

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:1

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:1. Scope note

This Chapter addresses the keys to successful partnering between inside and outside counsel in the professional sports industry. Although this Chapter places particular emphasis upon the four major United States professional sports leagues, Major League Baseball (“MLB”), the National Football League (“NFL”), the National Basketball Association (“NBA”) and the National Hockey League (“NHL”), it is also presented with an eye towards other leagues—such as Minor League Baseball, Major League Soccer and Major League Lacrosse—that may have less visibility on the United States professional sports landscape, but whose counsel will encounter the same types of issues as the larger leagues. One development to monitor is the rise of the eSports industry.<sup>1</sup>

Sports law has shaped the operations of these leagues (and their respective member teams) and continues to leave its imprimatur upon the professional sports industry. Sports law also continues to affect the legal landscape generally—recent examples of the intersection of sports law with other areas of the law include the Congressional steroid investigation and the 2010 Supreme Court decision on the applicability of federal antitrust law to NFL licensing action.<sup>2</sup> In light of the various business activities engaged in by teams, legal professionals are challenged by a wide range of legal issues including player contracts, real estate (including stadium leasing), ticketing, media broadcasts, bank financing, concessions, merchandising, sponsorships, intellectual property licensing, branding, private equity, ownership, securities law, negligence and personal injury. This challenge is further compounded by the various league rules and regulations that come to bear upon the structure, terms and conditions of transactions and agreements entered into by teams.

In order for outside counsel to provide value-added legal services, a firm understanding of these league rules and regulations, as well as professional sports industry trends, is essential. The delivery of these legal services in a cost-effective manner requires that a system be implemented for the division of labor between inside and outside counsel.<sup>3</sup> To best enable the reader to render legal services in the manner described above, this Chapter is not designed to be conceptual or esoteric, but rather treats sports law pragmatically from inside and outside counsels' perspectives. Although volumes could be written on the specific rules, regulations and scenarios that teams and their counsel face, this Chapter provides various representative examples aimed at highlighting the goals and considerations that inside and outside counsel should be mindful of in developing a successful partnering strategy.

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#### Footnotes

- 1 *See* § 74A:76.
- 2 As discussed in greater detail in § 74A:13, the U.S. Supreme Court unanimously held in *American Needle, Inc. v. National Football League*, 560 U.S. 183, 130 S. Ct. 2201, 176, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019, 79 A.L.R. Fed. 2d 591 (2010) that the NFL teams, acting through a single licensing entity in granting an exclusive license to produce NFL member team-

branded headwear, remained subject to antitrust scrutiny under Section 1 of the Sherman Act (which prohibits concerted, anticompetitive action). This decision is proof positive of the ongoing impact of sports law.

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See §§ 74A:1 to 74A:11.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:2

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#### § 74A:2. Understanding the professional sports landscape

Sports law is not built upon a foundation of “clean landfill.” Rather, the bedrock of sports law is comprised of league rules and regulations as shaped over time by developments and trends in the sports industry. An understanding of applicable league rules and regulations is an essential prerequisite to providing effective legal services. These issues are discussed in §§ 74A:3 to 74A:5 of this Chapter.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:3

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#### § 74A:3. Understanding the professional sports landscape—Assessing the impact of applicable league rules and regulations upon the business of the team

When called upon by inside counsel to evaluate any potential transaction involving a team or its ownership, outside counsel should be cognizant of the ways in which league rules and regulations may be applicable. Typically, inside counsel will be intimately familiar with these rules and regulations, but effective partnering requires outside counsel to have a working knowledge of the ways in which league rules, regulations and frameworks may impact the structuring, timing and economics of transactions. Certain transactions may require approval by member teams in the league and/or the league's commissioner or other governing body. Other transactions may be impacted by league revenue sharing rules. For example, the parties may be required to include certain league-mandated language in their transaction documents. The foregoing is equally applicable with respect to the team's organizational and other governing documents, and ownership concentration.<sup>1</sup>

An understanding of the ways in which league rules and regulations and the team's governing documents intersect with business decisions to be made by the team will enable inside and outside counsel to effectively structure transactions and timely anticipate potential consents, approvals and other league involvement. Conversely, counsel to the third party or parties on the other side of the applicable transaction should also seek to develop an understanding of applicable rules and regulations, and the team's governing documents, in order to prevent unnecessary expenditure of time and money on structuring transactions that will ultimately be “non-starters.”

Most often, league rules and regulations work in favor of the team or its ownership and will restrict the third parties looking to engage the team in a transaction. For example, a bank may desire to make a significant working capital loan to the team secured by a pledge of the ownership interests in the team. However, as discussed later in this Chapter,<sup>2</sup> league rules and regulations often affect the manner in which these business objectives may be achieved. Thus, the bank's counsel need to be flexible and creative in structuring the transaction if the bank desires to maintain its relationship with the team. Banks are often quite willing to accommodate a team in light of the publicity and other marketing benefits (*e.g.*, increased visibility within the community at large) that typically flow from a team relationship. Moreover, banks will often gain access to team owners through team financing transactions. This access may result in additional business for the bank not directly related to the team.

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#### Footnotes

<sup>1</sup> See § 74A:70.

<sup>2</sup> See §§ 74A:15 to 74A:17.

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:4

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#### § 74A:4. Understanding the professional sports landscape— Awareness of “market” terms and conditions for particular transactions

In addition to having the ability to assess the impact of league rules and regulations on a particular transaction, outside counsel adds value by educating inside counsel on “market” terms and conditions for the transaction. Outside counsel should stay current on transaction terms in the sports industry, as well as the marketplace generally, for such purpose. For instance, in negotiating team financing, awareness of the types of collateral packages and financial covenants required by lenders in the then-current market is of critical importance. Credit agreements entered into by MLB teams in the wake of the Texas Rangers bankruptcy in 2010 and the Los Angeles Dodgers bankruptcy in 2011 can be expected to contain provisions affording MLB with event of default standstill powers and interim operating expense funding rights. These rights afford MLB, rather than creditors, with the right to control a team's destiny following an event of default for a period of time.<sup>1</sup>

The assistance outside counsel provides to inside counsel in evaluating premier sponsorship arrangements by advising on the types of benefits granted to major sponsors by other teams in the league and the range of payments made by sponsors in respect of such rights is yet another example of value added outside counsel services. Similarly, outside counsel may advise on concession services arrangements, such as with regard to pricing, the types of services that have become standard in concession services agreements and in certain cases, concession area build-out and equipment financing provided by concessionaires.

No matter what the particular transaction at issue may be, inside counsel will frequently look to outside counsel during negotiations for advice on market conditions and the types of terms and conditions that inside counsel should seek to obtain. Further, outside counsel may have acquired knowledge as to transaction terms by having dealt with the transaction counterparty through the prior representation of another client. The portion of this knowledge not subject to confidentiality restrictions should be shared by outside counsel with inside counsel. Based on the foregoing, outside counsel can be invaluable in preparing inside counsel to make tough decisions on an informed basis during the negotiation and drafting process.

As much as inside counsel may look to outside counsel for guidance, a successful pairing is a two-way street and inside and outside counsel should seek to build a bridge of communication with each other. Inside counsel will often have information that outside counsel would not otherwise be privy to. For example, certain league rules and regulations and key governing documents are not publicly available. As such, inside and outside counsel must communicate effectively to ensure that each is adequately informed. As a matter of best practice, outside counsel should not charge its client for the time it takes to become fluent with league rules and regulations—such base-level knowledge is expected of outside counsel as a prerequisite to being retained.

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Footnotes

- 1 In July 2011, a Delaware bankruptcy court rejected the Los Angeles Dodgers' proposed bankruptcy financing plan with a hedge fund, finding that an unsecured financing offer made by MLB included more favorable financial terms. [In re Los Angeles Dodgers LLC, 457 B.R. 308, 55 Bankr. Ct. Dec. \(CRR\) 52 \(Bankr. D. Del. 2011\)](#). The team had previously rejected MLB's financing offer, asserting that it was an attempt by MLB and its Commissioner to gain control of the team and force a sale in bankruptcy. Several months prior, the MLB Commissioner appointed the former president of the Texas Rangers to oversee all of the Los Angeles Dodgers' operational and financial matters and act as the decision-maker with respect to any proposals made by team owner Frank McCourt. The team and MLB eventually agreed upon a financing plan of up to \$150 million. Subsequently, the Los Angeles Dodgers filed a plan to auction its broadcast rights as a means to refinance the team and allow the then-current owner, Frank McCourt, to retain ownership. The team sought the early termination of a licensing agreement with its broadcast partner. In petitioning the court to end its licensing arrangement, the team argued that a sale of its telecast rights was essential in order to maximize the team's market value. The broadcast partner and MLB contested this position, arguing that the sale of telecast rights was not necessary for the team to emerge from bankruptcy. MLB also submitted an opposition filing stating that any sale of the team's media rights without MLB consent would subject the team to severe discipline, including possible termination as a member team in the league. Instead, MLB urged the court to force a sale of the team, alleging that Mr. McCourt's actions were motivated by personal financial troubles and not in the best interests of the team. After review, the court found that allowing the team to maximize its value was a top priority, and that any delay in negotiating the sale of the team's telecast rights would be detrimental to the team's estate. The court granted the team's motion and allowed it to negotiate for better telecast terms. In May 2012, the Los Angeles Dodgers emerged from bankruptcy and were sold to a group of buyers for a purchase price in excess of \$2 billion. League rules and regulations may continue to evolve as a result of the Texas Rangers and Los Angeles Dodgers bankruptcies.

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§ 74A:5. Understanding the professional sports landscape—Monitoring trends in the sports industry generally

Section 74A:4 discussed the importance of counsel's awareness of market terms and conditions for particular transactions. Similarly, inside and outside counsel should continually monitor trends in the sports industry generally, in order to garner ideas that will keep the team on the forefront of industry changes and trends. Not too long ago, personal seat licenses<sup>1</sup> and regional sports networks were absent from the sports landscape and have presented a myriad of legal issues since their introduction. By staying current on industry news and happenings, outside counsel can make suggestions to inside counsel that may be passed along to the appropriate team decision-makers. Monitoring developments of other teams, such as hosting non-sporting events, entering into joint ventures with recognizable brands in other industries and harnessing developing technologies (*e.g.*, paperless tickets and use of wireless devices as the means of payment at concession stands), will put outside counsel at an advantage when called upon to provide opinions on potential transactions or suggest ways in which a team can increase its own revenue or visibility.

Counsel must also monitor global and national economic conditions generally, as they affect the sports business in much the same way as other industries. For example, forecasting stagnant ticket or premium license sales may enable teams to develop alternate sales or discount strategies to navigate through difficult economic times. Conversely, positive economic conditions will necessitate a review of available inventory for season-ticket and premium license holders and may require development of lottery or seniority systems, which have their own legal issues to be considered. The best advice that inside and outside counsel can provide to the team is proactive, not reactive.

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### Footnotes

1 *See* § 74A:35.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:6

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#### § 74A:6. Creating a system for the division of legal tasks

In order to provide legal services in an efficient manner, a system for the division of legal tasks between inside counsel and outside counsel needs to be created. Legal tasks are often divided on the basis of whether the legal task is routine or significant in nature. Another common determinate for the division of legal tasks is whether inside counsel or outside counsel is more experienced with, or knowledgeable about, a particular legal task. Further, ownership, management, player and team sensitivity considerations influence the division of legal tasks. Strategies for creating and implementing a system for the division of legal tasks are discussed in §§ [74A:7](#) to [74A:11](#) of this Chapter.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:7

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#### § 74A:7. Creating a system for the division of legal tasks—Routine ministerial legal matters may require little or no outside counsel involvement

Based on their combined knowledge of the foregoing league rules and regulations, team organizational and governing documents, market terms and industry trends (as discussed in Sections [74A:3](#) to [74A:5](#)), inside and outside counsel can work to create a system for the division of legal tasks. Certain routine legal matters that may be considered ministerial in nature may require little or no outside counsel involvement. Such matters typically include lawsuits brought against the team on the basis of negligence (*e.g.*, personal injury suffered while on stadium or arena premises) or other types of lawsuits that are brought with relative frequency and involve repetitive types of claims or relatively small amounts of damages (*e.g.*, vendor disputes, warranty claims). Given the fact that the bulk of these matters will be assigned to the team's insurance providers, engagement of outside counsel on a case-by-case basis may be an unnecessary expense. Outside counsel, however, may monitor actions taken by the insurance company's legal staff in processing insurance claims. Outside counsel should also work with inside counsel to ensure that adequate risk-management policies are in place and that adequate in-house insurance personnel are employed.<sup>1</sup> Similarly, transactional matters that are administrative in nature, such as dealing with routine renewal or amendment of agreements, are typically handled by inside counsel without much need, if any, for consultation with outside counsel. Alternatively, more significant litigation, which may have increased public visibility, involve a significant aspect of team operations or involve a potentially large amount of damages, often requires engagement of outside counsel.

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#### Footnotes

<sup>1</sup> See generally [Chapter 25 “Representing a Client with Insurance”](#) (§§ 25:1 et seq.).

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#### § 74A:8. Creating a system for the division of legal tasks—Player/ team sensitivity issues typically handled primarily by inside counsel

Matters involving players and team staff, such as player contracts, salary arbitration and union negotiations, tend to be primarily handled by inside counsel, given the specialized nature of the relationship and the heavy involvement of the league in such matters. Inside counsel will be required to interact with agents, managers, labor unions and other representatives, as well as specialized counsel engaged by the league. Unless outside counsel has particular expertise in these areas, these issues are also typically dealt with in-house by reason of the team's sensitivity to and familiarity with such matters. As player and coaching relationships are of tantamount importance to any successful franchise, inside counsel will be especially sensitive to managing the tone of negotiations and will endeavor to minimize any “hard feelings” which might otherwise develop if the team were to engage third-party counsel to handle the matter.

Inside counsel will also be sensitive to press and media coverage of the team. Inside and outside counsel should establish clear protocols as to the handling by outside counsel of press inquiries. As a matter of best practice, and given the visibility of professional sports teams and, at times, their ownership, outside counsel should never provide a comment unless specifically instructed to do so by inside counsel. Inside counsel may direct outside counsel to refer all inquiries to inside counsel or some other third-party representative of the team, such as a public relations firm or other spokesperson. Similarly, teams should maintain control of their press releases with inside counsel's oversight. Outside counsel may be asked to comment on the substance of draft press releases prior to release to the public.

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§ 74A:9. Creating a system for the division of legal tasks—Templates of certain operational agreements typically drafted by outside counsel for use by inside counsel

Outside counsel is frequently called upon to supply inside counsel with template forms of certain operational agreements that typically will require minimal modification for specific arrangements. Such agreements often include season ticket and personal seat licenses, concession vendor agreements, advertising and sponsorship agreements, confidentiality agreements and the like. Preparation by outside counsel ensures that key, up-to-date legal terms and provisions are included in the template document, providing maximum protection for, and benefit to, the team. Outside counsel will often first consult with inside counsel as to key business provisions that should be included, such as terms of use of certain team-owned intellectual property, preferred dispute resolution mechanisms and any league or government-mandated provisions. If the agreement becomes subject to considerable negotiation with the applicable counterparty, outside counsel will typically be consulted by inside counsel, given outside counsel's familiarity with the agreement. Outside counsel may be further requested to develop an appropriate negotiation strategy. As a matter of best practice, outside counsel should periodically review the team's template documents for necessary or desirable updates.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:10

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#### § 74A:10. Creating a system for the division of legal tasks—Significant transactions typically entail outside counsel assuming a primary role

Significant transactions typically mandate assumption of a primary role by outside counsel. Such transactions may include credit facilities,<sup>1</sup> stadium financings,<sup>2</sup> premier sponsorship arrangements or naming rights,<sup>3</sup> concession services arrangements,<sup>4</sup> media rights licensing,<sup>5</sup> stadium technology arrangements,<sup>6</sup> branding deals and acquisitions of minor league franchises. Given the amount of time and attention that must be devoted to such transactions and the internal day-to-day obligations of inside counsel, partnering with outside counsel is essential to the successful and efficient consummation of any significant transaction. Further, specialized legal knowledge will often be required—knowledge that an inside counsel generalist may not possess. Tax, environmental, intellectual property, real estate, zoning and land use, structured financing, derivatives, bankruptcy, liquor licensing and governmental relations are just a few examples of specialized practice areas that may come to bear in the types of significant transactions discussed above. Outside counsel is expected to have the resources necessary for the transaction at hand and experience in dealing with the other types of professionals that may be involved in the transaction, such as accountants, financial advisors, investment bankers, architects and construction professionals.

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#### Footnotes

- 1 [See § 74A:19.](#)
- 2 [See § 74A:20.](#)
- 3 [See § 74A:30.](#)
- 4 [See § 74A:28.](#)
- 5 [See §§ 74A:25 to 74A:27.](#)
- 6 [See § 74A:40.](#)

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:11

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#### § 74A:11. Creating a system for the division of legal tasks—System should draw primary attention and recognition to inside counsel

In transactions involving outside and inside counsel, as a matter of good business practice, outside counsel should seek to have the “spotlight” focused on inside counsel, even if outside counsel is primarily involved in the transaction. Inside counsel is accountable to, and must answer to, executive officers and ownership of the team. For outside counsel, its continued engagement by the team should be reward enough. Any successful partnership between inside and outside counsel will draw primary attention and recognition by ownership, management and third parties to inside counsel. Outside counsel should play a supporting role and in all cases act in such a manner as will put inside counsel in a positive light with respect to negotiations, drafting decisions and the successful consummation of any transaction. As a matter of best practice, as the transaction and negotiations progress, outside counsel should prepare open issues lists that facilitate internal discussions that inside counsel may engage in with executive officers and ownership of the team. Open issues list should be prepared in an manner that is easily “digestable” by senior management. Technical legal issues should be reserved for separate discussion with inside counsel. A properly drafted open issues list will enable inside counsel to successfully navigate such issues with senior management and strengthen senior management's confidence level with inside counsel. On an ongoing basis, outside counsel may also assist inside counsel with periodic deadline reminders with regard to deliverable requirements under executed transaction documents or other applicable reporting requirements.

