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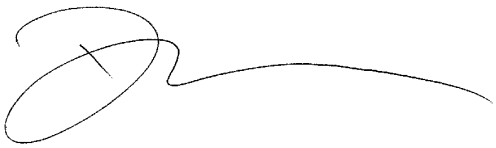
ROPES & GRAY

As Chairman of the Ropes & Gray Sports Law group, I welcome you to the Spring 2010 edition of *Sports Law Today*. The legal issues surrounding professional and collegiate sports are as wide and varied as the audience that watches them, but they are also just as inter-connected. Conduct that costs a school already-earned victories may also implicate the termination provision in a coach's contract. An athlete or coach may move to protect his or her right to publicity and secure an opportunity to profit from the name or reputation he or she has built, but conduct in one's personal life may cost that individual those valuable marketing dollars. The landscape surrounding these issues is constantly evolving, and it is critically important to be well advised. We have a long history of representing public and private higher education institutions as well as individuals employed all over the wide world of sports, and we view our experience in sports legal matters as a natural outgrowth of our firm's core strengths. We hope you find this edition informative and useful. Please contact me or one of my colleagues if you have any questions or if we can be of service to you. ■

Sincerely,



Dennis Coleman
Chairman, Sports Law Group

In this Issue

The Tiger Effect: The Future of Morals Clauses in Endorsement Agreements

By Patrick E. Fitzsimmons *and* Lindsey R. Goldstein

In light of the recent headlines surrounding Tiger Woods, endorsement contracts and the provisions governing their termination are garnering much attention. Woods' fall from grace has been quick and steep, and is likely—even if he's able to re-establish his public goodwill—to impact endorsement contracts for the near future.

In general, endorsement contracts are binding arrangements between an endorser (usually an athlete or other celebrity) and a brand owner whereby the brand owner pays the endorser for the right to use his or her name and likeness for promotional purposes. Often, endorsement contracts represent a multi-million dollar relationship. Because national brand owners have agreed to pay these significant sums in reliance upon the favorable image of the spokesperson, the agreements generally include a so-called "morals clause," which may provide the brand with the right to terminate the agreement or take other remedial action for conduct that is morally reprehensible, criminal, or otherwise exhibits low moral character. When the image of an endorser is untarnished, the endorser can usually insist on a fairly tightly drawn clause that will limit the subjectivity of the brand owner to terminate the contract on the basis of a reputational injury. When the stakes are particularly high, the endorser wants to make sure that the contract does not provide the brand owner with a roadmap to cut off payments other than for egregious conduct. The concern is that the brand owner's economic circumstances or a change of direction will put pressure on terms of an agreement that contain any wiggle room.

A morals clause in an endorsement contract can take many forms. Where the bargaining power of the endorser is weak, some contracts contain broad language that allows the brand, in its sole discretion, to terminate the agreement for immoral acts that detrimentally affect its image. Other contracts, however, contain narrow language limiting the clause's scope to

acts that result in a felony conviction. Not surprisingly, the scope and breadth of the morals clause generally has depended upon the stature of the endorser and his or her popularity among the brand's target customers; thus, an athlete like Woods, until now, has held significant bargaining power when negotiating morals clauses in endorsement deals.

However, given recent public scandals involving high-profile athletes such as Woods, Kobe Bryant, Michael Vick, and Ben Roethlisberger, brand owners are becoming increasingly sensitive to the scope of morals clauses in their endorsement arrangements. Coupling that sensitivity with today's sensationalist society, where personal transgressions are regularly front-page news, it will not be surprising if negotiations surrounding a brand owner's right to terminate endorsement contracts begin to take on greater complexity.

It is predictable that the bargaining power of an otherwise clean-cut, high-profile spokesperson will be reduced. Now that Woods—who was squeaky clean—has once again demonstrated that scandal is right around anyone's corner, brand owners are in a better position to make well-reasoned arguments for maintaining more discretion in the face of controversy, even with blue-chip endorsers. Top-notch spokespeople, therefore, should anticipate tougher negotiations, and less deference to a stellar reputation, when it comes to morals clauses.

This erosion of bargaining power means brand owners generally will demand morals clauses that are broader and perhaps even tied to a measurement of the sports figure's public perception, such as a Q Rating. For instance, the agreement may set forth a procedure by which the brand owner will measure a spokesperson's popularity—or lack thereof—among its customers over time, with a "trigger" rating that, if reached, will allow the brand to terminate the relationship. Even in the absence of such a procedure, morals clauses certainly will provide the brand owner an ability to terminate the agreement for behavior that is far less egregious than that which may result in a felony conviction. Furthermore, it will be more difficult for an endorser to include due process protections, such as binding arbitration, to determine violations of the morals clause. Ultimately, brand owners will demand greater protections from morals clauses.

