

Trends and Developments

Contributed by:

Alan M Rifkin, Barry L Gogel and Jamie E Katz
Rifkin Weiner Livingston LLC

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Authors



Alan M Rifkin is the managing partner of Rifkin Weiner Livingston LLC. He chairs the firm’s sports law, gaming and facilities practice. Alan was an early pioneer in sports law and

has represented many familiar sports teams and entities, including the Baltimore Orioles, the Washington Football Team, Mid-Atlantic Sports Network and Cal Ripken, Jr business enterprises, among others. Alan is also an adjunct professor of Sports Law at the University of Maryland Carey School of Law. He is a well-recognised commercial and business attorney whose practice areas include sports franchise law, stadium development, and business and commercial transactions.



Barry L Gogel is the managing partner of the Baltimore office of Rifkin Weiner Livingston LLC. He has represented clients in the sports industry since 2000 in a variety of matters, including:

telecast rights and fees disputes, facility development negotiations, eminent domain defence, amusement tax dispute, and player investigations concerning performance-enhancing drugs. He is currently an adjunct professor of Sports and the Law at the University of Maryland Carey School of Law.

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Jamie E Katz is chair of Rifkin Weiner Livingston LLC's business and commercial transactions practice and a member of the sports law, gaming and facilities practice, with broad transactional legal experience. She has been representing clients in the sports industry for more than 20 years in matters such as: facility development, leases and construction; sponsorship and advertising; telecast rights; ticketing issues; concession agreements; intellectual property protection and brand rights; technology matters; and a host of other sports-related contract matters. She is also a member of the ABA Forum on the Entertainment & Sports Industries.

Rifkin Weiner Livingston LLC

225 Duke of Gloucester Street
Annapolis, MD 21401
USA

Tel: +1 410 269 5066
Fax: +1 410 269 1235
Email: rwllaw@rwllaw.com
Web: www.rwllaw.com



Introduction

Tommy Lasorda famously said: “In baseball and business, there are three types of people. Those who make it happen, those who watch it happen, and those who wonder what happened.”

All these types of people must have marvelled at the trending developments in sports law during 2023. The business of sports continues to explode, as can be seen from the record-setting prices of sports franchises in 2023. In February, the Phoenix Suns sold for USD4 billion; in July, the Washington Commanders sold for USD6.05 billion; and in July 2023, the Charlot Hornets were sold for USD3 billion. On 27 March 2024, Major League Baseball approved the sale of the Baltimore Orioles for USD1.725 billion to a group including David Rubenstein, David Bloomberg, Cal Ripken and others.

Last year, this ever-evolving practice area saw continuing legal fallout from the ongoing changes in the sports world over the past several years. These have included:

- the ongoing consequences of the National Collegiate Athletic Association (NCAA) decision to allow college athletes to profit from their name, image and likeness (NIL) in the wake of the Supreme Court’s decision in *Alston v NCAA*;
- major antitrust cases in golf and baseball, questioning the applicability and parameters of sports-related exemptions;
- the implications of the changing landscape of sports broadcasting, “cord cutting” and streaming video services;
- the continuing legal wrangling related to FIFA telecast rights and corruption matters; and
- an ever-growing emphasis on property development rights associated with stadium facilities projects.

NIL and College Athlete Employment– The New Frontier

The year 2023 saw student athletes’ earnings top more than USD1 billion collectively, as athletes have taken advantage of the NCAA decision in 2021 to lift restrictions on NIL in the wake of the *Alston* decision. As the riches for student athletes grow, so have their efforts to gain even more rights and opportunities. Concurrent with the development of NIL rights, student athletes in 2023 also sought in the courts and legislative arenas: employment status for the purposes of wage payment and labour laws, recovery from losses due to prior and certain continuing NIL prohibitions, and fewer restrictions on their right to change schools.