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#### § 74A:12. League-wide issues

The leagues are the primary governance mechanisms in the sports industry and function as self-regulatory organizations. In such capacity, the leagues are responsible for negotiating collective bargaining agreements with the players unions and other league-wide agreements involving such issues as trademarks and media rights. The leagues also adopt rules and regulations intended to promote parity and competitiveness among the teams, and otherwise ameliorate the advantages that larger market teams have over smaller market teams. The leagues further oversee the enforcement of league rules and regulations and are empowered to impose fines and other sanctions for violations of such rules and regulations. As is the case with self-regulatory organizations in other industries, actions taken by the leagues must be consistent with applicable statutes and other principles of law. League-wide issues are discussed in §§ 74A:13 to 74A:17 of this Chapter.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:13

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#### § 74A:13. League-wide issues—Application of antitrust laws to teams

One body of law with particular significance in the professional sports industry is antitrust law.<sup>1</sup> Traditional United States antitrust law, aimed at prevention of unfair competition,<sup>2</sup> has not always been easily applied to the sports industry. Although in practice inside and outside counsel may not deal with antitrust issues with great frequency, it is nonetheless important to have a primer on the ways in which federal antitrust law has shaped, and continues to shape, the professional sports landscape.

Uniquely, MLB has enjoyed an exemption from the federal antitrust laws by virtue of the U.S. Supreme Court's decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.<sup>3</sup> In that case, the Court held that baseball was “purely a state affair” that did not involve interstate commerce, a requirement for application of federal antitrust laws. Although the best argument in support of the Court in *Federal Baseball* may be that baseball is entertainment, as opposed to interstate commerce, the *Federal Baseball* decision has been sharply criticized by legal scholars. Following *Federal Baseball*, the Supreme Court considered the baseball exemption again in *Toolson v. New York Yankees*.<sup>4</sup> In dismissing several challenges to baseball's reserve system, the Court concluded that “Congress had no intention of including the business of baseball within the scope of the Federal antitrust laws.” The Court noted that Congress was aware of the consequences of *Federal Baseball* and that any remedial action in respect thereof should be properly left to the legislature. Almost twenty years later, in *Flood v. Kuhn*,<sup>5</sup> the Supreme Court upheld *Federal Baseball* and *Toolson*, and noted that it was within Congress' jurisdiction to challenge MLB's antitrust exemption.<sup>6</sup> Almost thirty years thereafter, Congress passed the Curt Flood Act of 1998, giving MLB players the right to bring antitrust challenges against their employers under the Sherman Antitrust Act of 1890 (the “Sherman Act”), effectively eroding the precedence of *Federal Baseball*. However, the Curt Flood Act specifically states that it is limited in scope to players' labor-related actions and does not otherwise limit MLB's general antitrust exemption. These distinctions have shaped the preparation and negotiation of team player contracts.

Other professional sports have not been afforded the same exemption. Following *Federal Baseball*, in *United States v. International Boxing Club*,<sup>7</sup> the Supreme Court held that promotion of boxing across state lines constituted interstate commerce with respect to applicability of the Sherman Act. As such, the Court made clear that professional sports could indeed be subject to federal antitrust laws. This case opened the door to numerous antitrust challenges in the professional sports industry, several of which are discussed below.

In 1974, a NFL player successfully challenged certain NFL player restraints, including the NFL one-year option clause (which permitted NFL teams to renew any player contract at 90% of the previous salary) and the college draft. The court in that case, *Kapp v. NFL*,<sup>8</sup> held that the player restrictions were patently unreasonable and beyond any possible need. The decision led to changes in the NFL draft process. In another significant case involving the NFL, *Mackey v. NFL*, the so-called “Rozelle Rule,” requiring compensation for a player from another team consisting of draft picks, players or money, was challenged. The Eighth Circuit, applying the so-called “rule of reason,” found the Rozelle Rule to be

an “unreasonable” restraint of trade, the hallmark of a violation of the Sherman Act.<sup>9</sup> As a result, the NFL Players Association negotiated a new collective bargaining agreement that eliminated the Rozelle Rule.

A case of particular impact on the NBA was *Denver Rockets v. All-Pro Management*.<sup>10</sup> Spencer Haywood challenged provisions of the NBA Bylaws stating that no person would be eligible to play in the NBA until four years after his high school class graduated. Haywood, who was denied entry into the NBA two years after his high school graduation on these grounds, argued that the rule was an unfair boycott of persons of a certain age. The court agreed and found a Sherman Act violation. As a result, *Denver Rockets* paved the way for players to enter the NBA prior to completion of their college educations.

On the ownership side, *Los Angeles Memorial Coliseum Commission v. NFL*<sup>11</sup> involved a bid by the Oakland Raiders to move from Oakland, California to Los Angeles. Under NFL rules and regulations, unanimous consent of all NFL teams was required in order to relocate. The Ninth Circuit found that the rule did not withstand rule of reason scrutiny and was anticompetitive in that it perpetuated local monopolies. As a result, the NFL paid \$18 million in damages and ultimately granted the franchise relocation. The Raiders did relocate (temporarily) to Los Angeles and received monetary damages from the NFL following the decision. This decision signified that professional leagues subject to antitrust scrutiny may only have restraints on franchise relocation that are reasonable.

Inside and outside counsel should familiarize themselves with the applicable league's rules and regulations regarding relocation in the event that the team they represent seeks to relocate. Restrictions on territories and league member consent will inevitably impact the team's relocation options and strategy. Further, as discussed in greater detail in [Section 74A:20](#), many teams that have received governmental assistance (e.g., stadium financing) are often required to enter into non-relocation agreements.<sup>12</sup> These agreements expressly provide for injunctive and other equitable relief to prevent a team from relocating in violation thereof. In the event equitable relief is unavailable, teams face paying significant amounts in the form of liquidated damages.

Professional sports leagues are unique in that member teams are both cooperative and competitive at the same time. Despite this unique nature, leagues have developed a “single-entity” defense to antitrust challenges. The heart of this defense is the argument that leagues are structured as single entities (as opposed to cooperatives of individual member teams) that are per se unable to conspire or contract in restraint of trade. The NFL has frequently asserted this defense to no avail. Most recently, in a highly-anticipated decision, the Supreme Court struck down the single-entity defense in *American Needle, Inc. v. NFL*.<sup>13</sup> A sportswear manufacturer brought an antitrust challenge against National Football League Properties (“NFLP”), the licensing entity of the NFL, for granting Reebok an exclusive license to produce NFL member team-branded headwear. The sportswear manufacturer had formerly produced branded headwear for NFLP, but its license was not renewed due to the new Reebok exclusivity deal. The NFL asserted the single-entity defense, arguing that the NFLP was a single entity, incapable of concerted anticompetitive action with another party. The Supreme Court disagreed, holding that concerted action does not hinge simply on “whether the parties involved are legally distinct entities.” Instead, there must be a “functional consideration” of how the parties have acted in substance rather than form. For there to be concerted action, there must be “separate economic actors pursuing separate economic interests ... [i.e.] diversity of entrepreneurial interests” resulting in deprivation of actual or potential competition in the marketplace. The Supreme Court noted that NFL teams have many distinct interests, including intellectual property licensing activities. However, in remanding the case to the lower court and discussing whether the conduct at issue violated the Sherman Act, the Supreme Court acknowledged that factors related to the NFL's collective nature (e.g., shared interest in fostering a profitable league or cooperation in coordinating schedules) may lead the lower court to find that the exclusive license was not an unreasonable restraint of trade under the rule of reason.

*American Needle* proves that even today, antitrust law continues to have an impact on the business of professional sports in a significant way and cautions that even routine matters like trademark licensing should be evaluated by inside and

outside counsel with respect to the potential of such routine matters triggering antitrust scrutiny. Antitrust analysis is simply an additional layer for both inside and outside counsel to consider in evaluating any transaction and its structure. The ability of outside counsel to provide specialized expertise in this area is often particularly helpful to inside counsel who can typically be expected to be possessed of a more generalized degree of knowledge.

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#### Footnotes

1 *See generally* [Chapter 79 “Antitrust and Competition” \(§§ 79:1 et. seq.\)](#).

2 Section 1 of the Sherman Antitrust Act of 1890 provides that:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Antitrust Act of 1890 provides that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3 [Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs](#), 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898, 26 A.L.R. 357 (1922).

4 [Toolson v. New York Yankees, Inc.](#), 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64 (1953).

5 [Flood v. Kuhn](#), 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728, 1972 Trade Cas. (CCH) ¶ 74041 (1972).

6 Flood was also a key case in that (through the trial court and Second Circuit, and affirmed by the Supreme court) it established that application of state antitrust laws to the interstate activities of professional sports would create an impermissible burden on interstate commerce. Flood has been upheld in this regard in many subsequent decisions, particularly with regard to MLB. Certain recent lower court decisions have held that state antitrust laws will not be preempted by federal antitrust laws so long as they are not in direct conflict, but such decisions are limited and not widely cited or followed.

7 [United States v. International Boxing Club of N.Y.](#), 348 U.S. 236, 75 S. Ct. 259, 99 L. Ed. 290 (1955).

8 [Kapp v. National Football League](#), 390 F. Supp. 73, 88 L.R.R.M. (BNA) 2241, 76 Lab. Cas. (CCH) P 10642, 1974-2 Trade Cas. (CCH) ¶ 75430 (N.D. Cal. 1974), vacated in part, 1975-2 Trade Cas. (CCH) ¶ 60543, 1975 WL 959 (N.D. Cal. 1975), aff'd, 586 F.2d 644, 1978-2 Trade Cas. (CCH) ¶ 62198 (9th Cir. 1978) and judgment aff'd, 586 F.2d 644, 1978-2 Trade Cas. (CCH) ¶ 62198 (9th Cir. 1978).

9 [Standard Oil Co. of New Jersey v. U.S.](#), 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

10 [Denver Rockets v. All-Pro Management, Inc.](#), 325 F. Supp. 1049, 1971 Trade Cas. (CCH) ¶ 73534, 1971 Trade Cas. (CCH) ¶ 73536, 18 A.L.R. Fed. 463 (C.D. Cal. 1971), reinstated, 401 U.S. 1204, 91 S. Ct. 672, 28 L. Ed. 2d 206, 1971 Trade Cas. (CCH) ¶ 73494 (1971).

- 11 Los Angeles Memorial Coliseum Com'n v. National Football League, 726 F.2d 1381, 1984-1 Trade Cas. (CCH) ¶ 65879 (9th Cir. 1984).
- 12 See § 74A:21 for a discussion of non-relocation agreements.
- 13 American Needle, Inc. v. National Football League, 560 U.S. 183, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019, 79 A.L.R. Fed. 2d 591 (2010).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:14

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:14. League-wide issues—Governance

The four major United States professional sports leagues, MLB, NFL, NHL and NBA, all have somewhat similar governance structures. Each league has a Commissioner who serves as the Chief Executive Officer of the league and is elected by such league's member teams.<sup>1</sup> The Commissioner's duties typically include general supervision of the business and affairs of the league (including, without limitation, the manner in which games are played), labor relations, arbitration of certain disputes among member teams, owners, players, coaches, employees and officials, assessment and enforcement of preventative, remedial or punitive action, interpretation of league rules and regulations and other extraordinary matters involving the league or its member teams.<sup>2</sup> The league may also have officers that will play a supporting role for the Commissioner.<sup>3</sup> Given that the Commissioner is elected by the member teams of the league, he or she serves a dual role—both representing the interests of those teams, but also acting as a disciplinarian of owners, players and others when necessary. Each Commissioner must delicately balance these duties if he or she would like to maintain a lengthy tenure in office. However, in each league, the Commissioner is generally charged with the overarching responsibility of protecting the integrity of the league and the sport.

Each league also has a governing body composed of representatives from its member teams. The NFL has an Executive Committee composed of one representative from each of its member teams.<sup>4</sup> The NHL has a Board of Governors composed of one representative from each of its member teams, along with two alternates, and an Executive Committee named by the Commissioner consisting of eight to twelve members of the Board of Governors.<sup>5</sup> MLB has an Executive Council composed of the Commissioner (as Chairman) and representatives from eight of its member teams (four from each of the American League and the National League)<sup>6</sup> and the NBA has a Board of Governors composed of one representative from each of its member teams.<sup>7</sup> Each of these governing bodies has the power and responsibility granted to it in the applicable league's constitution. By way of example, the NFL Executive Committee holds the power, *inter alia*, to impose fines upon member teams, owners, players and other league or team employees, borrow money in the name of the NFL and cause audits of the books and records of the NFL and its Treasurer.<sup>8</sup> The MLB Executive Council has jurisdiction over, *inter alia*, recommendations regarding MLB rules and regulations and candidates for Commissioner and approval or disapproval of the Commissioner's proposed annual budget.<sup>9</sup> Certain significant matters are reserved for approval by each league's member teams. The member teams meet periodically, as prescribed by the league's constitution, and follow an agenda prepared by the Commissioner or as otherwise set forth in the constitution. The NFL Constitution, for example, sets forth the order of business for the Annual Meeting of its member teams,<sup>10</sup> while the NHL Constitution charges the NHL Commissioner with formulation of the agenda. Each league's constitution sets forth the requirements for formal action by its member teams.

As discussed in [Section 74A:17](#), these member team voting powers have a significant impact on many types of transactions that a particular team may desire to enter into. As discussed in [Section 74A:4](#), outside counsel should familiarize itself with all of these rules and regulations without charge to the client. Such familiarity is part of the skill set expected of outside counsel.

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Footnotes

- 1 Constitution of the National Hockey League (“NHL Const.”), Art. VI; Constitution and Bylaws of the National Football League, Effective February 1, 1970 (2006 Rev.) (“NFL Const.”), Art. VIII; Major League Constitution, Art. II (“MLB Const.”); Constitution and By-laws of the National Basketball Association, October 30, 1996 (“NBA Const.” or “NBA By-laws”), Art. 24(a).
- 2 *See generally* NHL Const., Art. VI; NFL Const., Art. VIII; MLB Const.; NBA Const., Art. 24(a).
- 3 NFL Const., Art. VII, No. 7.1; NHL Const., Art. VII; NBA Const., Arts. 25–28.
- 4 NFL Const., Art. VI, No. 6.1.
- 5 NHL Const., Art. V, Sec. 5.1, 5.2.
- 6 MLB Const., Art. III, Sec. 1.
- 7 NBA Const. Art. 18(b).
- 8 NFL Const. Art. VI, No. 6.5.
- 9 Const., Art III, Sec. 2.
- 10 NFL Const., Art. V, No. 5.7.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:15

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:15. League-wide issues—Rights reserved by the league

Although member teams in each of the NFL, NHL, NBA and MLB enjoy a certain level of autonomy, there are certain rights that are reserved by the leagues.

Broadcasting and other media rights are a prime example. As a general matter, subject to any exclusive primetime, special event and/or national network rights the applicable league may retain (examples of which are discussed below), member teams of each of the leagues are permitted to arrange for broadcasting of their games in their defined home territories, subject to certain restrictions set forth in the applicable league constitution, rules or regulations aimed at preventing or permitting overlapping broadcasts.<sup>1</sup> However, as discussed in § 74A:60 (Antitrust—Broadcasting), certain leagues and teams have been sued on the ground that the television and Internet distribution methods for “in market” and “out-of-market” games are anticompetitive.

Exclusive rights with respect to nationally broadcast games, postseason games and other special events are typically reserved by the applicable league. The MLB Constitution provides that the Commissioner shall act as exclusive agent on behalf of the member teams in selling, throughout the United States and other territories selected by the Commissioner, television and radio<sup>2</sup> or other video or audio media rights (including the Internet) to the World Series, League Championship Series, Division Series, All-Star Games, regular season championship series, spring training games, exhibition games and other MLB events.<sup>3</sup> Under the NFL Constitution, any contract entered into by any member team with respect to telecast or broadcast of its games and any sponsor of such broadcast or telecast must be approved by the Commissioner in advance of such broadcast or telecast. All such contracts must also state that they are subject to the applicable section of the NFL Constitution providing for such approval requirement.<sup>4</sup> The NFL is markedly different from the other professional leagues discussed in this Chapter, in that the broadcast rights are national, not local or regional.<sup>5</sup> However, similar to MLB rules and regulations, the sale of radio, television and film rights for the NFL Super Bowl game and Conference Championship games are under the sole jurisdiction of the NFL Commissioner.<sup>6</sup> The NBA broadcasting rules and regulations are comparable to those of the NFL. All contracts entered into by any member team for the television or radio broadcast of any of its games must contain provisions rendering them subject to (i) the NBA Constitution and By-laws and all other rules and regulations of the NBA; (ii) any existing or future broadcasting contracts entered into by the NBA; and (iii) the approval of the Commissioner.<sup>7</sup> Outside counsel is often engaged to assist with significant broadcasting agreements or partnerships. On such occasions, outside counsel must be familiar with limitations on, and conditions to, broadcasting arrangements. In order to effectively represent the team, this knowledge is of paramount importance.