Finally, brand owners are likely to seek greater flexibility in their endorsement arrangements. We are likely to see shorter contract terms, so as to limit a brand owner's overall financial exposure should it become difficult to cut ties with one of its endorsers. It is also possible that brands will be less inclined to rely upon only one or two superstars as the face of the brand, preferring instead to spend their marketing and advertising dollars on a larger group of spokespeople, decreasing the risk that one major public scandal will severely impact the image of the brand.

Sports figures should anticipate some of these changes during their next endorsement contract negotiations. The scandal surrounding Woods has undoubtedly strengthened the bargaining position of brands regarding morals clauses and termination rights, the effects of which we are likely to see manifested in the next wave of endorsement contracts. ■

NCAA Bylaw 19.5.2.2-(e): A School's Worst Vacation

By Christopher Conniff *and* Ned Sebelius

Florida State University head football coach Bobby Bowden capped his storied 57-year coaching career with a win in the Gator Bowl on New Year's Day, 2010. Just four days later, however, the NCAA Infractions Appeals Committee upheld a penalty that vacated 12 wins from the Seminoles' 2006 and 2007 football seasons because ineligible student-athletes participated in those games. Instead of retiring with 389 career wins, Bowden will retire with 377 career wins in the record books. Last year, the University of Memphis suffered a similar fate when the Infractions Committee vacated all of the wins during the 2007-2008 season of its men's basketball program, including the wins earned during the team's participation in the NCAA tournament, because the Committee determined that one ineligible player had played in those games. While it is not always possible to identify NCAA infractions in a timely manner, these two cases demonstrate the harsh consequences of not doing so; namely, that the NCAA often will impose a "vacation" penalty and vacate any win in a game in which an ineligible player participated. This article provides some basic tips to help avoid an unplanned "vacation."

Background

In the 81 major infractions reports issued by the Division I Infractions Committee since 2003, the Committee has vacated individual or team records 28 times. The Committee has imposed vacation penalties with increasing frequency since 2003. The Committee imposed a vacation penalty only once in 2003, twice in 2004, four times in 2005, and three times in 2006. In 2007, the Committee vacated records five times. In 2008 and 2009, the Committee used vacation penalties six times each year, including penalizing a number of high profile and lucrative programs. In 2010, the Infractions Committee had issued only two major infractions reports by the beginning of March, but one of them included a vacation penalty.

The rule relied upon by the NCAA Infractions Committee to vacate records is NCAA Bylaw 19.5.2.2-(e). This Bylaw subsection allows the NCAA Infractions Committee to claw back from the record books any win in which an ineligible athlete competed. According to this rule, the NCAA may impose the following disciplinary measures against an institution for a major violation: (1) individual records and performances shall be vacated or stricken; (2) team records and performances shall be vacated or stricken; or (3) individual or team awards shall be returned to the Association. In essence, this subsection, together with Bylaw 31.2.2.3, which specifically deals with ineligibility during NCAA championships, can force schools to remove banners, return championship trophies, and alter career win totals or individual records of student-athletes and athletic programs. A few key lessons from past vacation penalty assessments can help every program and institution become informed and diligent about avoiding a similar fate.

First and foremost, it is critical for every program to remain vigilant in educating their student-athletes, coaches, and compliance staff in the rules and boundaries of NCAA eligibility. Any violation of NCAA eligibility rules that the Infractions Committee finds to have given a team or individual student-athlete an extensive competitive advantage will be classified as a major violation and will authorize the Committee to consider issuing a vacation penalty. Many times, coaches and student-athletes are unaware that they have violated a rule or that their inadvertent violation could cost their team a winning or championship season. Institutions should make sure that everyone is aware of what the rules are and what to do if they believe one may have been violated. A key first step in this regard is to ensure that the compliance program is seen as a vital part of a school's athletic program rather than a necessary evil meant to be avoided.

Second, institutions must act quickly if they suspect a possible NCAA rules violation. From the moment a student-athlete becomes ineligible, every event in which that student-athlete participates may be vacated. To avoid having games or entire seasons removed from their program's record books, institutions should investigate either internally or with the assistance of outside counsel all suspected violations of the NCAA rules. The Infractions Appeals Committee recognized this principle in a recent ruling, noting that the recognition of violations before the end of the season can mitigate the risk that vacation penalties will be assessed. "And it may well be true that, if these violations had been discovered and reported promptly, reinstatement of the student-athlete would have followed routinely. But the violations were not promptly discovered and reported and so the student-athlete remained ineligible throughout his time at the institution." Accordingly, early detection of potential violations is the best defense against a vacated season. If the institution waits for the NCAA to discover the violation, it runs the risk that all games involving the student-athlete deemed ineligible will be vacated.