The longest standing of these efforts, *Johnson v NCAA*, saw little movement in 2023. That case was initiated in 2019 when student athletes from several colleges and universities sued under the Fair Labor Standards Act. The federal trial court has certified a single issue to the Third Circuit for decision – that being whether college athletes are employees of the colleges and universities for which they play. Should the Third Circuit rule that they are, then a split of opinions would arise from the Seventh and Ninth Circuits, meaning that the case could go to the Supreme Court for final resolution.

While collegiate student wage payment issues may have sat relatively dormant in 2023, collective bargaining, NIL and antitrust issues have accelerated. In May of 2023, the Los Angeles region of the National Labor Relations Board (NLRB) filed a complaint against the University of Southern California, the Pac-12 Conference, and the NCAA alleging that student-athletes in the revenue-generating sports of football and men’s and women’s basketball are school employees and demanding that the respondents

“cease and desist from misclassifying” players as student-athletes. The administrative hearing in this matter began on 7 November 2023 and has extended into 2024. During the pendency of this case, on 5 February 2024, another region of the NLRB ruled that members of the men’s basketball team at Dartmouth College were eligible to unionise. On 15 March 2024, the team voted to do just that. The college has vowed to fight this decision in federal court.

On the NIL front, student athletes sought recovery for past and ongoing NIL losses in the case of College Athlete NIL Litigation. In September 2023, US District Judge Claudia Wilken, the same federal judge in California who ruled against the NCAA in the seminal cases of O’Bannon v NCAA and Alston v NCAA, certified a class of 184,000 college athletes for the purposes of injunctive relief. In November 2023, Judge Wilken divided the students into three classes for damage purposes. The students can claim losses from video games, college sports broadcasts and other lost revenues resulting from the restrictions that the NCAA and Power Five Conferences historically have placed, and continue to place, on NIL earnings. If successful, damages could be in the several billions of dollars. The trial is scheduled for January 2025. In December 2023, the NCAA further loosened its restrictions on NIL by proposing rules allowing schools and athletes to enter directly into NIL deals unrelated to educational resources.

Also in 2023, college athletes continued their antitrust assault on the NCAA – this time against the requirement that certain athletes who transfer schools (on multiple occasions) must wait a year before competing in games. In December 2023, a federal judge in West Virginia issued a temporary restraining order restricting the NCAA from enforcing the transfer rule. Days later, the

NCAA agreed to a preliminary injunction. The transfer rule will therefore not be enforced until the matter can be decided some time after “the last day of competition in the 2023–24 winter and spring sports seasons and sanctioned tournament play,” as the court ruled.

For its part, the NCAA continues to seek guidance and assistance from Congress to unify the rules for college athletes and allow the NCAA to gain certainty in its management of intercollegiate athletics. But Congress is as divided as the public on this issue. In 2023, no fewer than five separate and competing bills were introduced with varying and sometimes conflicting provisions on employment status, collective bargaining, NIL rights, revenue sharing, federal regulation, and antitrust exemptions. None have yet to be brought out of committee for a floor vote.

Even as this article is being written, the NCAA is issuing new NIL rules in an attempt to get a grasp on the issue. The NCAA will seek to require registration for those who enter into name, image and likeness deals with athletes, to create a standard NIL contract, and to provide athletes and institutions sufficient education on NIL concerns.

Sports-Related Antitrust Exemptions Under Review

With the understanding that members of sports associations – like MLB and the Professional Golf Association (PGA) – must engage in some level of economic co-operation, the spectre of antitrust violations is always present. In 2023, the PGA and MLB saw potentially existential antitrust challenges to their sports.

In golf, the Public Investment Fund of the sovereign of Saudi Arabia launched the LIV Golf series in 2023. With its wealth and desire to compete

with the PGA, LIV lured some of the world's best golfers with large, guaranteed payments to play in LIV tournaments. In response, the PGA banned these players from its tour based on its exclusivity rules. LIV and its golfers thus sued, setting up a league-against-league antitrust suit, the likes of which has not been seen since the USFL famously won USD1 from the NFL in a 1986 antitrust verdict.