Intellectual property is another area in which individual teams' rights may be limited by exclusive rights of their league. Although teams are generally granted exclusive rights vis-à-vis other member teams to use their trademarks within their home territories, the league may retain certain rights with respect to those trademarks.<sup>8</sup> Under the NFL Constitution, the NFL retains the exclusive worldwide control to license and otherwise use all league trademarks and individual team trademarks for certain enumerated business operations, including promotion of the NFL, apparel, accessories, footwear

and fitness products, computer and video games, on-field equipment, products including the marks of all NFL teams and licensing, advertising, product or service placement, sponsorships and promotional agreements relating to commercial identification on the sidelines or playing field or otherwise subject to television exposure during NFL games. No member team may “opt out” of any league arrangement with respect to any of such business operations or otherwise refuse to cooperate.<sup>9</sup> With respect to copyright issues<sup>10</sup> and broadcasting,<sup>11</sup> the leagues diverge with respect to re-broadcasting rights. For example, MLB delegates re-broadcasting rights to its member teams, while the NBA retains exclusive re-broadcasting rights. All broadcasting contracts entered into by any NBA team must reserve to the NBA the copyright in all games telecast or radio broadcast thereunder. Failure to comply with this rule can result in disapproval of the contract by the Commissioner, rendering the contract null and void.<sup>12</sup> Outside counsel must become familiar with these types of reserved rights so that they are properly observed by member teams and appropriately handled in related transactions. Both outside and inside counsel must ensure that the team does not bargain for more than it can deliver. Negotiating a transaction with third parties without considering and properly addressing reserved rights early on can cause embarrassment for the team executive officers and inside counsel. In addition, dealing with these matters late in the transaction may cause undue delay, as the team and third parties may have to rely on consents and approvals provided by the league on its own timetable.

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#### Footnotes

- 1 MLB Const., Art X, Sec. 3.
- 2 MLB teams have very broad radio rights. With respect to home games, the game may be broadcast throughout the United States by the home team, other than within a 50-mile radius of the opponent's stadium. With respect to road games, unless the home team otherwise agrees, the road team may only broadcast road games within a 50-mile radius of its stadium. The ordinary course practice is for teams to exchange on an annual basis letters consenting to broadcasts of road team games outside of the 50-mile radius of the road team's stadium. Given that the exchange of these letters has been a long-standing practice, it would be highly unusual for a team not to participate in the consent letter exchange process.
- 3 MLB Const., Art. X, Sec. 4. Television and radio or other video or audio media rights (including the Internet) with respect to spring training games, exhibition games and other MLB events is an ever-evolving area.
- 4 Const., Art. X, No. 10.1.
- 5 The equal sharing of the significant revenues generated by the national broadcasting contracts among the member teams is a primary driver of the NFL's goal of league-wide parity.
- 6 NFL Const., Art X, No. 10.5.
- 7 By-laws, Sec. 9.01 and 10.01.
- 8 See § 74A:39; see generally Chapter 69 “Trademarks” (§§ 69:1 et. seq.).
- 9 Const., Art. IV, No. 4.4(F).
- 10 See generally Chapter 70 “Copyright Litigation” (§§ 70:1 et. seq.).
- 11 See § 74A:25 for a discussion of broadcasting and media rights agreements.
- 12 By-laws, Sec. 9.01 and 10.01.

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:16

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:16. League-wide issues—Significant league rules and regulations

Beyond the types of rules, regulations and guidelines enacted by a league regarding game play, matters involving the players (*i.e.*, eligibility, rosters, drafts, trades, etc.), scheduling and team territories, there are other significant rules and regulations that affect member teams on a business level—rules and regulations that may impact significant transactions that outside counsel may be called upon to oversee.

One major category in this regard is team indebtedness. Under NFL rules and regulations, for example, the amount of indebtedness which each member team may incur is limited to \$250 million.<sup>1</sup> The NFL Finance Committee annually considers whether, in light of inflation, projected revenues, and franchise values, the overall debt limitation should be further increased.<sup>2</sup> Notwithstanding the foregoing, the NFL Finance Committee has granted waivers from compliance with the debt limitation in connection with stadium financings. For example, the Atlanta Falcons was granted a debt limitation waiver for the costs of constructing a new home stadium which broke ground in May 2014. The waiver was granted to enable the Falcons to borrow \$650 million more than permitted under the then-current debt limitation to fund construction costs. Further, the NFL Finance Committee has granted a similar waiver in connection with the financing of the permanent home stadium of the Los Angeles Chargers. MLB teams are also subject to rules and regulations regarding indebtedness, namely the so-called Debt Service Rule, found in the Basic Agreement between the MLB Players Association and the MLB member teams.<sup>3</sup> Simply stated, no MLB team may maintain more “Total Club Debt”<sup>4</sup> in any given year than can reasonably be supported by its EBITDA (earnings for its fiscal year before interest, taxes, depreciation and amortization, and either (i) net of revenue sharing payments made or (ii) inclusive of revenue sharing payments received).<sup>5</sup> The impetus behind this rule is MLB's desire to minimize team bankruptcy risk and forced sales of team equity and assets. The NBA Constitution also provides that the Board of Governors shall have the right to put limits on the total indebtedness that any member team or owner may incur that is secured by the team's membership in the NBA or an owner's interest in the team.<sup>6</sup> Under the NBA By-laws, revenues derived from network, national and international television contracts are shared equally among the member teams. The NBA By-laws prohibit each member team from pledging more than eighty-five percent (85%) of its share of such revenue, and each team must grant to the NBA a first priority security interest in the remaining fifteen percent (15%) of such share.<sup>7</sup>

League conflict of interest rules and regulations also have a significant impact on the business of professional sports. As a general matter, cross-ownership in a league (*i.e.*, ownership of more than one member team) is typically not permitted. Under MLB rules and regulations, no team, owner, stockholder, officer, director, employee (including manager or player) of a team may, directly or indirectly, own stock or any other proprietary interest or have any financial interest in any other team in its league, with certain “de minimis” exceptions.<sup>8</sup> NFL and NHL rules and regulations contain a similar prohibition, except that under NHL rules and regulations, non-controlling owners (described in further detail in [Section 74A:17](#)) may have ownership interests in multiple member teams in certain circumstances.<sup>9</sup>

As outside counsel will frequently advise inside counsel on both legal *and* business matters, these types of restrictions provide another example of the importance of careful consideration of potential transactions and creative structuring.

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Footnotes

- 1 As reported by Street & Smith's SportsBusiness Journal on May 25, 2015, *available at* <http://www.sportsbusinessdaily.com/Journal/Issues/2015/05/25/Leagues-and-Governing-Bodies/NFL-debt-limit.aspx>.
- 2 NFL 2005 Resolution FC-2 (As Amended).
- 3 2007–2011 Basic Agreement, effective December 20, 2006, between the 30 Major League Clubs and the Major League Baseball Players Association (the “MLB Basic Agreement”).
- 4 “Total Club Debt” means a team's total outstanding debt, calculated as an average over the course of each fiscal year, including without limitation all long-term and short-term obligations and all indebtedness resulting from: (1) funding from Major League Baseball's industry credit facility; (2) other third-party debt; (3) deferred compensation (other than deferred compensation payable to Major League Players (*see* clause (8) below)); (4) stadium-related debt incurred for or in connection with ballpark construction or improvements; provided, however, that any debt falling within this clause (4) shall not become part of Total Club Debt until the first full season of the operation of the new or renovated stadium for which such debt was incurred; (5) loans or advances from related parties, but only if those loans or advances are collateralized by the assets of the team; and (6) any other debt that is properly classified as an indebtedness of the team under generally accepted accounting principles, but excluding (7) the Excludable Debt (defined below) and (8) any compensation payable to Major League Players, including deferred compensation or any other commitment under a Uniform Player's Contract, or any obligation to the Major League Baseball Players Benefit Plan or the Industry Growth Fund. In 2010, “Excludable Debt” was the first \$40 million in outstanding debt from any of the sources described in clauses (1)-(6) above. The amount of Excludable Debt increases in each succeeding year by the percentage growth in the industry's total operating revenue from year to year. The Excludable Debt amounts for the years 2012 and 2013 are \$42 million and \$43.7 million, respectively.
- 5 MLB Basic Agreement, Attachment 22.
- 6 NBA Const. Art. 6.
- 7 By-laws, Sec. 8.03(a).
- 8 MLB Rule 20(a).
- 9 NFL Const., Art. IX, No. 9.1(B); NHL Const., Art. XIII.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:17

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:17. League-wide issues—Transactions requiring league approval

As noted in Sections 74A:14 and 74A:15, certain transactions by teams or their ownership may require prior league scrutiny and approval. Outside counsel's awareness of these requirements is essential to the successful structuring of any transaction—as discussed in Section 74A:15, failure to seek requisite approvals at the appropriate time may result in an inefficient use of time, money and resources or otherwise delay a transaction that may have significant timing considerations. League approval should always be accounted for at the beginning of any applicable transaction. Several of the most significant types of transactions requiring league approval are discussed below in this section.

Transfers of ownership or membership interests in teams will generally be subject to some type of league approval, depending upon the significance of the transfer. Under the NHL Constitution, with certain exceptions, no membership or ownership interest in a team may be sold, assigned or otherwise transferred without consent of three-fourths of the teams and application must first be made to the Commissioner for his or her recommendation to the teams.<sup>1</sup> Under the MLB Constitution, the sale or transfer of a control interest (possession, directly or indirectly, of the power or authority to influence substantially the management policies of the team) in any MLB team also requires the approval of three-fourths of the teams, provided that in the event that such transfer occurs upon the death of an owner to such owner's spouse or lineal descendents, approval of a majority of the teams shall suffice. The sale or transfer of any non-controlling interest in a MLB team only requires the approval of the Commissioner.<sup>2</sup> The provisions of the NFL Constitution on transfer of membership interests are substantially similar to those of the MLB Constitution, except that the NFL Commissioner is expressly entitled to conduct substantial due diligence regarding the proposed transferee and no consent of the Commissioner or any team is required for a transfer upon death or gift to an immediate family member.

The NBA rules and regulations governing transfer of membership interests are substantially similar to those of the other leagues, requiring Commissioner recommendation and approval of three-fourths of the Board of Governors, and are subject to certain exceptions, depending upon the size of the transfer.<sup>3</sup> However, the consequences for failure to comply with the NBA rules and regulations on this issue can be significant. Under the NBA Constitution, the NBA membership of a team may be terminated by a vote of three-fourths of the Board of Governors if an owner transfers or attempts to transfer a membership interest without first complying with the aforementioned rules and regulations.<sup>4</sup> In structuring estate planning, equity investment, joint venture transactions and financing transactions involving franchise ownership, outside counsel must evaluate each transaction to determine what, if any, league approval will be required to effectuate the desired transaction and advise inside counsel and the proposed transferor accordingly. This analysis should be performed early on, to give inside and outside counsel sufficient time to deal with all approval matters and any required restructuring of the transaction as a result of diligence performed by the league or tax considerations. In addition, acquisitions of interests in professional sports teams frequently necessitate indemnity and funding agreements, which outside counsel may prepare and negotiate with inside counsel's input. Indemnity agreements address issues such as infringement of teams' respective home territories (*e.g.*, unauthorized broadcasts of one team's games inside another team's home territory). Funding agreements obligate the acquirer(s) of an ownership interest in a team to commit to making specified funding available to the team in the future. Inside counsel will prefer not having to directly negotiate with different ownership factions that may control the team (and essentially employ the inside counsel) post-closing.

Transactions involving conflicts of interest will also likely require league approval. As discussed in Section 74A:16, although most conflicts of interest are prohibited in each league's constitution, certain transactions are permitted with the requisite prior approval on a case-by-case basis. In the NHL, persons may have non-controlling interests in multiple NHL teams — they are called “Multiple Owners.” Essentially, a non-controlling interest means that such person does not have management or operational rights with respect to the team and has an ownership interest in the team of less than thirty percent (30%). The NHL Constitution aims to alleviate conflicts of interest involving Multiple Owners by providing that NHL teams are prohibited from communicating with their Multiple Owners on player-related or NHL-related matters, other than periodic reports of overall profit and loss performance and business strategy. As such, Multiple Owners are effectively limited to passive investments. However, a Multiple Owner must give prior written notice to the NHL Commissioner of any transaction with any team that provides (or could reasonably be determined to provide) the Multiple Owner with material rights with respect to the team, including the right to receive payments based on the financial performance of the team or that would provide the Multiple Owner with power over the management or operations of the team. If the Commissioner determines that approval of such transaction is appropriate, it must be approved by the affirmative vote of three-fourths of the teams before it may be consummated.<sup>5</sup> Outside counsel may be helpful in assisting inside counsel with presentations by Multiple Owners to the Commissioner and other teams.

The making of loans is another type of conflict of interest transaction.<sup>6</sup> The MLB Rules provide that no team, owner, stockholder, officer, director or employee (including manager or player) may, directly or indirectly, loan money to or become surety or guarantor for any team, officer, employee or umpire of its league, unless all facts of the transaction have first been fully disclosed to all other teams and the Commissioner and approved by each of them.<sup>7</sup> The NBA Constitution contains a similar prohibition, but provides an exception for financing arrangements made by owners to teams (other than their own), players (other than those playing for such owner's team) and referees if such owners are engaged in commercial lending as a principal business activity and (i) such loans are approved by a three-fourths vote of the Board of Governors or (ii) such owners do not have effective control over the teams they own and the financing arrangement is made on terms customarily offered to similarly situated persons not affiliated with the NBA.<sup>8</sup> Various other types of significant transactions or contracts may also require prior league approval. For example, under NFL 1988 Resolution FC-5 (as amended), at least thirty days prior to the anticipated execution of any stadium lease or amendment thereto, each NFL team must submit copies of such lease or amendment to the NFL Finance Committee. All financial terms therein must be reviewed by the Finance Committee and recommended to the Executive Committee for approval prior to execution by the team. As discussed in Section 74A:15, the NFL Commissioner must also approve all telecasting and broadcasting contracts, other than those relating to pre-season games.

By way of further example, MLB Rule 54(a)(1) provides that no Minor League Baseball team may pledge its franchise right as security for any indebtedness without the prior approval of the league such team plays in, the senior executives of the applicable minor league association and the Commissioner. In addition, MLB teams often seek MLB approval of credit facilities and other significant financing transactions involving the incurrence of significant indebtedness and/or grant of a security interest in the assets of the team or the team's ownership interests. This approval is often in the form of a MLB consent or “no objection” letter, which lenders typically require to be delivered at closing.

Other extraordinary transactions, such as new stadium financing<sup>9</sup> and construction,<sup>10</sup> will also require significant league consultation. For example, the NBA Commissioner has the power to establish minimum standards for the design, construction and operation of “NBA-quality” arenas in the areas related to the production and marketing of NBA games and events. However, the NBA Constitution provides that it is the responsibility of each team, and not the NBA, to ensure that its arena complies with all applicable statutes, regulations and ordinances.<sup>11</sup> A wide range of legal issues will arise given the various types of statutes, regulations and ordinances that normally come to bear. The outside counsel's multi-disciplinary legal practice will frequently be drawn upon by inside counsel in satisfying compliance-related matters.

In summary, practically all transactions of significance entered into by a team will require an analysis of the applicability of league rules, regulations and approval requirements. Although inside counsel will typically be cognizant of the rules and regulations that may be implicated, it behooves outside counsel to gain familiarity with its client's league's governing documents and stay abreast of any amendments thereto so that each transaction or issue that arises may be evaluated in light of current league requirements.

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#### Footnotes

- 1 There are exceptions, however, to the approval requirement for publicly-held companies.
- 2 MLB Const., Art. V, Sec. 2(b)(2).
- 3 NBA Const., Art. V.
- 4 Const. Art. 13(b).
- 5 NHL Const., Art XIII, Sec. 13.7.
- 6 See § 74A:19 for a discussion of credit agreements between teams and lenders.
- 7 MLB Rule 20(c).
- 8 Const., Art. 3(b).
- 9 See § 74A:20 for a discussion of stadium financing agreements.
- 10 See § 74A:23 for a discussion of stadium construction/development agreements.
- 11 NBA Const., Art. 8(a).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:18

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:18. Significant agreements

The preparation and negotiation of a team's significant agreements entail a high degree of interaction between inside and outside counsel. Depending upon the complexity of a transaction, and the sophistication and experience of inside counsel, certain significant agreements and transactions may require the team to engage one or more outside firms and consultants, particularly if the transaction includes a multi-jurisdictional component and/or requires narrow and specific expertise. For example, in financing<sup>1</sup> and developing<sup>2</sup> a stadium property, a team will likely be required to engage outside legal counsel with significant expertise in real estate, financing, intellectual property, labor, government relations, tax, securities law, municipal law and other specialties, as well as financial consultants, accountants, contractors, architects and other specialists.

The bedrock of any complex transaction is its documentation. As in other industries, teams and their affiliates enter into credit agreements, indentures, purchase and sale agreements, leases, service agreements and other types of contracts. In addition, teams and their affiliates also enter into sports industry-specific agreements, including non-relocation agreements,<sup>3</sup> concessionaire agreements<sup>4</sup> and television license agreements.<sup>5</sup>

These agreements are often long-term in nature, and thus it is important that inside and outside counsel work to ensure that such agreements are duly considered and carefully drafted, as they may impact the team's finances and operations for many years. Outside counsel should thoroughly evaluate the lasting impact of significant agreements entered into by the team, and inside counsel should be aware of any ramifications on future team operations. For example, in negotiating a credit facility or other debt financing for the team, outside counsel should discuss with inside counsel the entry into interest rate hedging arrangements as a means to offset any potential interest rate fluctuation risk.

Outside counsel may also be in a position to advise and assist inside counsel in implementing the team's governmental relations program. In light of the public nature of many team activities, including developing and operating a stadium, it is important that the team cultivate positive relationships with local government and with the community in which the team is located. These relationships are critical when the team requires governmental assistance (*e.g.*, in connection with local infrastructure projects to facilitate stadium development). At times, teams will enter into community benefit agreements to strengthen community relations. These agreements may provide a community with access to players, free tickets, jobs reserved for local residents, and improved park and recreational spaces.

A summary of some of the primary issues inside and outside counsel should be aware of in preparing and negotiating significant agreements is set forth below in Sections 74A:19 to 74A:23.

