other forms of wagering, the ruling reinforces the Wire Act's broad impact on the legalized sports wagering marketplace.

The genesis of the First Circuit's ruling was a reversal of guidance issued by the DOJ in 2011. In 2011, the DOJ opined that the Wire Act was designed to prohibit transmissions of wire communications relating to sports. Indeed, the DOJ adopted its reasoning from the Fifth Circuit Court of Appeals, which held in dicta the Wire Act required that the "object of the gambling be a sporting event or contest." But the DOJ revisited its interpretation of the Wire Act in 2018, and published new guidance which stated that the Wire Act prohibited all forms of interstate wagering, and was

not solely related to sports wagering. The DOJ supported its reversal by claiming that the 2011 DOJ opinion did not devote enough time to statutory construction. If implemented, the DOJ's position would have had a significant impact on state run lotteries, which had begun selling various forms of lottery tickets online since 2011. Moreover, the DOJ's position would have had a significant impact on iGaming, and other forms of interstate wagering.

In a blow to the DOJ's 2018 interpretation of the Wire Act, the First Circuit held in a 49-page opinion that the statute only applies to sports bets or wagers. Indeed, the First Circuit noted that the DOJ's interpretation and statutory argument was a "curious reach." The First Circuit held that a natural reading of the text, along with the legislative history, leads to the conclusion that the Wire Act applies solely to sports wagers. The First Circuit's opinion, which was released on January 20, 2021, is unlikely to be appealed by the current Biden administration.

The First Circuit's recent ruling confirms that the Wire Act will remain an obstacle to interstate sports legalization, but that other forms of interstate wagering may be acceptable. Ultimately, Congress will need to act in order to modernize an antiquated law that is in need of repair.

THE LINE UP

01

20%, 30% AND 5. Acquiring ownership interests in an NBA franchise has proven difficult as the NBA's revenue streams have grown, and enterprise value has skyrocketed. Purchasing a limited interest in an NBA franchise, however, may have gotten easier. According to *Sportico*, the NBA Board of Governors has agreed that private equity and other institutional investors can purchase ownership interests in NBA franchises. There are, however, rules that govern such transactions. Currently, the NBA is limiting up to 20% equity in a single franchise, and that no franchise can have more than 30% of its equity held by investment funds. Finally, each fund can invest in only five teams. New capital injections will provide for additional infrastructure, including digital, for each franchise. More importantly, new investments will increase the franchise valuation, which will please majority ownership groups.

02

2014. On July 9, 2013, EA Sports published its last version of a collegiate football video game, NCAA Football 14.

The video game's dynasty mode allowed users to recruit high school athletes in new ways, and provided exciting challenges to an established franchise. The video game, however, quickly disappeared after lawsuits involving former athletes, including Nebraska quarterback Sam Keller and UCLA basketball star Ed O'Bannon. EA, however, has announced that is bringing back its much beloved franchise through its partnership with Collegiate Licensing Co. Notably, the game will not include the names, images and likenesses of collegiate athletes, and will not be titled "NCAA Football". The game is expected to replicate game day for over 100 schools. EA, however, has noted that it is closely watching NIL bills which have passed in several states, and is monitoring legislation on Capitol Hill by Sens. Murphy and Booker.

03

21%. In 2017, we noted the impacts of Section 4960 of the Tax Cuts and Jobs Act of 2017

which would be disruptive to collegiate sports athletic departments. In June 2020, the Internal Revenue Service proposed regulations for Section 4960, and those regulated were finalized in January of this year. The regulations are set to apply for tax years beginning after December 31, 2021. As we previously discussed, Section 4960 imposes an excise tax of 21% for certain 'covered employees'. Generally, this tax will affect the top five highest paid employees once compensation exceeds \$1 million. Accordingly, athletic departments should revamp contracts with highly compensated athletic department members to minimize the effects of the excise tax, which will need to be paid beginning next year.

04

\$4.3 BILLION. The on-the-field action for this year's Super Bowl was less than thrilling as the Tampa Bay

Buccaneers cruised to victory over the Kansas City Chiefs. The off-the-field action, however, was momentous. The American Gaming Association estimates that about 23.2 million people in the United States wagered about \$4.3 billion on this year's Super Bowl. The tax revenue from the Super Bowl to states that have legalized sports wagering was significant. For example, the State of Illinois saw over \$45 million of legal bets, and the state received over \$1.1 million in tax revenue. Since June 2018, over 25 states have enacted legal wagering, with Kansas, Minnesota and Missouri considering legislation, though all three bills will face hurdles in their passage. As states seek to reduce budget shortfalls because of the coronavirus, expect more movement for legalized sports wagering.

05

43,000. The NHL and PointsBet have taken their partnership to a new level.

According to filings with the Australian Securities Exchange, the NHL will receive 43,000 shares in a sportsbook, PointsBet, over the next three years. The deal will allow PointsBet to use official team logos in marketing materials and the PointsBet app. More importantly, the partnership will allow PointsBet to enhance its already existing relationship with NBC Sports. The deal will allow for the distribution of live betting odds in NHL broadcasts on NBC, and will enhance pregame, in-game and postgame broadcasts wagering.

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