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Jim Brown v. Electronic Arts: Can Hall of Fame Football Player Jim Brown Score a Touchdown Against EA for Scrambling His Image?

Ryan S. Hilbert

Retired professional football legend Jim Brown is no stranger to on-the-field battles with opponents. His latest battle, however, is with videogame powerhouse Electronic Arts.

On March 6, 2009, Brown sued EA in federal court in the Central District of California. Among other things, Brown alleges that EA violated his right of publicity by using his digital image in a number of EA's popular Madden videogames. This practice, known as "scrambling" because of the way EA uses certain criteria — including a player's height, weight, position and year(s) in the league — to make the game appear more authentic but removes the player's name in order to make him less recognizable, has come under intense scrutiny from other former football players as well. On May 5, 2009, former Arizona State University and University of Nebraska quarterback Sam Keller sued EA (and two other defendants) in federal court in the Northern District of California for "scrambling" his image in EA's NCAA football game. And several weeks ago, on June 15, 2009, Ryan Hart, a former quarterback at Rutgers, and Troy Taylor, a former quarterback at the University of California and then for the New York Jets, sued EA in New Jersey state court. Hart appears to be suing EA for scrambling his image in the NCAA game, and Taylor appears to be suing for scrambling his image both in the NCAA game and in editions of Madden. With the exception of Hart, who alleges a violation of New Jersey's right of publicity statute because he lives there, each of the players bringing suit has included a claim for violation of California's right of publicity statute.

Each of these cases is still in its infant stages. In Brown's case, his original complaint was met with a motion to dismiss on the ground that EA does not use any protectable attribute of Brown's likeness. Even if it did, EA claims

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that such use is protected by the First Amendment. EA also responded by filing a motion to strike Brown's complaint under California's anti-SLAPP statute. This statute is designed to penalize those who would bring a lawsuit for the purpose of chilling free speech (which is what EA claims Brown has done). On July 2, 2009, Brown's complaint was dismissed on nonsubstantive grounds and he was given an opportunity to file an amended complaint. That complaint was filed approximately a week ago on July 22, 2009.

EA appears to have adopted the same tactic it used with Brown in Keller's case — i.e., on July 29, 2009, it filed both a motion to dismiss and a motion to strike under California's anti-SLAPP statute. According to documents previously filed in the case, the parties have agreed that Keller's response will be due by August 24, 2009, and that EA's reply briefs will be due by September 10, 2009. The motions are currently scheduled to be heard on September 24, 2009, in federal court in Oakland.

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A New Marketplace for Sports Franchises: Bankruptcy Court

Ivan Kallick

Bankruptcy courts are popular these days for business transactions. They are the forum of choice for the auto, energy, and airline industries and retail chains. The latest entrants are major sports franchises. In the 1990s the Pittsburg Penguins of the NHL sought refuge there, but the purpose was to force negotiation on a lease and not to sell. Now we are witness to the Phoenix Coyotes of the NHL filing Chapter 11 and media reports that the Chicago Cubs may file.

Why are major league sports franchises looking to the bankruptcy courts?

The Coyotes case presents the scenario of a money losing franchise that seeks to sell itself and move itself without the permission of the league from which its franchise is granted. The Coyotes' lineup has one side represented by team ownership that wants out from under huge debt, one side represented by the NHL that wants to have the ability to control transfers, one side represented by the city that built a state-of-the-art arena that is dependent on the presence of the Coyotes, and one side represented by a Canadian buyer intent on moving the Coyotes. Unless a settlement can be reached, a bankruptcy court will likely decide whether a sports franchise can be sold and moved despite the objections of various parties.

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The Cubs case may present a completely different scenario. The Cubs are currently owned by The Tribune Company, itself a Chapter 11 debtor. Because of the size of the proposed transaction and because the ownership interest is held by a Chapter 11 debtor, all sides may agree that the best way to accomplish a sale is with bankruptcy court approval. In other words, assuming all interested parties (current ownership, Major League Baseball, the City of Chicago) effectively agree on the sale and the transfer of the franchise, the most effective means to transfer free and clear title may be through the issuance of a bankruptcy court order approving the sale.

We may be seeing more sports-related issues turn up in bankruptcy courts. Professional sports franchises are often owned by very individualistic entrepreneurs who sometimes have problems with league rules about, for example, the location of franchises, and who sometimes tire of losing money on a franchise. Bankruptcy may provide what such owners would consider a solution to such problems.

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Ivan L. Kallick Mr. Kallick is co-chairman of Manatt's firm-wide Bankruptcy & Financial Restructuring Practice Group and focuses his practice on bankruptcy, insolvency and workout matters. Mr. Kallick's bankruptcy, insolvency and workout practice is concentrated on large reorganization cases, and has involved the representation of debtors, creditors, creditors' committees, franchisers, governmental and regulatory entities, and landlords in a wide range of matters and businesses including real estate development and brokerage, hospitality, manufacturing, healthcare, entertainment and service industries.


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