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#### Footnotes

- 1                    *See* § 74A:20.
- 2                    *See* § 74A:23.
- 3                    *See* § 74A:21.
- 4                    *See* § 74A:28.
- 5                    *See* §§ 74A:25 to 74A:27.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:19

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:19. Significant agreements—Credit agreements

In negotiating credit agreements with lenders, teams and their outside counsel should be cognizant of applicable league-imposed requirements relating to the team's indebtedness. As previously discussed in [Section 74A:16](#), leagues often impose aggregate debt limitations on teams, and such limitations will impact the size of the credit facility.

A firm understanding of all of a team's outstanding debt obligations by outside and inside counsel is essential. For example, some leagues provide credit facilities that are available to league members. League-sponsored credit facilities typically afford teams with lower costs of funds, limited covenant packages and lower transaction costs (through the use of standardized documentation). Inside and outside counsel should be aware of the interplay between such league-sponsored facilities and outside lender facilities, particularly with respect to the collateral package securing such facilities. As a preliminary matter, certain team assets (*e.g.*, franchise rights) may not be available for collateral purposes under applicable league rules and regulations. A particular credit facility may require that specific team assets be pledged on an exclusive basis. Moreover, a league may have certain payment priority rights in collateral securing a credit facility. If other team assets are pledged to support more than one credit facility, it is important to have appropriate intercreditor agreements in place.

League rules and regulations often require the team to obtain the league's consent in connection with the incurrence of indebtedness. Leagues may use consents as a means for obtaining restrictions on lenders' rights. Typically, these restrictions will include prohibitions on lenders' piecemeal sale of team assets, in connection with the exercise of lenders' remedies, and on the enforcement of lenders' intellectual property rights. Inside counsel will often rely on outside counsel in the negotiation of such remedies and restrictions on remedies. In order to effectively communicate with inside counsel on this issue, a firm and detailed understanding of league rules by outside counsel is essential. In reviewing restrictions imposed by the league, outside counsel should ensure that the covenants set forth in a proposed new credit facility do not conflict with covenants contained in existing team credit facilities.

Credit facilities involving teams will typically include certain industry-specific events of default, including loss of franchise rights, relocation, work stoppage (*e.g.*, player strikes), and cross-defaults to other agreements such as a stadium lease. Outside counsel will need to ensure that events of default are properly crafted in light of the team's specific business and regulatory concerns; generic default provisions from non-sports industry specific credit agreements will generally be inadequate. Additionally, in a default scenario, the league may have a right to effect a standstill with respect to foreclosure activities by lenders, and to provide working capital to the team that would be exempt from lenders' claims. Similarly, certain event of default cure provisions are industry-specific in nature. For example, a work stoppage event of default may be cured through the use of replacement player games.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:20

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:20. Significant agreements—Stadium financing agreements

Most stadium financing efforts include both private and public participation. A typical stadium financing plan may involve private participation through contributions by team owners, as well as public participation by way of bond issues, mass transit and other infrastructure improvements, and other public subsidies. Inside and outside counsel should each be cognizant of the spectrum of financing options available in connection with stadium construction and development. Experienced outside counsel can assist the team in analyzing these options and developing a financing plan. Inside counsel may also need to rely on financial consultants in evaluating which financing structures are most favorable.

Private contributions to stadium financing may include the proceeds from granting naming rights to the stadium, income from personal seat licenses, concessionaire arrangements, pouring rights (*i.e.*, the right of a beverage manufacturer or bottler to control beverage distribution at a venue) and/or loans from the owner or team pursuant to a loan agreement and related collateral documentation. Private credit facilities may also be used to help finance stadium construction.

Public subsidies used to finance stadiums are generally in the form of a municipal bond issue, the proceeds of which are used to finance stadium construction and maintenance costs. Interest accruing on municipal bonds is usually exempt from federal taxes, making such debt less expensive to service than taxable bonds. In a tax-exempt bond issue, stadium construction is directly subsidized by the local government that issues the bond, and indirectly subsidized by the federal government through uncollected tax revenue. Typically, in stadium financing structures involving public subsidies, the local government owns the land and the stadium, and the team leases the property. Public subsidies, however, are not limited to municipal bond issues. Other forms of public subsidies that have been employed to finance stadiums include parking taxes, hotel and lodging taxes, sales tax increases, use and excise taxes, lotteries, “sin” taxes on alcoholic beverages, cigarettes and the like, and the use of PILOTs (*i.e.*, payments in lieu of taxes) in situations involving a stadium built upon property, such as government-owned land, exempt from local property taxes.

As discussed above,<sup>1</sup> governmental relations are critical in securing public participation in stadium development and construction. In addition to issuing municipal bonds to support a stadium project, local governments may also elect to participate in stadium development by funding infrastructure projects, including rail extensions or road expansion to ease the flow of fans to and from the stadium. Good governmental relations can also facilitate applying for and receiving licenses and permits necessary to develop and operate a stadium. Further, the availability of public subsidies and other types of public financial assistance may be tied to the recipient agreeing to comply with living wage, prevailing wage, labor peace and other types of state and local laws and regulations applicable to workers at the stadium both during and after completion of construction. A cost-benefit analysis of the impact of these laws and regulations must be factored into the overall stadium plan of financing and operational and maintenance plan for the stadium upon completion.

Stadium construction and development is a lengthy process, and the team will need to ensure that the financing structure in place provides adequate availability of funds throughout the life of the project. In establishing a financing plan, many teams make use of a conduit financing structure wherein a bankruptcy remote special purpose vehicle (“SPV”) is formed as a conduit for all cash flows relating to the financing activity. Conduit financing structures are often used to enable a favorable rating of any bonds issued in connection with stadium development, and typically facilitate the financing

process by providing a single purpose entity to handle all cash flows relating to the transactions. If a conduit financing structure is used, outside counsel may be required to issue a non-consolidation opinion opining that the SPV will not be consolidated with the team in the event the team files for bankruptcy protection.

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#### Footnotes

1 *See* § 74A:18.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:21

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:21. Significant agreements—Non-relocation agreements

In connection with a stadium financing arrangement involving public funds (*e.g.*, through a municipal bond issue), the applicable governmental authority typically requires the team to enter into a non-relocation agreement. Non-relocation agreements oftentimes are used by teams to induce local government to provide public subsidies in connection with a stadium's development. Such agreements are intended to ensure that a team remains in the community following local investment in a stadium project, where the team's departure would result in “injury to the welfare, recreation, prestige, prosperity and trade and commerce” of the community.<sup>1</sup> Courts have upheld non-relocation agreements based upon the principle that a team's covenant to play in a publicly-financed stadium is “inextricably entwined with the vital public interest” and purpose of the stadium's construction.<sup>2</sup> A typical non-relocation agreement provides that if the team does not play a specific number of games at the team's home stadium, then the agreement is breached. Damages in connection with the breach of a non-relocation agreement are not subject to precise calculation. Accordingly, non-relocation agreements typically include injunctive relief and liquidated damages among the remedies available to local government. Liquidated damages will generally be permitted only in the event injunctive relief is unavailable; provided, however, that under the laws of some states (including New York), a liquidated damages provision in a non-relocation agreement will not, standing alone, exclude the enforceability of other remedies, including specific performance.<sup>3</sup>

Outside counsel and inside counsel typically work together on non-relocation agreements. Outside counsel and inside counsel should ensure that the event of default triggers under the non-relocation agreement are defined with precision. Further, the non-relocation agreement should be coterminous with the team's stadium lease agreement to prevent a situation where the lease has terminated, but the team is prohibited from relocating.

In preparing and negotiating a non-relocation agreement, inside counsel and outside counsel should carefully consider and provide for all events (other than those caused by the team) that will prevent the team from playing home games at the stadium. Events which may permit the team to relocate (temporary or otherwise) include damage to the stadium resulting from severe weather, earthquakes or fire (where a team's obligation to return to the stadium will depend on the degree of damage incurred), or league-mandated playing of “home games” away from the stadium (*e.g.*, on goodwill tours to foreign countries). The playing of “home games” away from the stadium will continue to be an important consideration as the leagues seek to broaden the appeal of their sport through the penetration of foreign markets.

Inside counsel and outside counsel need to be wary of any restrictions set forth in the non-relocation agreement with respect to the transfer or sale of interests in the team. A well-drafted non-relocation agreement, from a team's perspective, will typically permit such transfers so long as the transferee agrees to be bound by the terms of the non-relocation agreement.<sup>4</sup>

The bankruptcy of the Phoenix Coyotes of the NHL illustrates the significance of transfer restrictions.<sup>5</sup> In 2001, the City of Glendale, Arizona, contributed a significant portion of the funding required to construct a new arena for the Phoenix Coyotes pursuant to an Arena Management, Use and Lease Agreement (“Lease Agreement”). The Lease Agreement provided that (i) the team must play all of its home games at the arena through 2035 (the nonrelocation obligation); (ii) the

City of Glendale could seek specific performance of the nonrelocation obligation; and (iii) the City of Glendale would be entitled to liquidated damages if the Lease Agreement was terminated early and specific performance was not available. By 2009, the team encountered significant financial difficulties and filed for bankruptcy. Along with its bankruptcy filing, the team petitioned the court to allow a third party to purchase the team out of bankruptcy, contingent upon payment of specified consideration and the bankruptcy court's approval of the team's relocation to Ontario, Canada. The NHL opposed both the sale and the relocation, on the grounds that (i) neither the team nor the purchaser had sought the requisite NHL consents under NHL rules; (ii) NHL member agreements must be assumed and assigned in their entirety (including the requirement to apply for NHL consent to any change in ownership or relocation); and (iii) the NHL would be damaged by the purchase and relocation. In sum, the NHL argued that the bankruptcy law should not be used to circumvent league rules.<sup>6</sup> The City of Glendale opposed the sale and claimed that the nonrelocation covenant was not subject to rejection in bankruptcy. The team argued that the nonrelocation clause in the Lease Agreement and the NHL's power to block changes in ownership and relocation were precisely the type of restrictions that should be rejected in bankruptcy. The bankruptcy court, acknowledging the novelty of the case, denied the motion to approve the purchase of the team and its relocation to Ontario, Canada. The court ruled that the team would either have to observe the nonrelocation covenant set forth in the Lease Agreement or terminate the Lease Agreement and thereby subject itself to a multi-million dollar liquidated damages penalty; a penalty which the bankruptcy court was unwilling to sanction. The court eventually approved the NHL's bid to purchase the team on several grounds including the potential irreparable harm that the NHL would suffer if the team was permitted to relocate in the middle of a protracted litigation battle ultimately won by the NHL.

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#### Footnotes

- 1 [New York City v. New York Jets Football Club, Inc.](#), 90 Misc. 2d 311, 394 N.Y.S.2d 799 (Sup 1977).
- 2 [New York City v. New York Jets Football Club, Inc.](#), 90 Misc. 2d 311, 394 N.Y.S.2d 799 (Sup 1977).
- 3 *See, e.g.*, [Rubinstein v. Rubinstein](#), 23 N.Y.2d 293, 296 N.Y.S.2d 354, 244 N.E.2d 49 (1968).
- 4 *See* Section 74A:74 for a form of non-relocation agreement.
- 5 [In re Dewey Ranch Hockey, LLC](#), 406 B.R. 30, 51 Bankr. Ct. Dec. (CRR) 220 (Bankr. D. Ariz. 2009).
- 6 The NBA, the NFL and the Office of the Commissioner of MLB collectively filed an amicus curiae brief with the bankruptcy court supporting the NHL's position.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:22

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:22. Significant agreements—Stadium leases

A stadium lease agreement typically allows a team to lease public or privately-owned land for purposes of developing a stadium. In light of the long-term nature and significance of stadium arrangements to a team's operations, a stadium lease is by and large the most significant agreement to which a team will become party. Given the multitude of issues addressed in a stadium lease, including terms relating to employment, insurance, real estate matters, corporate structuring, assignments and transfers, and compliance with government regulations, outside counsel will generally play a major role in stadium lease negotiations.

When negotiating a stadium lease, team counsel should focus on the rights afforded to the team in connection with its use of the property. The team should seek to obtain the right to conduct non-team events at the stadium, including concerts, civic events, religious events, ceremonies and other sports activities. A stadium lease should be clear as to each party's rights to use the stadium, including whether the lessor will reserve the right to conduct events at the stadium; stadium leases sometimes provide the lessor with a set number of days' use per year. The lease should also spell out rights with respect to the operation of the stadium facility, including the provision of concessions and other merchandizing, and whether the team will be permitted to serve alcoholic beverages.

The lease should address stadium naming rights, rights to display advertising signage, rights to technology employed or made available at the stadium,<sup>1</sup> as well as the rights each party has to receive revenue generated by the stadium. A typical arrangement allocates all stadium revenue to the team, with the team required to pay rent and make stadium maintenance and upkeep expenditures. The lease should also contain provisions for the allocation of capital expenditures, and should clearly define which party is responsible for capital and non-capital repairs and renovations of the stadium. Typically, local government will serve as landlord under a stadium lease, although in some cases the landlord may be a separate municipal authority independent from local government. In the event the landlord is responsible for capital and non-capital renovation and repairs, outside counsel should seek to negotiate a “state-of-the-art” clause, requiring that the landlord provide the team with a state-of-the-art stadium, making necessary renovations as stadium technology evolves. In the event the landlord fails to provide a state-of-the-art facility, the team may have an option to terminate the lease. Barring a state-of-the-art clause, stadium leases typically permit early termination only upon the occurrence of a force majeure, casualty or condemnation event.

Inside and outside counsel should be aware of the team's obligations under the lease, including any timeline for stadium construction and development; whether the landlord has consent rights to the stadium plans and specifications; whether the team and/or any contractors servicing the team or the stadium, such as concessionaires, are required to have a minimum amount of insurance coverage; any requirement to provide suites and/or tickets to the landlord; and whether the team is required to obtain any permits or licenses. If the landlord is a city agency or other public authority, the lease will typically require the landlord to cooperate with the tenant in securing any requisite permits or licenses. Obtaining requisite permits and licenses in a timely manner is a critical concern at all times prior to, during and following the construction of the stadium. Consideration needs to be given as to the party most suited to obtain such permits and licenses. To the extent that a governmental authority is involved in a stadium construction project, the team should seek to place responsibility for obtaining the permits and licenses on such governmental authority. Further, once the

stadium construction has been completed, the lease will often require the filing of periodic reports pertaining to certain employment, tax and occupancy issues.

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#### Footnotes

[1](#) See [§ 74A:40](#) for a discussion of technology agreements.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:23

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:23. Significant agreements—Stadium construction/development agreements

In connection with the construction and development of a stadium property, a team will be required to enter into agreements with contractors, materialmen and other parties. These agreements typically involve highly specialized areas of law in which a team's inside counsel may not have sufficient expertise. Accordingly, outside counsel is often required to play a prominent role in evaluating and negotiating these agreements. Under a construction contract, a contractor is typically required to provide labor, materials, equipment, tools and services in connection with stadium construction. The contract should allocate the risks of construction delays or cost-overrun, which may be borne by the contractor.

A construction contract could provide for a price ceiling in connection with the contractor's services. This price ceiling is typically determined as a fixed amount over and above construction costs or, alternatively, as a guaranteed maximum aggregate price with no contingency provisions, other than those relating to construction change orders. The agreement could set forth procedures for monitoring the construction process. In this regard, a real estate management company or developer may be appointed to act as a construction monitor and file periodic status reports with the governmental authority involved in the stadium construction project concerning the progress of the project and compliance with the construction budget. Similarly, a team may seek to appoint a representative to provide construction monitoring and integrity services. The contractor may be required to meet certain construction milestones, with a failure to meet such milestones resulting in a default or penalty. Damages under a construction contract may include liquidated damages payable by the contractor in the event of construction delays.

A construction contract should also include mechanics for awarding subcontracts and should set forth payment and disbursement terms, as well as retainage provisions. Retainage provisions provide for the retention of a portion of payments for work performed by subcontractors until certain milestone events occur such as substantial completion of the stadium construction and completion of final construction punchlist items. Careful consideration should also be provided as to whether an owner or contractor controlled insurance program<sup>1</sup> should be implemented and the costs and provisions associated therewith. If construction involves organized labor, outside counsel may be of assistance to the team in dealing with issues specific to labor unions and collective bargaining agreements. It is important that the construction contract clearly delineate that contractors, subcontractors and their respective agents are not employees of the team. Such parties will typically be required to indemnify the team for certain costs and expenses relating to construction, and may be required to maintain minimum insurance coverage while they are involved in the stadium project.

In addition to the construction contract, stadium development may involve related agreements including architects contracts and agreements with materialmen, engineers and environmental consultants. Team counsel should be experienced and knowledgeable with respect to the construction process, including construction monitoring, and should be capable of negotiating the various contracts involved.

Footnotes

- 1 Under a controlled insurance program, either the project owner or general contractor for the project procures insurance on behalf of all (or most) parties performing work on the construction project. Typically, the coverages provided under a controlled insurance program include builders risk, commercial general liability, workers compensation and umbrella liability.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:24

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### Chapter 74A. Sports

by Lonan A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:24. Revenue producing agreements

Teams possess a host of valuable property rights which can be licensed, subject to league restrictions,<sup>1</sup> to generate revenues. Such arrangements include broadcasting agreements for radio and television, as well as Internet or wireless broadcasts of games;<sup>2</sup> merchandise licensing permitting manufacturers to use team logos on their products; sponsorship agreements under which a fee is paid in exchange for the right to be an official sponsor of the team, for example, or to have a sponsor's signage displayed in the stadium; naming rights agreements;<sup>3</sup> and concession services agreements with various vendors to sell food, beverages and merchandise within a sports facility.<sup>4</sup>

These licensing arrangements represent a significant outlay of money and resources on the part of the licensee involved and, in turn, constitute a large part of the revenue stream of teams. In drafting the contracts for such arrangements, it is in both parties' interest to clearly set forth the rights being granted and delineate the relationship between the parties. Sections 74A:25 to 74A:30 provide a discussion of the key issues to consider in negotiating contracts for some of the more commonplace licensing arrangements.