Third, if a violation is detected, the school should report the matter to the NCAA. The NCAA Infractions Committee and Infractions Appeals Committee heavily rely on self-reporting and cooperation with their investigations. An institution's cooperation after violations have been detected or suspected can moderate the severity of the Committee's ultimate punishment. In a 2008 report overturning the vacation of a team's season, the Infractions Appeals Committee repeated an oft-quoted refrain from past reports: "Where an institution fully accepts its membership obligations and makes every effort to participate in and assist the enforcement process, its conduct must be a significant factor in determining and imposing penalties . . . Failure to accord such cooperation substantial weight in determining and imposing penalties would be a disincentive to the fullest possible institutional cooperation." Importantly, this does not mean simply running to the NCAA whenever an allegation arises. This step should be taken after

a careful analysis of the facts to ensure that the school fully understands the scope of any problem before self-reporting. The goal of every compliance program should be to educate its student-athletes and coaches about the rules, to detect potential violations early on, and to find a way to work with the NCAA to minimize harm to the program and the institution in the event a penalty must be assessed.

Vacation penalties under Bylaw 19.5.2.2-(e) can be considerably more costly than other penalties to an institution, its sports programs, and the morale of its student-athletes and supporters. It can literally turn the loss of one player into the loss of an entire season's worth of games. Because vacation penalties are being used more frequently than in past years, perhaps to deter other institutions involved in similar practices, there is an even greater need to shape compliance programs designed to avoid them. Although no institution can fully immunize itself to violations, proactive planning can reduce the likelihood that the Infractions Committee applies a vacation penalty to make an example out of the institution. With strategic compliance programs focused on critical areas of eligibility and more frequent mid-season monitoring, institutions will be able to avoid these expensive, unwanted vacations. ■

Preparing for the End . . . From the Beginning: Drafting Termination Provisions in an Employment Contract

By Ryan Schaffer

Nobody likes to think about divorce as they prepare to walk down the aisle. And nobody likes to think about termination immediately prior to commencing an employment relationship. However, thinking through, and insisting on clearly drafted termination provisions in an employment contract is critically important for employers and both professional and collegiate coaches and their families. Some of the best and most respected coaches in the business have been fired during their career, and, whether a coach is moving up or just out, it is more likely than not that a coaching relationship ends with a termination.

When a new opportunity or new contract is within reach, there may be a tendency to minimize the importance of these issues in the interest of "getting the deal done," particularly where an assistant coach is getting his first opportunity to step up to the top job. For this reason, it is critical for coaches and their families to be well-advised by trusted counsel. As a number of recent high profile cases have illustrated, it is vital for both sides that the provisions concerning termination are clearly spelled out in the employment agreement. Waiting until the end of the employment relationship, with the hard feelings that sometimes accompany termination, is a recipe for conflict and very often can result in costly litigation where everybody loses.

Termination without Cause. Absent an agreement or public policy to the contrary, the law grants an employer the right to terminate a coach for just about any reason or for no reason at all. No written explanation is required and there is no right to appeal that decision within the organization. Of course, the most typical reason that coaches get fired is not winning enough games. In the event of a termination without cause, it is crucial to understand and clearly articulate in the employment contract the rights and obligations of each of the parties.

- ***What is owed.*** Though employers do have the right to terminate you for almost any reason, they do not have the right to stop paying you if time remains on the term of your contract. Parties are free to mutually agree to just about any provision governing what amount is owed to the coach upon a termination without cause. In some cases, the parties may agree on a fixed amount that is to be paid. However, a more common starting point for negotiation is the coach's then-current salary multiplied by the unexpired term of the contract. In this situation, it is critically important for the coach to understand what is included in the term "salary" used for the calculation. In addition to base salary, many employment contracts often contain annual compensation payments for radio and television appearances, speaking engagements, and others. In some cases, this ancillary compensation is significantly higher than the base salary included in the contract. The coach must understand which, if any, of these ancillary buckets of compensation are included, and must ensure that it is clearly spelled out in the document itself.
- ***When it is owed.*** In addition to providing for what compensation will be paid to the coach in the event of termination without cause, the contract should also contain provisions for how that money should be paid. Typically, the amounts are paid one of two ways: (i) payable to the coach in a lump sum within some period of days from the date of

termination, or (ii) monthly throughout the remainder of the term, as if the coach was still employed by the university or team. It is often favorable for both parties to choose the former option, which makes a clean break and allows each party to move forward independently. In some cases, the employer may prefer the latter option and this is usually subject to negotiation.