The lawsuit by LIV and its golfers against the PGA appeared to resolve, like many other league-against-league antitrust suits, with a settlement and merger of the tours. The settlement dismissing the lawsuit was to be completed by 31 December 2023. That agreement has yet to be consummated, and it may face antitrust scrutiny from the US Department of Justice and European Union competition enforcers.

In 2023, MLB, which is famously exempt from federal antitrust laws, fended off one of the greatest challenges to that notorious exemption since it was first judicially granted by the Supreme Court in the 1922 Federal Baseball Club v National League decision. The latest challenge to MLB's exemption arose out of the 2021 decision of Major League Baseball to limit the number of minor league affiliates that clubs may have, causing the termination of affiliation agreements with several minor league teams. These minor league teams brought an antitrust suit in New York federal court and related suits in state court based on New York tort law.

The federal trial court in New York, based on MLB's century-old exemption, dismissed the federal antitrust claims brought by the minor league clubs. In January 2023, the Second Circuit applied the exemption and affirmed the lower court's dismissal. This opened the door for the minor league teams to petition the US

Supreme Court for certiorari. The teams were joined by 18 state attorneys general, the MLB Players Association, and a bipartisan group of Congress members. Instead of leaving the matter to the High Court, and ten days before the state law trial was set to begin, MLB decided to settle the matter with the plaintiffs for an undisclosed amount of money. As such, MLB's antitrust exemption remains in place – for now.

The Rapidly Evolving Sports Media Landscape

Aside from player salaries, few things affect the annual profits of sports franchises more than telecast rights and revenues. In 2023, the landscape for sports telecasting continued to change as more fans engaged in so-called “cord-cutting” and relied on internet streaming to watch games. As a result, 2023 saw its share of dynamic changes in telecasting.

Cord-cutting pressures: Diamond Sports Group, LLC

The biggest jolt to the sports broadcasting industry in 2023 by far was the bankruptcy of Diamond Sports Group, LLC, a subsidiary of Sinclair Broadcast Group. In March 2023, the operator of 19 regional sports networks in the USA filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas. At the time of filing for bankruptcy protection, Diamond Sports, through its “Bally Sports” network, held the local broadcasting rights to 14 MLB teams, 16 National Basketball Association (NBA) teams and 12 National Hockey League (NHL) teams.

In June and July 2023, Diamond Sports ceased broadcasting games for the San Diego Padres and the Arizona Diamondbacks MLB franchises. MLB stepped in and took over both the produc-

tion and the distribution of those game broadcasts. In October 2023, MLB along with five clubs filed a Motion to Compel in the Bankruptcy Court to force Diamond Sports to accept or reject the broadcast rights agreements with the clubs, so as to not further delay MLB's planning for the 2024 Season. With respect to the remaining 11 MLB franchises (Diamond Sports' rights agreement with the Minnesota Twins reportedly expired at the end of the 2023 season), it was reported that Diamond Sports provided MLB with the names of the MLB franchises it would like to continue broadcasting in the 2024 Baseball Season, along with those clubs it is considering rejecting. At the time of writing of this article, a provisional deal between MLB and Diamond Sports was still being worked out which may include some or all of the 14 MLB teams. In November 2023, Diamond Sports received Bankruptcy Court approval for a deal reached with the NBA. This deal allows Diamond Sports to continue broadcasting games for the rest of the 2023–24 season.

In January 2024, to start off the new year, the Bankruptcy Court approved an agreement for Diamond Sports to continue broadcasting games during the 2023–24 season collectively for the 12 NHL teams. This arrangement is reportedly similar to that with the NBA. Contemporaneously with the NHL agreement approval, rumours surfaced about Amazon's possible interest in Diamond Sports – and later that month, Diamond Sports announced its plan for a restructuring support agreement with creditors which included a minority investment in the company by Amazon which will become its streaming partner for an undisclosed number of MLB 2024 Season games, among other Prime Video access arrangements. Undoubtedly, 2024 will bring some interesting developments affecting the telecast rights and broadcasts of many sports franchises.