Depending on the nature and complexity of the licensing arrangement, the contract may be prepared by inside counsel or outside counsel, or through a collaborative effort. Licensing arrangements involving a significant and unique event or situation, especially those where large amounts of money are involved (*e.g.*, naming rights), call for active involvement of outside counsel in all phases of negotiation and drafting, as do contracts involving complex legal issues requiring specialized legal expertise (*e.g.*, foreign law, intellectual property or tax). For licensing arrangements that a team enters into regularly (*e.g.*, licensing agreements with manufacturers to produce team-branded apparel and souvenirs), outside counsel may be utilized to create a template agreement containing standard terms and provisions.<sup>5</sup> Inside counsel will then tailor the template to add the specific business terms called for by the template agreement. Outside counsel may be further called upon to assist with customized provisions requested for inclusion in the template agreement.

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#### Footnotes

- 1 *See, e.g.*, § 74:15.
- 2 *See* §§ 74A:25 to 74A:27.
- 3 *See* § 74:30.
- 4 *See* § 74:28.
- 5 *See* §§ 74A:31 to 74A:41 for discussion of template agreements.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:25

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:25. Revenue producing agreements—Broadcasting and media rights agreements

Broadcasting rights are the property of teams. Teams, however, assign some or all of their broadcasting rights to leagues to permit the licensing of broadcasting rights on a league-wide basis. The NFL is unique among professional sports in that NFL teams assign all their broadcasting rights to the NFLP (National Football League Properties, Inc.), which bundles the broadcasting rights of all of the NFL teams and negotiates contracts with national networks. For other sports, depending on the league, a team typically has the right to license broadcasting rights within its home territory (as specified by the league).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:26

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:26. Revenue producing agreements—Broadcasting and media rights agreements—Who owns the property right?

Despite arguments of broadcasting organizations to the contrary, courts have consistently held that it is teams and/or leagues that have the property right to all broadcasts of games and that any royalties that a broadcasting organization may receive are a matter of private negotiation between the parties.<sup>1</sup> Accordingly, when a broadcasting organization purchases the right to broadcast a game, it cannot re-broadcast the game without the team's and/or league's permission. The same rule applies to highlight reel broadcasts. Many sports networks have entire shows devoted to reviewing and commenting on highlights of various games. These networks must obtain, and most likely pay for, permission to show these highlights even if the game has already been broadcast on the station.

Athletes have also attempted to assert a property right in game broadcasts, and were unsuccessful. In 1983 the Major League Baseball Players Association sent letters to several television stations claiming the players had a common law “publicity” right and their permission was required before any game could be broadcast. The MLB sued, and the Seventh Circuit held that the “work for hire” doctrine under the Copyright Act preempts any publicity right that players may have under state common law.<sup>2</sup>

Another issue that arose is websites or other services providing real-time scores for games and tournaments without paying the team for the right to do so. The courts have held that while a team has a copyrightable right in the compilation of scores, that property right disappears when the information enters the public domain. For example, in *NBA v. Motorola, Inc.*,<sup>3</sup> Motorola paid reporters to watch televised games and compile scores for real-time reporting to subscription customers. The Second Circuit ruled that this was permissible, since the games were televised and the scores were therefore publicly available.

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#### Footnotes

- <sup>1</sup> See [Mutual Broadcasting System v. Muzak Corp.](#), 177 Misc. 489, 30 N.Y.S.2d 419, 51 U.S.P.Q. 146 (Sup 1941) (court granted an injunction against rebroadcasting without obtaining permission from the team); [Johnson-Kennedy Radio Corporation v. Chicago Bears Football Club](#), 97 F.2d 223 (C.C.A. 7th Cir. 1938) (court enjoined broadcasting a game the rights to which had already been granted to another broadcasting organization); [New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.](#), 215 U.S.P.Q. 755, 1981 WL 1374 (D. Mass. 1981) (court granted a preliminary injunction against ESPN for airing highlight reels without obtaining the team's permission).
- <sup>2</sup> [Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n](#), 805 F.2d 663, 13 Media L. Rep. (BNA) 1625, 231 U.S.P.Q. 673 (7th Cir. 1986).
- <sup>3</sup> [National Basketball Ass'n v. Motorola, Inc.](#), 105 F.3d 841, 25 Media L. Rep. (BNA) 1385, 41 U.S.P.Q.2d 1585, 1997-1 Trade Cas. (CCH) ¶ 71705 (2d Cir. 1997).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:27

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### Chapter 74A. Sports

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#### § 74A:27. Revenue producing agreements—Broadcasting and media rights agreements—Key provisions of local agreements

The rights being granted by the team should be clearly set forth in the agreement, including the broadcast medium (*e.g.*, television, radio), the channel or station, any secondary audio broadcasting rights (referred to as “SAP”), the number of games to be broadcast and/or rebroadcasted. The team, in turn, will want to obtain various rights from the broadcaster, including approval rights over game rebroadcasts, game announcers and the broadcast of pre- and post-game shows related to the game, as well as approval rights over the quality of any such shows.

The agreement should delineate procedures and remedies in case of unforeseen circumstances. Typically, the broadcaster will seek a fee adjustment in case of events such as a work stoppage or team relocation. With respect to work stoppages, teams often seek to reduce or eliminate fee adjustments if replacement player games are played.

Advertising time during the show is another issue to address in the agreement. The agreement should specify the amount of commercial time that can be sold during each game broadcast. The team should negotiate to obtain commercial spots for use or sale by the team, as well as non-commercial spots for use by the team to make community relations and charity announcements.

In addition, in drafting a local broadcasting rights agreement, it is important to make clear that the agreement is subservient to the national, league-wide broadcasting rights agreement. For example, the agreement should provide that a blackout of a game due to a national broadcast is not a breach and will not trigger a fee adjustment. In addition, the agreement should account for the use of virtual signage (*i.e.*, advertising that is electronically superimposed on telecasts over advertising physically present at the stadium or arena). Virtual signage technology may result in different advertising appearing in the local and national broadcasts of the game.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:28

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:28. Revenue producing agreements—Concession services agreements

Teams often hold the concession services rights at their stadium or arena. Concession service agreements cover the right to sell food, beverages, and merchandise within the team's stadium or arena, as well as within areas that may be reserved by the team for an alternative dining venue, such as a restaurant or bar. In exchange for such rights, concessionaires usually pay the team a percentage of sales, which percentage could differ based on type of event (*e.g.*, pre-season game, regular game, non-sports event such as a concert at the stadium). The team will also seek to have certain concession services made available on a cost plus basis in certain areas of the stadium or arena (*e.g.*, executive offices) and for team functions and charity events. In addition, the concessionaire may be required to provide a set amount of promotional events for the team at its own cost (which cost may be capped at a set amount).

The scope of concession services has increased significantly in recent years to include venues both in and out of sports. For example, in 2013, Legends Hospitality, LLC, a high-profile concessionaire servicing multiple professional sports venues, reached an agreement to develop and operate concession services on the observation deck at the top of One World Trade Center in New York City.

The concession services agreement is typically drafted through a collaborative effort of inside counsel and outside counsel. Inside counsel will possess more detailed knowledge regarding the team's business operations and specific needs that must be included in the concession services agreement. Outside counsel often contributes to the concession services agreement by ensuring that the audit and approval rights, accounting provisions, representations and warranties, indemnity provisions and termination provisions are customized to adequately protect the team. Further, outside counsel will provide assistance with respect to the various laws, rules and regulations required to be complied with in order to properly conduct the concession business.

While concessionaires will generally conduct and manage the concession operation, the team should retain control over certain activities of the concessionaire through the use of approval rights. Inside counsel and outside counsel should jointly consider which aspects of the concession business should be subject to such approval rights. These approval rights are an important element of a concession services agreement as the services provided under a concession services agreement reflect on the team's image. In addition, control over certain activities of the concessionaire is necessary in order to avoid conflicts with the team's sponsorship arrangements (discussed below in [Section 74A:30](#) and [Section 74A:32](#)).

Typically, the team will have approval rights over the products sold in the concession area, including type, quality, brand, and source of supply, and the team should require samples well in advance in order to properly inspect and approve the products. Pricing of products should also be subject to the team's annual approval. The team should seek covenants regarding quality of all products and services provided by the concessionaire, including proper training for personnel. The agreement should also specify permitted and prohibited methods of delivery of services and products to consumers (*e.g.*, vending machine, in-seat service, walking through general seating areas to deliver food) and/or grant the team approval rights. The (i) staffing of the concession areas, stands and kiosks; (ii) hours of operation and number

of concession areas, stands and kiosks opened for a particular event; and (iii) design of the concession areas, stands, and kiosks should likewise be subject to the team's approval.

In order to protect its intellectual property, as well as the intellectual property of its sponsors, the team should seek approval rights over the placement of the team logo and use of the team name, as well as the logos and names of the team's sponsors, on the concessionaire's food containers, menus, equipment (*e.g.*, beverage dispensers, food displays), and other materials. In addition, the team should negotiate for approval rights over all descriptive literature, collateral material and advertising related to the concession services, including menus and advertising media, such as signs and loud speakers.

As discussed in [Section 74A:30](#), teams often grant exclusive sponsor rights. The concession service agreement needs to provide for such rights by requiring the concessionaire to not violate any of the rights. For example, if the team has an exclusive non-alcoholic beverage sponsor which includes exclusive pouring rights, the concession service agreement should provide that the concessionaire may only serve the sponsor's non-alcoholic beverages unless otherwise approved by the team.

Since concession rights agreements deal with provision of food and beverages, it is important to delineate which entity will be responsible for compliance with various laws relating to food and beverages, as well as service of alcohol, and for claims based on tainted or undercooked food, as well as “dram shop” and other claims stemming from service of alcoholic beverages. Such compliance and claims will usually be the responsibility of the concessionaire and the team should seek to negotiate a strong indemnification provision. With respect to service of alcohol, the concession rights agreement must also specify who will be responsible for obtaining the requisite licenses. Laws and regulations regarding liquor licenses vary by jurisdiction, so engaging the services of experienced outside counsel in applying for and maintaining such a license is advisable.

Other issues related to the service of food and beverages that should be dealt with in the agreement include health and safety-related policies and procedures (the team may want to have approval rights over such policies), cleaning, trash removal and grease disposal policies and procedures. Alternatively, the team may have stadium-wide policies and procedures that the concessionaire will be required to adhere to in conducting its operations. In the event of a breach under a concession services agreement by the concessionaire, the team should reserve the right to cure the breach at the concessionaire's cost and expense. This right is of particular importance with respect to the cleanliness of the concession areas and other matters where time is of the essence.

In order to ensure that the concessionaire is abiding by all of the covenants of the concession services agreement to the team's satisfaction, it is important to provide for broad audit and inspection rights.

A checklist for preparation of a concession services agreement is set forth below:

**A. Concession Services Generally**

1. Definition of “Concession Services” and exclusions from such definition. For example, kosher foods requiring religious supervision and special preparation may be excluded.
2. Identification of concession areas and reserved areas in which Concession Services are not provided
3. Responsibility for fitting out and upgrade of concession areas
4. Responsibility for purchase of, and rights to use, equipment and small wares
5. Permitted uses of concession areas by concessionaire
6. Reservation of rights by facility/team in concession areas and as to Concession Services

7. Events at which Concession Services are to be provided. For example, certain non-sporting events, such as use of the stadium as a film location, often entail the use of a third party experienced in providing concession services at film locations.
8. Scheduling of events
9. Right of facility/team to require provision of Concession Services at non-events
10. Right of facility/team to use third-party providers of branded goods
11. Right of facility/team to permit third-party promotional events

#### **B. Payments**

1. Concession Services payments
2. Third-party provider payments
3. Funding of reserve fund
4. Cost-plus concession services
5. Promotional item pricing (*e.g.*, 2 for price of 1 day)
6. Frequency of payments and payment reports
7. Audit rights
8. Payment dispute resolution
9. Food, beverage and merchandise measurement metrics
10. Shortages
11. Collection responsibility/bank accounts
12. Record keeping
13. Preparation of annual reports and submission of concession service forecasts for the following year

#### **C. Concession Services Personnel**

1. Background checks
2. Union/non-union
3. Collective bargaining agreement
4. Arbitration/union grievances
5. Management team
6. Customer service
7. Conduct of employees
8. Non-discrimination

#### **D. Operation and Conduct of Concession Services**

1. Use of concession areas
2. Permits, licenses and bonds
3. Hours of operation

4. Alcoholic beverage sales
5. Facility/team approval matters
6. Quality
7. Use of facility/team/sponsor names
8. Delivery
9. Catering
10. Purchasing, stocking and storing
11. Maintenance
12. Cleaning
13. Safety
14. Security
15. Utilities
16. Taxes
17. Liens and assessments
18. Alterations, additions and improvements
19. Term
20. Concessionaire defaults
21. Obligations upon expiration or termination
22. Damages, costs and expenses
23. Right of team to cure concessionaire defaults
24. Indemnification
25. Insurance
26. Subordination
27. Representations and warranties
28. Damage and destruction

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:29

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:29. Revenue producing agreements—Merchandise licensing agreements

Merchandise licensing agreements involve the licensing of the logo, character, symbol, design, likeness, name or other design of a team or league to a consumer product manufacturer that will use these designs on various products such as clothing, accessories and novelty items.

As with broadcasting rights,<sup>1</sup> licensing arrangements are also negotiated on a league-wide basis. That is, the teams establish a separate corporation which acts as the licensing agent for the all of the teams and licenses their intellectual property in a bundle. For example, NFL teams assign all of their intellectual property to the NFLP (National Football League Properties, Inc.) (with certain carve-outs for team stores and other local activities). NBA Properties, NHL Properties and MLB Properties serve a comparable function. These entities then divide licensing revenues equally among the teams. Such pooled licensing agreements have come under antitrust scrutiny under Section 2 of the Sherman Act.<sup>2</sup> The equal sharing of such revenues often creates tension between larger market teams and smaller market teams. The larger market teams can generally be expected to generate more revenue than smaller market teams. Inside and outside counsel should be cognizant of this revenue disparity. Larger market teams often seek to obtain the right to exclude from league-wide revenue sharing certain types of merchandise or merchandise sales effected in certain geographic areas or through certain distribution channels.

An effective merchandise licensing agreement should, as any other licensing agreement, precisely specify the rights being granted, including what products the logo may be placed on, whether the logo may be used to promote the merchandise, and the term and territory of use. A key term is, of course, the amount of the royalty payment by the licensee, which is a set percentage of the wholesale price of items sold (which percentage varies according to the bargaining leverage of the parties), usually with a set mandatory minimum.

Another key provision in the agreement for the team is quality control rights. The team should seek an affirmative covenant from the licensee that all merchandise will meet certain standards of quality, style and appearance. The enforcement of this covenant requires broad monitoring provisions and approval rights over all products, which should be tied to a requirement for the licensee to regularly provide samples of the products to the team. A related point is marketing of the products—the team should seek approval rights of any proposed advertising of the products in order to protect the team's image and reputation. For example, a tee shirt featuring a team logo next to racy or explicit imagery, or imagery promoting gambling or tobacco use, would tarnish the family-friendly, national pastime image that teams seek to maintain. Another advantageous provision to negotiate for is a requirement for the licensee to spend a set amount on marketing annually and/or to use its best efforts to market the products.

The contract should provide for remedies and procedures in case of unforeseen and unavoidable circumstances, such as work stoppages due to strikes or natural disasters which will halt production. The team should also protect itself against product liability suits by including a strong indemnity clause and requiring the licensee to maintain adequate insurance.

Since the licensee, in this case the vendor, is in the best place to detect unauthorized use of the licensed logo by its competitors, counsel for the team may wish to consider placing certain responsibilities for protecting the intellectual property with the licensee. For example, merchandise licensing agreements often require the licensee to establish and implement detection procedures and to notify the team of any violations.

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#### Footnotes

- 1 *See* §§ [74A:25](#) to [74A:27](#).
- 2 *See* § [74A:13](#) for a discussion of the U.S. Supreme Court case, *American Needle, Inc. v. Nat'l Football League*, which dealt with the antitrust implications of “bundling” intellectual property rights of all teams within a league for the purposes of merchandise licensing.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:30

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:30. Revenue producing agreements—Naming rights and premier sponsorship agreements

Companies pay large sums of money to have their name associated with a certain sporting event or sports facility. Many types of sponsorship arrangements exist. A company may become a “title sponsor” meaning its name will be in the title of the event, or may have a sporting facility named after it. Alternately, a company may purchase the right to use a league's or team's logo when promoting its products (*e.g.*, to say it is the “official” or “preferred” energy drink of the team), or may purchase advertising space within a sporting facility.

There are several reasons companies are willing to enter into sponsorship agreements, including favorable exposure and community goodwill. Sponsorship arrangements are seen as a good investment that offers a healthy return in exposure and increased sales of a company's product. For example, naming rights agreements for stadiums and arenas are a cost-effective way for a company to advertise since the company's name will be mentioned in reports of every event that occurs at the facility and large numbers of people will see the company's name and logo on the signs while passing by or while attending a game. There are also opportunities for cross-promotion and tie-ins. For example, a sports facility sponsored by a bank may exclusively have that bank's ATMs installed.

Sponsorship agreements, especially those involving significant and long-term relationships such as naming rights agreements, involve a unique situation where a large sum of money is at stake for both parties. Such agreements are therefore heavily negotiated, and both the team and sponsor's inside counsel typically work hand-in-hand with outside counsel in negotiating and drafting such agreements.