Termination with Cause. In contrast to termination without cause, termination "with cause" or "for cause" provisions generally allow an employer to terminate the employment relationship immediately with no further obligations to the coach (with the exception of compensation already earned but unpaid through the date of termination). Because the consequences of "for cause" termination are so drastic, when negotiating and drafting the employment agreement, the definition of "cause" should adhere to the following guidelines:

- ***Limited to the Contract.*** Whatever definition is agreed to between the parties, it is incumbent on both sides that the provision is clearly drafted in the employment contract. It is not advisable for the contract to cross-reference an employee handbook or other document. This leads to confusion on both sides. Instead, it is best if the list of items that constitute "cause" are clearly laid out within the four corners of the document itself.

- ***Well-Defined.*** A number of recent disputes between coaches and employers have centered around whether a termination was with or without cause. The difference in the two outcomes can, in some cases, mean millions of dollars. It is important for both sides that the listed definitions of "cause" not be subject to different interpretations. For example, a provision that defines cause as "any action not in compliance with the goals, policies, and mission statement of the University" is far too broad and open to interpretation. From the employee standpoint, this clause is obviously objectionable as it might allow the employer to fit just about anything under the definition of "cause." However, this clause should also be objectionable to employers, as it is so broad that any attempt to terminate under such a clause would inevitably lead to litigation, putting the outcome into a judge or jury's hands. It is advantageous for both sides that the "cause" definition be very clear to both sides from the outset.

- ***Egregious.*** As noted above, termination without cause has drastic consequences and it should be treated accordingly. Termination for cause is only appropriate where there has been serious and injurious action on the part of the employee. Not winning enough games should NEVER be included in the provision defining what constitutes "cause" for purposes of termination.

This article provides only an overview of the issues to be considered when negotiating and drafting termination provisions in an employment contract. It is important that you be advised by experienced and trusted advisors during such negotiations. The Ropes & Gray Sports Law group is highly experienced in these matters. ■

Back in the Groove: Will the Ping Eye2 Iron Be an Unexpected Catalyst for Change?

By Matthew Elliot *and* Matthew Byron

"Phil Mickelson Accused of Cheating at Torrey Pines"
—The New York Times, January 29, 2010

From the Tiger Woods debacle to the recent revelations about John Daly's personal struggles, it has been a tough year for the PGA Tour. But setting the tabloid fodder aside, golfers were far more intrigued when Phil Mickelson, one of the sport's biggest stars, a fan favorite, and the world's number two player, was accused of cheating by a fellow pro, Scott McCarron, for using a golf club that many believe provides an unfair advantage over other legal clubs. While it quickly became clear that Mickelson was not cheating, and that he was instead taking advantage of a loophole in the rule that specifically permitted use of the club, a fascinating inside story from the world of golf came to light. As Mickelson later revealed, his true motive for playing the club was to simultaneously express disgust over the lack of transparency of the decisions of golf's governing bodies, the United States Golf Association (USGA) and the Professional Golf Association (PGA), and how a clumsy rule change once again called into question the Tour's respect for its players.

The controversy over Mickelson's club is just the latest chapter in a lengthy saga about seemingly minor equipment design changes that took place almost three decades ago, and is only now coming to a close. Back in 1981, the USGA first focused on the grooves that are etched into the face of golf clubs. In an effort to improve club manufacturability, the USGA enacted a rule allowing U-shaped or square grooves in the clubface, in addition to the more common V-shaped grooves.

One club manufacturer, Ping, took advantage of this rule and developed a popular line of irons called the Ping Eye2. The square grooves were well-received, but their sharp edges shredded golf balls. In response, Ping smoothed out the groove edges. Unwittingly, the change forced Ping Eye2 irons out of compliance with another USGA rule that required a certain amount of space between each groove.

Around the same time, two of the tour's longer but less accurate drivers, Bob Tway and Mark Calcavecchia, won major championships playing Ping Eye2 irons. The PGA then passed a rule banning the use of square grooves in PGA events. Because square grooves allow players to generate a higher spin rate, particularly from the rough, the PGA concluded that square grooves "changed the character and nature of the game." The rule was another direct blow to Ping, the only manufacturer producing square-groove clubs at the time.

Ping responded by suing the USGA and PGA Tour for $100 million and $200 million, respectively. Ping and the USGA quickly settled, with Ping agreeing to redesign its clubs to conform to the groove-spacing rule, and the USGA grandfathering all pre-existing Ping Eye2 irons into conformance with current and future USGA equipment rules.