As examples of late-year resolutions of ongoing difficulties caused by shifts in broadcasting and streaming, in November, DISH TV reached a multi-year carriage agreement with Hearst to restore carriage in more than 30 television markets. Then, with only days before the end of 2023, Paramount and Comcast reached an agreement to renew their carriage agreement. This agreement avoided interruptions to the remainder of the NFL regular season and the start of the playoffs on CBS for Xfinity subscribers. And, after years of controversy and legal wranglings, the Mid-Atlantic Sports Network seemingly resolved its dispute with the Washington Nationals Baseball Club over the telecast rights fees for the period 2017–2022 with all parties accepting the MLB Revenue Sharing Definitions Committee's determination.

Congressional hearings

Continued disputes between television station broadcasters and regional sports networks against multi-channel video programming distributors (MVPDs), and frequent threats of “blackouts” of sports and entertainment programming, led to Congressional hearings before the House Energy and Commerce Subcommittee in September 2023. At issue were transmission and retransmission consent rights, their application to streaming services (virtual MVPDs or “vMVPDs”), and whether further changes are needed to the Cable Television Consumer Protection and Competition Act of 1992 to address the ongoing difficulties in the changing broadcasting/streaming market.

Continuing FIFA Drama

Drama around the *Federation Internationale de Football Association* (FIFA) continued in 2023. First, in March 2023, a federal jury in New York found former CEO of Fox International Channels, Hernan Lopez, and Argentine sports marketing company, Full Play Group SA, guilty on counts

of wire fraud and money laundering for paying bribes to CONMEBOL (the South American soccer governing body) in exchange for below-market rights to broadcast the Copa Libertadores soccer tournament. In September, however, US District Judge Pamela Chen vacated the convictions based on recent US Supreme Court decisions and ruled that there was no precedent to support the application of the US federal honest services fraud statute (18 U.S.C. §1346) to foreign commercial bribery within CONMEBOL. Federal prosecutors filed notice of appeal followed by a brief with the US Court of Appeals for the Second Circuit in January 2024, seeking to reinstate the jury verdicts against both Lopez and the Argentine marketing company.

On a second front, in August 2023, a New York federal judge granted final approval to a USD95 million securities settlement between Grupo Televisa SAB and a group of investors who claimed they lost money as a result of Grupo Televisa's alleged bribery of FIFA officials for broadcast rights to World Cup Soccer tournament(s).

And on yet another front, in September 2023, the US Department of Justice announced it was developing a strategy with officials from Canada and Mexico to deter collusion and anti-competitive conduct surrounding the 2026 FIFA men's World Cup games which is to be hosted by all three countries.

Stadium Developments

So many sports stadium development projects proceeded in 2023, it is difficult to list them all. Many of the projects include large public subsidies and a growing footprint to include mixed-use developments and entertainment districts adjacent to sports stadiums to provide additional sources of revenue for the sports teams. With all this development activity, transactional attor-

neys were busy in 2023 in areas such as: facility leasing, construction law, municipal finance, commercial finance, tax, intellectual property, digital and smart technology (including, AI integration), government relations, and many other overlapping disciplines. Stadium development activity in 2023 was robust at the major league level as well as for college stadium construction projects. Below are some highlights of various major league sports stadium projects that captured the news during 2023.