The sponsorship agreement should identify the type of sponsorship relationship the parties are entering into, as well as the rights the sponsor will have, including rights such as having the sponsor's name included in all advertisements for the team, the right to use the team name and/or logo in advertisements for its own products (in which case the team should negotiate for approval rights over any such advertisements), the right to produce and sell/give away merchandise with the team's logo (in which case the team should seek covenants regarding quality and style, and also seek approval rights over any such merchandise), and the number and location of signs the sponsor will have at the stadium. The sponsor will generally also seek other benefits, such as the use of luxury suites or the right to host company events at the stadium. In negotiating the provision of such benefits, it is important to also include in the agreement remedy procedures that will allow the team to provide alternate benefits or otherwise “make-whole” the sponsor in the event the team is unable to provide the specified benefit (*e.g.*, the luxury suites are being renovated and the sponsor cannot be granted access, or a star player has been injured and cannot make an appearance at the sponsor's party).

In granting exclusive rights, counsel for the team needs to consider what overlapping or conflicting arrangements may already be in place. For example, if one sponsor is the exclusive non-alcoholic beverage sponsor of the team, then the team will be precluded from granting sponsorship rights in respect of specific subcategories of non-alcoholic beverages (*e.g.*, water or energy drinks). The team should also be careful to include carve-outs in its exclusivity covenants for ambush and guerilla marketing (*e.g.*, companies taking advantage of the popularity of an event without actually sponsoring the event, for example by displaying unauthorized signage at or near an event) and other circumstances outside the team's

control. Outside counsel will typically review exclusive right grants to ensure that such grants do not raise antitrust issues or violate other requirements of law regarding the content and/or display of advertising.

In entering a sponsorship relationship, both the sponsor and the team are concerned with protecting their image and reputation. A major sponsor will want the right to veto other sponsors, for example if the sponsor does not wish to be associated with a particular product or image (*e.g.*, a children's toy company may not want to share “presented by” credit with a liquor company or with an adult magazine), or if the other company is a direct competitor. The team should seek termination rights in case of certain “bad acts” of the sponsor which will make it undesirable for the team to be associated with the sponsor and, in the case of a naming rights agreement, in the event the sponsor changes its name. Mutual approval rights for the use of logos, as well as quality control covenants with respect to merchandise produced by the sponsor or team bearing the other's logo, should also be included.

Delineating the nature of the parties' cooperative relationship, and apportioning responsibilities, as well as approval rights over each other's activities is an important part of the sponsorship agreement.<sup>1</sup> A naming rights agreement should contain provisions regarding cooperation and mutual approval over logo design for the stadium, provisions regarding permissible and required uses of the logo by each party, and may contain provisions regarding cooperative community outreach programs and other public relations activities.

A naming sponsor has an ongoing relationship with a team and will often want the team to agree to a minimum annual player payroll amount in order to maintain the team's fan base and popularity. Teams are often reluctant to agree to such provisions, as they are seen to impinge on management's discretion. Prior to agreeing to such a maintenance covenant, the team's counsel should carefully review the team's credit agreements to make sure the covenant will not conflict with its bank covenants.

Sponsors will seek to have protections added to the agreement that provide for a fee reduction if television coverage or ratings for the game(s) or event are below a set threshold, and a fee reduction or other remedies and procedures in the event of unforeseen or unavoidable circumstances such as work stoppages, condemnation of the stadium, and natural disasters.

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#### Footnotes

<sup>1</sup> See § 74A:65 for a discussion of disputes that may arise in the event of a breach of a sponsorship agreement.

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:31

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:31. Template revenue producing agreements

Routine revenue producing agreements, such as sponsorships not involving naming rights, are largely handled by inside counsel. Outside counsel may be utilized to create a template agreement containing standard terms and provisions.<sup>1</sup> Inside counsel will then tailor the template to add the specific business terms called for by the template agreement. Outside counsel may be further called upon to assist with customized provisions requested for inclusion in the template agreement.

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#### Footnotes

<sup>1</sup> See §§ 74A:32 to 74A:41 for a discussion of particular types of template agreements.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:32

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:32. Template revenue producing agreements—Advertising/sponsorship agreements

In addition to naming rights and other significant sponsorships discussed in [Section 74A:30](#), teams enter into a host of individual advertising and sponsorship agreements with various corporate sponsors.<sup>1</sup> These advertising or sponsorship arrangements may be for one season or for multiple seasons. Many teams seek to develop template agreements that can be used across various sponsorship categories. Such agreements must specify the grant of rights for the sponsor, the term of the sponsorship and the amount of the sponsorship fee. Inside counsel will typically take the lead in negotiations with corporate sponsors of this nature, however, outside counsel often assists in developing the template agreement that the team will ultimately use for such sponsorships. Outside counsel often assist with sponsor negotiations, which should be handled carefully, due to the importance of protecting sponsors rights and preserving ongoing relationships.

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#### Footnotes

<sup>1</sup> See [§ 74A:75](#) for a form of sponsorship agreement.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:33

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:33. Template revenue producing agreements—Suite licenses

Luxury suites have become fixtures at stadiums and arenas throughout the United States, providing teams with a lucrative alternative revenue stream, in addition to traditional sources of revenues, such as ticket and food and beverage sales. Typically, corporate clients lease the suite from the team for the course of an entire season. Suite licenses govern the right to use and occupy a luxury suite and specify the terms of the license, such as how long before and after a game a licensee can have access to the suite, and which other areas of the stadium or arena, in addition to the suite, a licensee may have access. An important component of many suite licenses is providing the licensee the right to purchase tickets to other events that may take place at a stadium or arena (*e.g.*, all-star game, playoff games, concerts). Such license agreements must specify the term of the license and the license fee to be paid for the right to use and occupy the particular suite. The suite license must also specify if certain benefits are included with the license, such as memberships to clubs or other private spaces located within the stadium or arena, parking passes and copies of team literature, such as a team yearbook or magazine. A properly drafted suite license must also contain restrictions, including prohibiting the licensee from reselling or sublicensing game tickets. In addition, suite licenses must provide a credit or otherwise account for cancelled or lost games. Outside counsel must also be cognizant of tax issues and draft such licenses in order to maximize tax efficiencies. Due to differences in state tax codes, these tax issues will vary from state to state. Outside counsel should be knowledgeable about the types of goods and services subject to taxation, as well as any available exemptions and tax credits under the applicable tax laws. Outside counsel often plays a greater role in drafting the template suite license than it does with other types of template agreements discussed in this Section. Since such agreements are not subject to lengthy negotiations between a team and the licensee, outside counsel should develop a strong, pro-team form of agreement.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:34

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:34. Template revenue producing agreements—Full and partial season ticket licenses

Full and partial season ticket licenses allow individual fans to purchase tickets to the games of a particular team. The licensee is allowed to use and occupy specific seats in the stadium or arena. The license has specific terms with respect to the rights of the licensee to transfer the license and the circumstances under which the license can be revoked by the team. The ticket license should contain terms by which the licensee can purchase tickets to playoff games, and should also contain certain benefits for the licensee that provide further incentive to enter into the license, such as the ability to have access to certain areas of the stadium that would otherwise be restricted. In addition, ticket licenses provide a credit or otherwise account for cancelled or lost games. Tickets must also contain standard assumption of risk language on the actual tickets in order to provide the team with additional protection. Outside counsel often plays a greater role in the preparation of template license agreements used for full and partial season tickets, due to the variety of issues and the number of restrictions that may be placed upon the use of such license. Outside counsel must also be cognizant of tax issues, such as whether or not sales tax is charged on the sale of such licenses, and draft such licenses in order to maximize tax efficiencies. Government issues, particularly as they relate to pricing of tickets, are another area of concern, where experienced outside must provide guidance.<sup>1</sup>

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#### Footnotes

<sup>1</sup> See § 74A:57 for a discussion of ticket sales and pricing.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:35

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:35. Template revenue producing agreements—Personal seat licenses

In certain cases, the right to purchase tickets is subject to having entered into a personal seat license (“PSL”). A PSL gives the holder the right to buy season tickets for a certain seat in a stadium or arena. The holder of the license must still pay for the tickets to the game, but can sell the seat license to someone else if the holder no longer wishes to purchase season tickets. However, if the seat license holder chooses not to sell the seat license and does not renew the season tickets, the holder forfeits the license back to the team. Most PSLs are valid for as long as the team plays in the current stadium or arena. The primary reason sporting venues offer PSLs is to utilize the proceeds to help pay the debt incurred during the construction of a new stadium or arena. While most prevalent in the NFL, PSLs have also been utilized in other major professional sports leagues. The Carolina Panthers were one of the first NFL teams to employ PSLs in connection with the construction of Ericsson Stadium (now Bank of America Stadium) in 1996, raising more than \$120 million through the sale of PSLs.<sup>1</sup>

PSLs are complex agreements that must be drafted carefully to ensure that all key issues are addressed.<sup>2</sup> Outside counsel should take the lead in drafting the form of PSL and any transfer documentation relating thereto. Issues which outside counsel must address in the PSL include transferability of the PSL (typically at the discretion of the licensor), credit for cancelled games and dispute resolution. Outside counsel must also be cognizant of tax issues and draft such licenses in order to maximize tax efficiencies. Outside counsel may also be called upon to assist teams with public relations matters as well, since PSLs are often criticized as not being fan friendly. The introduction of PSLs by a team may be challenged by fans that are used to purchasing season tickets without a license. Fans of the New York Giants and New York Jets filed a lawsuit against the teams in an effort to retain their season tickets without first having to purchase a PSL.<sup>3</sup> The fans argued that the introduction of PSLs by the teams constituted a breach of the contract that allegedly arose from the fans' status as long-time season ticket holders, which they contended should entitle them to automatic renewal rights. In opposing this claim, the New York Giants and New York Jets maintained that season tickets are revocable licenses, and confer no automatic renewal rights upon the holder. The court found on behalf of the teams, and granted the teams' motion for summary judgment.

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#### Footnotes

- 1 [Forbes.com, List of NFL Team Valuations, August 2010.](#)
- 2 [See § 74A:73 for a form of PSL agreement.](#)
- 3 [Estate of Harold Oshinsky v. New York Football Giants, Inc., 2011 WL 383880 \(D.N.J. 2011\).](#)

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:36

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:36. Template revenue producing agreements—Food and beverage licenses

In contrast to concession services agreements,<sup>1</sup> which cover multiple food and beverage categories, food and beverage licenses are typically entered into for particular types of food and beverages, often for a “one-off” item or specialty brand (*e.g.*, Dunkin' Donuts). However, many of the considerations discussed above regarding concession services agreements are equally applicable hereto. Further, consideration needs to be given as to whether, given the particular food or beverage, employees of the licensee are required to distribute the particular product at the stadium or arena. Certain licenses may, due to the nature of the particular product (*e.g.*, specialized training is required to prepare the product), require that employees of the product producer distribute the product. In such instances, the fact that employees of the product producer will be working in the stadium or arena must be covered by the license or in a separate agreement. In addition, similar to the concession services agreements discussed above, licensees usually pay the stadium or team a commission based on a percentage of sales. Such agreements must have strong accounting provisions and provide the team with audit rights so that revenues can be properly tracked. In drafting a food and beverage license, outside counsel must develop a template agreement that does not conflict with the concession services agreement covering the stadium or arena generally. Like concession services agreements, the inclusion of provisions that address the quality of the products subject to a food and beverage license is of paramount importance. In addition, outside counsel must remain cognizant of the team's needs since they may be called upon to review specific terms, such as pricing and the types of food and beverage items permitted to be served.

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#### Footnotes

<sup>1</sup> See § 74A:28.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:37

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:37. Template revenue producing agreements—Catering contracts

Teams often engage commercial caterers, to the extent such services are not provided by the existing concessionaire, to provide certain types of upscale food in the stadium or arena, as well as for luxury suites located in the stadium or arena.<sup>1</sup> In addition to clearly specifying the type of food and beverages to be provided, such agreements must clearly delineate areas that the caterer may access, particularly for special events and non-game days. Catering agreements should also address permitted points of stadium or arena ingress or egress for employees of the caterer, and require all catering personnel to follow all team guidelines with respect to access to the stadium or arena. In addition, similar to concession services agreements discussed above,<sup>2</sup> caterers usually pay the stadium or team a commission based on a percentage of sales. Such agreements must have strong accounting provisions and provide the team with audit rights for purposes of properly tracking revenues. In drafting a catering agreement, outside counsel must develop a template agreement that does not conflict with the master concession services agreement for the stadium or arena. In addition, outside counsel must remain cognizant of the team's needs since they may be called upon to review specific terms, such as pricing and the types of food and beverage items permitted to be served. Inside counsel should consult with outside counsel prior to deviating from the terms of the template catering agreement drafted by outside counsel.

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#### Footnotes

- 1 *See* § 74A:33.  
2 *See* § 74:28.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:38

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:38. Template revenue producing agreements—Parking licenses

Parking facilities are usually either owned directly by the team or the city where the stadium or arena is located. In many instances the responsibility of operating the parking facility is licensed to an experienced parking facility operator. While teams have traditionally charged fans for the right to park vehicles in stadium or arena parking lots, a pre-paid parking license that allows the holder to gain entry to team property for purposes of parking a vehicle is a relatively new form of revenue producing mechanism employed by teams. In order to provide the team with appropriate control over the parking facility, a properly drafted parking license will clearly delineate permitted and prohibited activities at the parking facility. For example, a parking license typically prohibits solicitation, commercial or otherwise, at the parking facility in order to protect the sponsorship rights of stadium or arena sponsors. In addition, the parking license should prohibit the sale of any outside food, beverages or other items in the parking facility, without prior team approval, in order to protect the rights of the team's concessionaires. Parking licenses often contain certain prohibitions with respect to "tailgating," such as not allowing fans to tailgate in empty parking spaces or cook by open flame. Revocation of a licensee's season ticket privileges for significant or repeated violations of the parking license is a remedy often included in a parking license to ensure compliance. Further, parking licenses should specify the limits of the team's indemnification obligations and potential liability for matters such as damage to automobiles parked at the parking facility.

With respect to license agreements between a team and a parking facility operator, such parking licenses, in addition to addressing important points such as indemnification and damage liability, must provide for accounting provisions and afford the team with audit rights for purposes of properly tracking revenues. Outside counsel will usually draft the form of parking license agreement. Outside counsel will also review specific terms, such as pricing, and ensure compliance with applicable laws and regulations. Further, outside counsel should be cognizant of tax issues, such as whether sales tax is charged on the sale of such licenses, in drafting the form of parking license agreement in order to maximize tax efficiencies. During the construction of a parking facility, outside counsel may be called upon to provide assistance with respect to environmental, zoning and other governmental requirements.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:39

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:39. Template revenue producing agreements—Trademark and other intellectual property licenses

As discussed above,<sup>1</sup> teams often license their trademarks, logos and other intellectual property rights. The licensing of these rights usually form a part of other agreements, such as sponsorship agreements discussed in [Section 74A:32](#). Outside counsel with specific expertise in intellectual property law often is often engaged to either draft or review the intellectual property provisions of such agreements. Outside counsel must remain cognizant of league issues, as the various leagues impose restrictions on the use of intellectual property, such as specifying specific territories in which teams may or may not utilize their intellectual property. Outside counsel must ensure that licenses for the use of a team's intellectual property specify the permitted uses of the marks and the manner in which such marks can be used. If the license provides for royalty payments to the team, the license should include strong accounting provisions and provide the team with audit rights for purposes of properly tracking revenues. The license should also include strong indemnification provisions and remedies for the teams, such as the ability to obtain an injunction if a licensee is using a mark in an impermissible manner. Outside counsel will often assist inside counsel in developing procedures to check trademark filings, keep track of deadlines for renewals of marks, and monitor for adverse or potentially infringing claims.

The scope of intellectual property having application in the sports industry was extended by the University of Arkansas to cover a sound trademark. Since the 1920's, fans of University of Arkansas athletic teams have cheered “*Wooooooo Pig Sooie*” in support of the teams' Razorback pig mascot. Over time, this cheer has become one of the most recognizable in collegiate athletics. In an effort to protect the cheer, the University of Arkansas obtained a sound trademark for the hog call in July 2014. This sound trademark is believed to be the first collegiate cheer or chant officially registered with the U.S. Patent and Trademark Office. In support of its sound trademark application, the University of Arkansas submitted several examples of audio and video showing Razorback fans calling the hogs. Some clips were crowd shots at football games, while others showed individuals, such as the University of Arkansas Chancellor and Athletic Director making the hog call.

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#### Footnotes

<sup>1</sup> See §§ [74A:30](#) and [74A:32](#).

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:40

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:40. Template revenue producing agreements—WiFi and other technology agreements

Due to the enhancement of television coverage of sporting events in recent years, such as increased picture quality and the inclusion of ever changing graphics and statistics, teams and stadiums have had to increase their technology offerings in order to keep fans engaged and attending games in person. Teams finding themselves competing directly with television networks have begun to greatly enhance the in-stadium/arena experience in order to maintain fan interest. Teams are now offering an array of technological services to enhance the fan experience, including free WiFi, free smart phone applications, which can be used to see instant replays and statistics, as well as applications that will alert fans as to which concession stands have the shortest lines. Newer stadiums are being equipped with thousands of television screens and other audio visual enhancements to further integrate fans into the game experience and ensure that fans are never away from the action while attending a game. Outside counsel is called upon to provide expertise with respect to ever changing technology and also to develop or review agreements to bring the latest technologies to stadiums and arenas. Outside counsel may play a key role in negotiations with technology providers and other team sponsors that may be impacted by technology offerings in a stadium or arena. Additionally, the costs of such technologies are often significant and outside counsel can play a significant role in advising inside counsel as to the proper allocation of responsibility for the costs of the technology.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:41

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:41. Template revenue producing agreements—Sweepstakes/contests and related rules and regulations

To the extent permitted by their respective leagues, most teams regularly conduct sweepstakes or contests where prizes are given away to fans. Such contests are useful for generating fan interest and promoting the team. While many people use the terms interchangeably, technically, contests are giveaways that have some element of skill to them, while sweepstakes are giveaways where winners are chosen by luck.