Since Ping and the PGA could not reach a settlement, Ping secured an injunction that prohibited the PGA from banning square grooves. Finally, in 1993, after three years of legal battles, Ping and the PGA reached a settlement allowing square grooves and agreeing that any Ping Eye2 irons that were already in existence would never be prohibited.

After the settlement, the groove debate remained quiet for over a decade, until golfers like Bubba Watson and J.B. Holmes started making a name for themselves with "bomb and gouge" golf. "Bomb and gouge" is a somewhat disparaging term used to describe the style of play that encourages crushing the ball off the tee, with little regard for the fairway, combined with a mastery of chipping out of any rough. Like baseball purists that decry home run hitters with gaudy strikeout totals, the USGA thought little of players that swung for the fences every time. Since it was believed that square grooves enabled "gouging" by making it much easier to generate spin out of the rough, the grooves were suddenly under the microscope again.

After three years of internal analysis and consultations with club manufacturers, the USGA adopted a new rule that banned square grooves. The PGA Tour endorsed the rule and implemented it for the start of the 2010 professional season, forcing many players who used square groove clubs to quickly modify their equipment and style of play. However, because of the Ping legal settlements from the 90's, the rule contained a major loophole: the PGA Tour and the USGA could not prevent players from using the old Ping Eye2 irons with square grooves.

Not surprisingly, the iron-clad rule with a crater-sized loophole led to dismay and discontent amongst professional golfers, the heart of the PGA Tour, who reportedly were not consulted during the process to change the rules. Without drawing much attention, a few players used the Ping Eye2 irons at the start of the 2010 season until Mickelson, who has deftly locked horns with the Commissioner in the past, decided to vent his frustration, willingly placing himself at the center of the controversy.

So, at the fourth event of the season, the Farmers Insurance Open, Mickelson added a grandfathered club to his bag; McCarron erupted, and duffers around the country scoured their garages for 30-year-old rusted lob wedges they could sell on eBay for $200. When Mickelson was asked to comment on his decision to play the club, a club that is not widely available for all players, he said, "I have been very upset over the way the entire groove rule has come about and its total lack of transparency . . . [and] the way one man essentially can approve or not approve a golf club based on his own personal decision regardless of what the rule says." Mickelson may have been angry about McCarron's accusations, or even motivated to protect his sponsors, but ultimately his furor was directed at the PGA and USGA.

In response to the Mickelson-McCarron flap, PGA Tour Commissioner Tim Finchem conceded that "[t]he assumption was made last year that very few, if any, players would use that club because they're 20 years old. I think we underestimated that a little bit." Finchem's comment revealed a complete disconnect between the governing bodies and the Tour players.

This was not the first time that the Tour's players have clashed with golf's rule-making bodies. Remember Casey Martin?

Martin, a former college teammate of Tiger Woods at Stanford, was an exceptional golfer who suffered from a painful handicap rendering him incapable of walking long distances without serious pain. As a result, he sought an exemption to allow him to ride a golf cart. The PGA Tour initially declined his request, did not examine Martin's medical records, and disregarded the opinions of other professionals like veteran Peter Jacobsen, who said at the time, "the PGA Tour is not about walking, it's about good golf . . . I will be 100% in [Casey's] corner." It was only after the Supreme Court ruled in Martin's favor that the PGA Tour relented.

The square groove dispute once again raised tensions between the PGA Tour and its players. Then, on March 8th, Ping founder Karsten Solheim agreed to allow the PGA Tour and USGA to drop the grandfather rule for Ping Eye2 irons, extricating themselves from their mess. In exchange, Solheim pressed for a rule-making process that is transparent and inclusive. The USGA then announced that it would sponsor the first-ever forum on rule-making processes in 2010, which will provide an opportunity for players, manufacturers, and other interested parties to comment on the processes.

The proposed USGA forum is promising, but lacks any real commitment to value the needs and interests of Tour players and everyday golfers and fans. There's a significant risk that it will be meaningless. In fact, in a press conference on March 9th, Commissioner Finchem would not agree that the proposed forum would have altered the process for implementing the new groove rule had it been in place last year. Golf is an international game, generating billions of dollars in annual revenues, but if its governing bodies remain insensitive to the protection of the interests of their constituencies, the popularity of the sport will be in jeopardy as the frustrations of the game's greatest players gain public attention. In the end, Mickelson's concerns may have been addressed, but at the high cost of another blow to the reputation of one of the game's brightest stars. ■

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