Major League Baseball

- In January 2023, the Cleveland Guardians announced a number of renovations at Progressive Field estimated to cost USD202.5 million for completion in 2025. These projects were made possible as a result of the 2022 agreement entered into between the Cleveland Guardians and the City of Cleveland to extend their lease at Progressive Field through 2036.
- In April 2023, Oakland Athletics ended its negotiations for a new stadium with the City of Oakland, California and turned its attention to Las Vegas. With a legislative financial package approved during the summer for a new ballpark, MLB approved the relocation of the Oakland A's to Las Vegas in November, 2023. The new ballpark, on the site of the Tropicana Las Vegas, is slated for completion in time for the 2028 MLB Season.
- In September 2023, the Tampa Bay Rays announced an agreement with the City of St Petersburg and Pinellas County to move forward with plans for a new ballpark and surrounding development project on the same site that Tropicana Field currently occupies. The new stadium alone is estimated to cost approximately USD1.3 billion. The public approval process commenced in 2023 and is ongoing. The St Petersburg City Council is

expected to vote on the stadium agreements possibly in May 2024.

- In November 2023, the Wisconsin legislature approved USD500 million in funding for renovations to the Milwaukee Brewers stadium, which was signed into law in December.
- During the 2022 Maryland Legislative Session, lawmakers approved USD1.2 billion in funding for the modernisation of the two stadiums at Camden Yards – M&T Bank Stadium, home to the NFL Baltimore Ravens, and Oriole Park at Camden Yards, home to the MLB Baltimore Orioles. This funding was contingent on each team executing long-term leases for their respective stadium. In December 2023, the Maryland Stadium Authority and the Baltimore Orioles executed an extension to the Oriole Park lease, allowing the Orioles to access their portion of the public funds.

National Football League

- In January 2023, the Baltimore Ravens and the Maryland Stadium Authority entered into a multi-year lease extension and amendment, allowing the team to tap into USD600 million for additions and renovations to M&T Bank Stadium.
- In April 2023, the Nashville Metro Council approved a new lease and financing with the Tennessee Titans for the construction of a new Nissan Stadium. The overall project is expected to cost approximately USD2.1 billion (with USD760 million in funding from bonds issued by the Metro Sports Authority and USD500 million in funding from the State of Tennessee) and be completed in 2027.
- In May 2023, the Erie County Legislature approved a new stadium lease agreement between the Buffalo Bills and Erie County Stadium Corporation for the New Highmark Stadium. The groundbreaking on the USD1.4

billion project occurred shortly thereafter. The new stadium is projected to be completed in time for the 2026 NFL Season.

- With the sale of the Washington Commanders in 2023, and the pending 2027 expiration of the team's lease for FedEx Field in Landover, Maryland, each of the District of Columbia, the State of Maryland and the Commonwealth of Virginia are vying to secure the NFL franchise in their jurisdiction. According to numerous reports, various politicians from each jurisdiction have communicated with Commanders' owners and, in some cases the NFL, regarding relocation of the stadium.

National Basketball Association/National Hockey League

In December 2023 Monumental Sports & Entertainment announced plans to move the NBA Washington Wizards and NHL Washington Capitals from the Capital One Arena in the District of Columbia to a new 20,000-seat arena to be built in Arlington, Virginia. The move is part of a mixed-use development and entertainment district estimated to cost USD2.2 billion. The arrangement is pending approvals from both the Virginia Legislature and the Alexandria City Council. More activity is expected during the Virginia General Assembly's 2024 legislative session.

Major League Soccer

Construction began in August 2023 on the privately funded Miami Freedom Park. This includes a new 25,000-capacity stadium for MLS Inter Miami CF. The opening is planned for 2025.

Thoroughbred horse racing

In early, 2024, the State of Maryland and the Maryland Jockey Club agreed to facilitate a new Pimlico Race Course for the Preakness Stakes®, the middle jewel of the Triple Crown,

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and Maryland's historic horse-racing industry. As this article goes to print, the Maryland General Assembly is considering a USD400 million capital improvements plan for a new Pimlico Race Course and a new offsite training facility. Under the terms of the agreement and proposed legislation, the Maryland Jockey Club, Preakness Stakes® and year-round racing will be licensed to and operated by a state-sponsored nonprofit entity.

Conclusion

As busy as 2023 was for the sports law industry, 2024 is expected to be even busier with many of the unsettled issues noted above to be addressed by courts and legislatures around the country.