Lotteries in the United States are highly regulated and the vast majority of states have rules governing lotteries and sweepstakes. For example, to avoid being classified as an illegal lottery, a sweepstakes cannot have consideration (*i.e.*, a sweepstakes entrant cannot be required to pay to enter the sweepstakes and purchasing a particular product will not improve the odds of winning). In addition to state lottery laws, teams must be mindful of league rules with respect to the use of team marks and working with companies in certain prohibited industries. It is important for teams taking part in such games to also be cognizant of applicable league rules and regulations concerning the use of team intellectual property. For example, the creation of composite marks as part of a contest or promotion could weaken a team's mark.<sup>1</sup> Leagues also require the users of team intellectual property to expressly disclaim any rights of ownership in such intellectual property. In addition, due to the high visibility of professional sports teams, compliance with federal and state laws is crucial, as state attorney generals' offices monitor such activities and can bring public suits against a team if it is not in compliance.

Many teams create boilerplate forms for use with different sweepstakes or contests and it is often left to inside counsel to prepare and issue the rules used in connection with a particular sweepstakes or contest. Inside counsel will often look to outside counsel to provide guidance with respect to changes in particular rules or regulations, or if a team is conducting an entirely new type of sweepstakes or contest in order to ensure compliance with all applicable legal and league rules and regulations.

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#### Footnotes

<sup>1</sup> See generally [Chapter 69 “Trademarks” \(§§ 69:1 et seq.\)](#) for a discussion of trademarks.

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:42

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:42. Operational agreements

Before a team can begin playing games, many operational agreements must first be negotiated and put into effect. These operational agreements, which are discussed in §§ [74A:43](#) to [74A:49](#), include cleaning services, security, utility, maintenance, insurance, travel agreements, equipment and publicity agreements.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:43

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:43. Operational agreements—Cleaning services agreements

Cleaning services agreements are entered into between a team and service providers that clean the team's stadium or arena. Such agreements are essential to the successful operation of the team, since the cleanliness of a stadium or arena directly impacts the fan experience. Inside counsel will usually take the lead with respect to cleaning services agreements given their familiarity with the facilities and their ability to interface with team operational personnel. The role of outside counsel is typically in a review capacity. However, one area where outside counsel may become actively engaged is compliance with environmental regulations in disposing of cleaning fluids. Outside counsel should become familiar with the requirements of the particular stadium or arena as to the types of cleaning services provided and the cleaning products used in connection therewith.

Counsel should ensure that the cleaning services agreement clearly delineates that employees of the service provider are not deemed to be employed by the team. Accordingly, the service provider should be responsible for the hiring and firing of its employees, as well as the payment of their compensation and receipt of other employment benefits. However, the team may seek to have a right to cause the service provider to discharge employees found to be disruptive by the team. Further, the team should require that the service provider's employees abide by all applicable stadium or arena policies and procedures applicable to team personnel. It is important that these core policies are in place and that team personnel, third parties and independent contractors are familiar with these policies. Leagues also often prescribe their own set of policies. Policies and procedures typically address permitted points of stadium or arena ingress or egress, the display of identification badges and submission to background checks.

Given the importance of maintaining a clean stadium or arena, team counsel should seek to include a minimum standard of performance, as well as a clause reserving the right to resort to self-help and cause dirty areas of the stadium or arena to be cleaned by a third party at the service provider's expense. A strong indemnification provision should be sought given the various cleaning solutions used and the likelihood of a "slip and fall" lawsuit being filed as a result of an improperly cleaned area.

Due to inside counsel's familiarity with the stadium or arena operations, inside counsel frequently plays the primary role in developing the aforesaid policies. Outside counsel often plays a secondary role by reviewing and, to the extent necessary, supplementing these agreements to provide additional team protections.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:44

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:44. Operational agreements—Security agreements

Creating a safe stadium or arena environment for fans is of paramount importance to every team. Fans are more likely to attend events at stadiums and arenas where they feel safe and security is not a major concern. Security at a stadium or arena is typically conducted through a combination of local police officers and private security service providers. The local police officers are charged to secure the areas around the stadium or arena and may also have a presence within the stadium or arena on game days. Private security service providers are typically responsible for crowd control and other internal stadium security matters.

The team, stadium or arena may or may not enter into a separate agreement with a local police department. A private security firm will enter into a security agreement with the team or entity operating the stadium or arena. Such agreements contain provisions similar to the cleaning services agreement<sup>1</sup> as to service provider employee-related matters and stadium or arena policies.

Strong indemnity provisions, as well as insurance coverage, should be sought to protect the team from claims resulting from a service provider's acts or omissions. A clause describing the minimum standard of performance must also be included to insure a safe environment. Inside counsel will usually be responsible for dealing directly with third-party security service providers, although outside counsel may be called upon to review such agreements. Outside counsel should be cognizant of the core policies of the stadium or arena when reviewing such agreements, since certain of these policies, such as requiring all independent contractors to undergo a background check, are often specified in these agreements.

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#### Footnotes

<sup>1</sup> See § 74A:43.

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:45

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:45. Operational agreements—Physical plant/maintenance agreements

Each stadium or arena has maintenance issues which must be addressed. The responsibility for the maintenance of the facility is typically the obligation of the team, even if the stadium is not owned by the team. Maintenance agreements contain provisions similar to the cleaning services agreement<sup>1</sup> as to service provider employee-related matters and stadium or arena policies.

Strong indemnity provisions, as well as sufficient insurance coverage, should be sought to provide the team with protection for claims arising from acts of a maintenance provider's employees, as well as the use or disposal of hazardous materials and broken or obsolete equipment. Maintenance agreements should require that all testing of physical plant equipment, such as elevators and escalators, is performed by licensed and qualified maintenance technicians of the maintenance service provider. These agreements should also specify the types of maintenance tasks to be performed, the frequency of when such tasks are to be performed and the standard of quality associated with the tasks. Inside counsel is typically responsible for the drafting and negotiation of maintenance agreements. Outside counsel often plays a secondary role by advising on specific provisions of a labor or environmental nature.

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#### Footnotes

<sup>1</sup> See § 74A:43.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:46

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### Chapter 74A. Sports

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#### § 74A:46. Operational agreements—Insurance

Insurance issues are a major concern for every team. Insurance requirements are often dictated in large part by the stadium or arena lease agreement. While insurance matters are covered more extensively in Chapter 25,<sup>1</sup> insurance in the professional sports context does present unique issues. Insurance for the various types of injuries which may occur at a sporting event must be specifically addressed in each team's commercial general liability policy. In addition, teams must maintain policies for worker's compensation, automobile insurance for employees, errors and omissions and advertising and media liability insurance.

Most teams maintain an in-house risk manager or risk management department that is primarily responsible for negotiating the various policies with insurance providers. However, outside counsel should be knowledgeable of the various types of insurance and coverage amounts maintained by the team. This knowledge may be of particular use in negotiating agreements with third parties for the use of the stadium or arena for events unrelated to the team (*e.g.*, music concert). As a result of outside counsel's in-depth knowledge of insurance law, outside counsel may take a more active role in negotiating insurance contracts and obtaining required certificates of insurance. In providing such services, outside counsel must also consider the rating of the insurance carrier in general and in terms of complying with the applicable stadium or arena lease agreement.

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#### Footnotes

1 [See Chapter 25 “Representing a Client with Insurance” \(§§ 25:1 et seq.\).](#)

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### Chapter 74A. Sports

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#### § 74A:47. Operational agreements—Utility contracts

Due to the very nature of a stadium or arena, every team has significant utility needs. Teams will typically enter into agreements directly with utility service providers. Utility agreements are typically dealt with by inside counsel. Outside counsel is often engaged to review such agreements. Knowledge of utility agreements is useful to outside counsel in negotiating concession services agreements<sup>1</sup> and other types of agreements in which significant usage of the utilities at the stadium or arena is required. Recently, with a push towards an environmentally friendly or “green” initiative, outside counsel have been engaged to negotiate environmental and other “green” provisions in utility agreements.

Utility services is a costly item for the team and outside counsel should be sure to include the right to audit a utility bill. The audit right should specify that a team's dispute or objection to an unauthorized or questionable charge will not result in the breach of the contract or shut down of utility services.

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#### Footnotes

1 *See* § 74A:28.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:48

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### Chapter 74A. Sports

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#### § 74A:48. Operational agreements—Hotel, travel and supply agreements

Teams require a variety of supplies—from equipment for players to office supplies for team administrative personnel. In addition, teams have significant travel and lodging requirements that must be addressed. Inside counsel will be primarily responsible for entering into such agreements, and typically will not utilize outside counsel in connection with such agreements. Outside counsel, however, may be called upon to review such agreements in the ordinary course.

Teams often develop a customized set of provisions, such as allowing for late check-in times, that they seek to include in hotel, travel and supply agreements. The goods and services providers often seek to obtain publicity from the team's patronage. This factor should be used to the team's advantage in bargaining for lower payment and other favorable terms even if the particular goods or services provider is not an official sponsor of the team. Further, teams often seek to enter into barter arrangements whereby official team sponsorship or advertising is exchanged for favorable payment terms. Alternatively, goods and services providers may be willing to pay the team for the right to be designated as an official sponsor of, or official goods or services provider to, the team.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:49

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### Chapter 74A. Sports

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#### § 74A:49. Operational agreements—Team advertising/publicity agreements

Reaching existing and potential new fans is a major concern for every team. Teams utilize traditional media, such as print, radio and television, and increasingly non-traditional media such as the Internet to reach their fan bases. While specific leagues may impose certain guidelines, teams generally have wide latitude to enter into arrangements to advertise and promote their games and the sale of tickets within their respective home territories. Inside counsel typically takes the lead in negotiating such arrangements. Outside counsel, however, often provides assistance with respect to ensuring compliance with applicable Federal Trade Commission regulations, and specific state regulations, where applicable, governing advertising and publicity. A policy should be implemented that is designed to tightly control what information is released and the protocol for effecting information releases. Such policy is especially important with respect to players' health and privacy issues. Another area of particular concern is the release of team financial information, since teams, with minor exception, are privately owned.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:50

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:50. Player contracts and salary arbitration

The NFL, NHL, NBA and MLB have created and implemented uniform player contracts. Teams and players may modify these uniform player contracts with addenda or riders, but any amendment other than those permitted by the applicable collective bargaining agreement are considered null and void. These matters are discussed in §§ [74A:51](#) and [74A:52](#).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:51

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:51. Player contracts and salary arbitration—Player contracts

The NFL, NHL, NBA and MLB use standard player contracts that each contain the following three types of covenants governing a team's rights to an athlete's services: (i) the exclusivity clause, in which the player pledges to play only for a particular team; (ii) the activity prohibition clause, which limits the player's right to participate in athletic activities not sponsored by the team to prevent the player's exposure to injury during his employment; and (iii) the unique services clause, which acknowledges that the athlete provides unique services to his team that cannot be replaced or adequately compensated by monetary damages. To clarify, if a player has entered into a contract with a team and is receiving timely payments thereunder, the team can prevent the player from playing for another team and limit a player's outside athletic activities. Further, if a player decides not to play for a team and his contract with the team contains a unique services clause, the player may be liable to the team for any bonuses or other advances the player received under his contract. In preparing player contracts, consideration also needs to be given to general principles of employment law.<sup>1</sup> For example, the rules as to the enforceability of non-competition covenants vary from state to state.

Player contracts are usually negotiated by inside counsel and the player's agent. Since such negotiations require direct interface with the team's general manager and sometimes team ownership, inside counsel is better suited to take the lead on such negotiations. Outside counsel tends to play a more peripheral role. However, outside counsel may be asked to advise in situations involving unique contractual provisions. Further, if negotiations are tense, outside counsel may be called in to take a harder line or may be used by inside counsel as a scapegoat. This approach allows the blame to be shifted onto the outside counsel, without harming the relationship the team and inside counsel have developed with the players.

Regardless of the counsel responsible for drafting the player contracts, such counsel must recognize the pitfalls that faulty drafting might cause, such as dangers of throwing in a bonus clause written in a shorthand style. In one contract, the drafters used the following to describe a bonus: "\$2,000—First Official Cut; \$1,000—Second Official Cut; \$3,000—Third Official Cut." The word "cut" is ambiguous, as are the other terms to a person unfamiliar with football phraseology. All terms should be clearly defined, especially if there is an alternative way to interpret the term (*e.g.* punt returns, ranks first, top punter). An excessively longwinded style may also cause problems if the drafters use unessential language.

Outside counsel should also be cognizant of the various types of legal issues player contracts may entail. Antitrust issues may arise, such as owners being prohibited from colluding with one another—a main factor behind the free agency ruling.<sup>2</sup> Sponsorship and promotional clauses may be added requiring a player to make appearances for the team's benefit (*e.g.*, meeting of potential season ticket purchasers). Other clauses to consider include drug use, alcohol use, and moral character clauses that are more stringent than those contained in the applicable uniform player contract.

Footnotes

- 1 *See generally* [Chapter 71 “Employment Law” \(§§ 71:1 et seq.\)](#).  
2 *See* [§ 74A:13](#).

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### Chapter 74A. Sports

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#### § 74A:52. Player contracts and salary arbitration—Salary arbitration

Either the uniform player contract (UPC) or the collective bargaining agreement (CBA) will provide an arbitration provision in case of a contractual dispute. Parties most often use the arbitration process to resolve disputes concerning player salaries, fines or suspensions, interpretation of uniform player contracts, player injury compensation (excluding workers' compensation), and player/agent representation issues.

Inside counsel and outside counsel need to be familiar with the league's rules about players' eligibility for arbitration. For example, in a MLB salary arbitration, each side privately submits its respective number—the club's salary offer and the player's salary request—to the arbitrator. The arbitrator must choose one or the other, he has no ability to compromise on a middle figure. On average, 160 to 170 players file for arbitration each year. The parties may compromise before the hearing and settlements regularly occur up to the final hour. Such matters are typically handled by in-house counsel, although outside counsel may be called upon to provide advice with respect to unique issues.

The format of salary arbitration is very similar to that of a trial. In particular, both sides typically submit briefs and other position-supporting papers, present evidence to the arbitrator and are afforded an opportunity to argue their position before the arbitrators.

While most disputes between teams and its players are resolved by arbitration, recently, players have brought suits challenging the league's role in the arbitration process. Arbitration can be circumvented in the following three ways: (i) if a professional athlete refuses to perform exclusively for the team during the contract period, the contract's exclusivity clause can be enforced by obtaining a court-ordered injunction; (ii) the arbitration process can be avoided when the dispute is beyond the scope of arbitration set forth in the uniform player contract and collective bargaining agreement; or (iii) arbitration is not used when either party has fraudulently induced the other into entering the contract.<sup>1</sup>

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#### Footnotes

<sup>1</sup> See generally [Chapter 57 “Alternative Dispute Resolution” \(§§ 57:1 et seq.\)](#) for additional discussion of arbitration.

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:53. Labor issues

Teams confront a myriad of labor issues.<sup>1</sup> Many of these issues are addressed in the collective bargaining agreement (CBA) between the league and the players. The CBA typically covers labor issues, specifically employment. In collective bargaining, management and employees, through their unions, negotiate the terms of employment (*e.g.*, form of uniform players contract, agent certification, college draft, scheduling, minimum salaries, option clauses, free agent compensation, assignability of contracts, injury protection and safety issues, discipline, anti-drug program, medical treatment and release of medical information) to be finalized in a CBA. For non-player contracts, counsel may want to include non-compete, non-solicitation and confidentiality clauses.<sup>2</sup> Teams may also be confronted with collective bargaining issues in respect of its employees.

Following highly-publicized negotiations and the longest lock-out period in NFL history (over 100 days), the NFL entered into a new 10-year CBA prior to the start of the 2011 NFL regular season. The process of negotiating a new CBA involved many legal challenges, including claims by the players that the lockout violated federal antitrust laws and state contract and tort laws. While negotiating the new CBA, the National Football League Players Association decertified as a union in order to challenge the lockout on antitrust grounds. The NFL argued that team owners should retain their immunity from antitrust liability owing to a nonstatutory labor exemption which permits employers to bargain in concert with their employees' union. The NFL also argued that the district court in which the players' claims were brought lacked jurisdiction to enjoin the lockout. Ultimately, a federal circuit court agreed with the league and vacated a district court order granting the National Football League Players Association a preliminary injunction. After waging significant legal battles on a variety of issues, the players and the league eventually came to an agreement on a new CBA. Key terms of the CBA included on-field disciplinary policies, disability program benefits, free agency eligibility, revenue sharing,<sup>3</sup> team salary cap (initially set at approximately \$120 million) and minimum player salary increases. Another notable term relates to the potential instatement of mandatory, random human growth hormone blood testing for players. The NFL included the testing in the 2011 CBA but did not set the terms until 2014. In 2013, MLB initiated HGH blood testing, and NBA will begin testing in the 2015-2016 season.

The anti-drug program under the MLB CBA was put to the test in 2013. After an ex-employee annoyed over missing back pay revealed clinic records that indicated PEDs were being sold, MLB sued six people connected to the clinic accusing them of damaging the sport by providing banned substances to its players. In July 2013, 13 MLB players received lengthy suspensions of 15 or more games (nearly a third of a season). Each of the suspended players elected not to appeal his suspension.

On August 5, 2013, Alex Rodriguez was suspended without pay through the 2014 season, a total of 211 games. MLB imposed the lengthier suspension upon Mr. Rodriguez based on his alleged use and possession of numerous forms of PEDs over the course of multiple years and for alleged attempts to cover up those violations and obstruct MLB's investigation. Mr. Rodriguez's suspension, however, was stayed while he appealed his suspension as permitted under the MLB CBA. As a result, Mr. Rodriguez played the entirety of the 2013 season. Mr. Rodriguez's appeal resulted in his suspension being reduced to 162 games or the entire 2014 MLB season.

The MLB CBA expires on December 1, 2021. The NFL CBA expires following the 2020 NFL season. The NBA CBA runs through the 2020-2021 season. The NHL CBA expires on September 15, 2022, subject to an earlier opt out right held by both sides.

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#### Footnotes

- 1 *See generally* [Chapter 71B “Labor Law” \(§§ 71B:1 et seq.\)](#).
- 2 For a more in-depth description and analysis of labor issues, *see* [Chapter 55 “Employee Benefits” \(§§ 55:1 et seq.\)](#) and [Chapter 71 “Employment Law” \(§§ 71:1 et seq.\)](#).
- 3 Labor issues in respect of revenue sharing may also impact the licensing arrangements that a team or league may have in respect of broadcast and media rights. Prior to the resolution of the recent NFL lockout, after opting out of the previous CBA as well as a stipulation and settlement agreement (“SSA”) pertaining to certain revenue sharing agreements, the NFL began negotiating extensions to its broadcast contracts whereby the NFL would retain a significant portion of rights fees in 2011 if the players were locked out. Players argued that the terms of these extensions violated the SSA by failing to maximize total league revenues. After the players challenged the extensions under the SSA, a court found that the NFL had failed to act in good faith when it renegotiated its broadcast contracts, and had thus breached the terms of the SSA.

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:54. Labor issues—Pension plans and employee benefits

Leagues have various pension plans and other benefits in place for players, game officials, and non-players, and must therefore confront a host of issues relating to benefits. There are also pension plan and employee benefits for both players and non-players. Players benefits are subject to the CBA. Non-players, such as executives and personnel, are typically eligible to participate in a pension plan for non-uniformed personnel. Such individuals may also be entitled to other benefits, including health and life insurance, bonuses and options for equity interests in the team.

It is important to have a Human Resources Department equipped with the proper resources to develop and implement these plans for all employees. Inside counsel will work closely with the Human Resources Department to insure compliance with federal and state standards including the Fair Labor Standards Act, which establishes minimum wage, overtime pay, recordkeeping requirements, and the Family and Medical Leave Act, which entitles eligible employees to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Outside counsel will typically be involved in an oversight capacity, unless technical issues arise, and may also assist in filing reports. The types of issues which must be addressed are covered in other chapters.<sup>1</sup>

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#### Footnotes

- 1 [See Chapter 55 “Employee Benefits” \(§§ 55:1 et seq.\)](#), [Chapter 55A “Executive Compensation” \(§§ 55A:1 et seq.\)](#) and [Chapter 55B “Health Law” \(§§ 55B:1 et seq.\)](#).

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### Chapter 74A. Sports

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#### § 74A:55. Governmental relations

Governmental relations are a vital consideration for every sports team. As such, it is important for inside counsel to keep apprised of legislative developments pertaining not only to the team, but to the sports industry as a whole. This includes laws related to ticket sales and pricing, zoning and the protection of disabled persons. Moreover, outside counsel can provide important assistance in dealing with such matters at a local, state and Federal level.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:56

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:56. Governmental relations—Lobbying

Legislation is a critical concern for a team due to its potential impact on the team individually and on the sports industry as a whole. As such, the professional sports industry spends millions on lobbying in an effort to persuade state and Federal officials on antitrust, labor, tax and other issues. At the day-to-day level, a team often has employees who monitor legislative matters. Additionally, a team will engage professional lobbyists to interact with legislators regarding proposed or pending legislation.

Outside counsel specializing in government relations are often engaged on an ongoing basis to shape legislation and government policy at the local, state and Federal level, and to monitor and report on legislative and regulatory developments.<sup>1</sup> Outside counsel may initially propose and draft legislation or provide comments on a range of legal issues arising from legislation proposed by other parties. For example, legislation related to zoning, signage, parking and the resale of tickets raise legal issues that directly impact a team. An unfavorable zoning or parking statute could impair a team's ability to erect additional facilities near a stadium, while legislation relating to the resale of tickets could impact a team's desire to use paperless ticketing technology. Thus, it is important for a team to be aware of legislative initiatives and to work with outside counsel to propose legislation favorable to the team's interests.

For example, a team that desires to build a new facility will employ outside counsel to assist with the myriad of tax and regulatory issues that the team will confront throughout the construction process. In connection with the construction of a new facility some teams will hire outside counsel specializing in corporate and tax matters to assist in obtaining a private letter ruling from the Internal Revenue Service (the "IRS"). A private letter ruling binds only the IRS and the requesting taxpayer and in this context will generally permit a team to issue tax-exempt bonds to finance the construction of a new facility. Outside counsel also often assists a team with obtaining various zoning and environmental governmental approvals, and condemnation and eminent domain rulings.

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#### Footnotes

<sup>1</sup> See generally Chapter 44 "Joint Legislative and Regulatory Lobbying Efforts by Inside and Outside Counsel" (§§ 44:1 et seq.).

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:57

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:57. Governmental relations—Ticket sales and pricing

Historically, any direct or indirect resale, auction, assignment or transfer (collectively, a “resale”) of any ticket to a sporting event was banned under state anti-scalping laws. Such laws were enforced only in the area near a sports venue. Today, the resale of tickets is legal in most states and has expanded beyond in-person sales to include online auctions conducted by companies such as Ticketmaster and StubHub. This sales method eliminates the constraints of time and geography and allows for a greater number of sellers and buyers to become involved in the process.

New York has enacted a law which provides new consumer protections in light of online ticketing and also permits the resale of tickets on the secondary market.<sup>1</sup> The evolution of this legislation provides an example of how teams will generally work with lobbyists and outside counsel to develop and promote pertinent legislation. Moreover, it demonstrates how outside advisors will work with other third-party constituencies to identify common goals and to form coalitions in support of or against certain legislative positions. In this legislation, paperless ticketing was a hotly-debated legislative issue. On one hand, paperless ticketing represented significant potential cost savings for teams. As such, teams advocated for the elimination of paper tickets. Ticketmaster chose to align with the teams and also advocated for paperless ticketing technology. On the other hand, legislators recognized the disadvantages of paperless ticketing for consumers, who cannot resell tickets in this format. In turn, legislators wanted to mandate paper tickets.

The final text of the legislation represents a compromise between these various constituencies. Under the law, a venue operator and its agent are prohibited from employing a paperless ticketing system unless the consumer is given an option to purchase paperless tickets that the consumer can transfer at any price, and at any time, and without additional fees, or its agent may employ a paperless ticketing system that does not allow for independent transferability of paperless tickets only if the consumer is offered an option at the time of initial sale to purchase the same tickets in some other form that is transferable independent of the operator or operator's agent including, but not limited to, paper tickets or e-tickets. The established price for any given ticket shall be the same regardless of the form or transferability of such ticket. The ability for a ticket to be transferred independent of the venue operator or its agent may not be treated as a special service for the purpose of imposing a service charge.

Another example of state regulation of ticket sales relates to refunds. Under New York law and subject to certain exceptions discussed below, operators selling advance tickets in advance of a game must either (i) deposit all sales proceeds into an escrow account (to be released to the operator when the game is played, or to be returned to consumers if the game is cancelled or rescheduled) or (ii) post a letter of credit, bond or contract of indemnity with the New York Secretary of State for the benefit of any consumer who has purchased an advance ticket for a game that has been cancelled or rescheduled. However, operators are not required to issue refunds if (i) there was no material change in the time or location of the game; (ii) the game was rescheduled due to an Act of God, riot or other catastrophe outside of the operator's control and the consumer is given the right to use the ticket for a rescheduled game or to exchange the ticket for a comparable ticket to another game; or (iii) the back of the ticket conspicuously states that if the game is cancelled or rescheduled, the operator shall not be required to refund the ticket price if the consumer is given the right, within 12 months of the originally scheduled game, to attend the rescheduled game or to exchange the ticket for a comparable ticket to another game. There are certain other notable exceptions to New York's refund rules, which generally run in

favor of well-established major league teams, although seemingly undercut the protections created for consumers. In particular, the refund rules do not apply to operators who have (i) for a period in excess of 10 years, presented games at the same stadium or arena under the same corporate or organizational name or (ii) maintained minimum net capital of \$100,000 or minimum net worth of \$200,000.<sup>2</sup> Given the tension between the refund rules and the exceptions, outside counsel should advise team ownership and in-house counsel to adopt a fair refund policy that will not be subject to state consumer protection scrutiny, even if the team might qualify for a technical exception.

In short, teams are highly focused on local, state and Federal legislation and often work with lobbyists and outside counsel to monitor and shape such legislation.<sup>3</sup> Such diligence is important because adverse legislation can directly and negatively impact a team's bottom line. Often the community in which a team is located hopes for the team's success and as such, is willing to work with team representatives to achieve more favorable legislation.

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#### Footnotes

- 1 [N.Y. Arts and Cultural Affairs Law §§ 25.01 to 25.35.](#)
- 2 [N.Y. Arts & Cult. Aff. Law §§ 23.08 and 23.09.](#)
- 3 *See generally* [Chapter 44 “Joint Legislative and Regulatory Lobbying Efforts by Inside and Outside Counsel” \(§§ 44:1 et seq.\)](#).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:58

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:58. Governmental relations—Noise and light levels

Inside counsel must be aware of local zoning ordinances governing noise and light levels surrounding a sports facility. A typical light pollution ordinance will prohibit the operation of illuminated outdoor advertising signs between the hours of 11:00 PM and sunrise. In negotiating a sponsorship agreement, local light pollution ordinances should be taken into consideration by corporate sponsors. For example, light pollution ordinances may limit the size, placement, or visibility of a sponsor's signage. It is important for counsel to corporate sponsors to factor in these limitations when determining the price of the sponsorship. Alternatively, team counsel should make its obligations under sponsorship agreements subject to all applicable ordinances to avoid breaching such agreements.

Similarly, noise pollution ordinances typically prohibit a commercial facility, including a sports stadium or arena, from emitting sound in excess of certain decibel levels. Other noise pollution ordinances exempt noises originating or emanating from sports stadiums. Outside counsel may be employed to assist with lobbying efforts directed at shaping these ordinances in a manner more favorable to a team and its facilities.<sup>1</sup>

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#### Footnotes

- 1 [See generally Chapter 44 “Joint Legislative and Regulatory Lobbying Effects by Inside and Outside Counsel” \(§§ 44:1 et seq.\).](#)

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:59

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:59. Governmental relations—ADA and other accommodation requirements

Since the enactment of the Americans with Disabilities Act in 1990 (the “ADA”),<sup>1</sup> professional sports teams must be aware of the impact of the ADA on sports facilities. In *Paralyzed Veterans of America v. D.C. Arena L.P.*, the Court of Appeals for the District of Columbia Circuit affirmed that most, but not all, of a sports arena's wheelchair seating needed line of sight seating over standing spectators.<sup>2</sup> Thus, teams must ensure that the design of sports facilities provides accommodations to disabled fans. Outside counsel should partner with inside counsel to address ADA and other accommodation issues as they relate to sports facilities. In this regard, outside counsel and inside counsel should conduct periodic, detailed audits to ensure compliance with all then-applicable ADA and other accommodation requirements.

Yankee Stadium serves as an exemplary model of a sports facility that exceeds the minimum ADA requirements for providing access to disabled patrons. This stadium features approximately 1,500 wheelchair-accessible seats, including 530 companion seats that allow non-disabled guests to sit alongside designated wheelchair spaces. Moreover, aisle transfer seats feature removable armrests to allow patrons to easily transition into them from a wheelchair. Such transfer seats are dispersed equally across the stadium and at varying price points. Yankee Stadium is also the only MLB stadium that has implemented wheelchair lifts in both dugouts, granting wheelchair users direct access to both the players' bench and the field. Yankee Stadium also contains message boards that provide captions for all public address announcements made at baseball games and other events conducted thereat. Beyond the stadium itself, the Yankees provide free assistive listening devices and game materials in Braille or large print, and accommodate service animals.

Accommodation requirements at sports facilities continue to evolve. Outside counsel and inside counsel need to monitor all legislative and judicial actions pertaining to accommodation and develop a procedure for addressing additional accommodation requirements. In this regard, various laws have been enacted requiring accommodation of transgender and gender nonconforming people in sports facilities and other public places. These laws require, among other things, that a person cannot be denied entry to, or service at, a public place by reason of transgender or gender nonconforming status. Among the accommodations being made in response to such laws are the creation of gender neutral/unisex changing rooms and rest rooms.

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#### Footnotes

- <sup>1</sup> See Chapter 71 “Employment Law” (§§ 71:1 et seq.) for additional discussion of the ADA.
- <sup>2</sup> *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 23 A.D.D. 142, 6 A.D. Cas. (BNA) 1614 (D.C. Cir. 1997) (abrogated by, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 181, 191 L. Ed. 2d 186, 24 Wage & Hour Cas. 2d (BNA) 529, 165 Lab. Cas. (CCH) P 36321 (2015)).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:60

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:60. Litigation

Litigation involving a sports team can generally be broken into two broad categories: routine and non-routine litigation. Routine litigation includes frequent and repetitive types of claims, while non-routine litigation, though less frequent, is potentially more serious in nature. Sections [74A:61](#) to [74A:65](#) offer advice to inside counsel for handling routine and non-routine litigation.

Set forth below is a summary of significant sports-related litigation which occurred during the period January 1, 2012 through November 1, 2017:

*Antitrust—Relocation*—Notwithstanding the judicial precedents and limited legislative action that has resulted in the preservation of MLB's general antitrust exemption, the City of San Jose filed an antitrust suit against MLB in June 2013 in connection with the proposed relocation of the Oakland A's to San Jose.

The City of San Jose claimed that MLB's antitrust exemption was used as a “guise” to control MLB Club locations and thereby unlawfully limit competition. In seeking to overturn the antitrust exemption, the City of San Jose has argued that the scope of MLB's activities involves interstate commerce. MLB countered that the lawsuit is “an unfounded attack on the fundamental structures of a professional sports league.”

The U.S. District Court for Northern District of California batted down the City of San Jose's antitrust claim.<sup>1</sup> The court, while acknowledging that MLB's antitrust exemption is an aberration that makes little sense, nonetheless ruled that the court was bound by prior U.S. Supreme Court rulings upholding MLB's antitrust exemption. The City of San Jose appealed the dismissal of the antitrust claim to the U.S. Ninth Circuit Court of Appeals. The Ninth Circuit rejected the appeal.<sup>2</sup> The Ninth Circuit's decision was appealed to the U.S. Supreme Court. The U.S. Supreme Court declined to hear the City of San Jose's appeal.

*Antitrust—Restraint of Trade (Wages)*—In July 2017, the U.S. Ninth Circuit Court of Appeals rejected a lawsuit by minor league baseball players alleging MLB colluded to fix minor leaguers' wages, again upholding a nearly 100-year-old judicially created exemption for the business of baseball from antitrust scrutiny.<sup>2.50</sup> The minor leaguers argued that courts have misapplied the so-called baseball exemption for 95 years by allowing MLB teams to suppress players' wages.

The Ninth Circuit panel, however, ruled that it was bound by controlling precedent and affirmed a district court decision that had dismissed the ballplayers' claims. The Ninth Circuit made reference to a series of U.S. Supreme Court cases that declined to overturn the exemption and deferred to Congress, which eventually overturned the exemption pertaining to contracts of major league ballplayers in the 1998 Curt Flood Act, but explicitly kept it alive for minor league employment issues.

*Antitrust—Restraint of Trade (Wages)*—In August 2017, the U.S. Second Circuit Court of Appeals rejected a challenge to the MLB antitrust exemption brought by MLB scouts.<sup>2.70</sup> The MLB scouts had sought to revive their previously-

dismissed lawsuit accusing MLB and its 30 teams of conspiring not to poach scouts from each other in order to keep wages down. Despite courts having called the MLB antitrust exemption “dubious” and “anomalous,” courts have continued to uphold the exemption.

However, the MLB scouts did not ask the court to overturn the exemption. Instead, the MLB scouts urged the court to read the exemption more narrowly to cover only those functions that are “essential to staging professional baseball games.” Unlike coaches, players and umpires, which courts have said are subject to the exemption, scouts are not essential to the routine staging of games.

*Antitrust—Broadcasting*—The NHL, nine NHL teams, and certain regional sports networks and cable providers were charged in a consumer class action lawsuit (*Laumann v. NHL*) of conspiring to restrain competition in the television and internet sports broadcasting market in violation of Section 1 of the Sherman Act. The defendants allegedly carried out their conspiracy by agreeing to “black out” coverage of professional hockey games through territorial broadcast restrictions. As a result of these alleged unlawful agreements, the plaintiffs claimed they were forced to pay excess prices to view out-of-market NHL games on television and over the Internet. The lawsuit was settled in September 2015.

*Antitrust—Broadcasting*—On May 9, 2012, the Office of the Commissioner of Baseball, together with nine MLB clubs, MLB Advanced Media, L.P. and certain regional sports networks and cable providers, were sued (*Garber v. Office of the Commissioner of Baseball*) in the U.S. District Court for the Southern District of New York in a consumer class action antitrust case. The plaintiffs alleged violations of Sections 1 and 2 of the Sherman Act relating to national and local telecast licensing practices, including the grant of certain exclusive rights, the maintaining of home television territories, the manner of granting rights relating to MLB's out-of-market packages (MLB Extra Innings and MLB.TV) and others. The plaintiffs claimed that the foregoing arrangements eliminated competition in the distribution of MLB games on television and over the Internet. The lawsuit was settled in January 2016.

*Broadcasting*—On June 25, 2014, the U.S. Supreme Court ruled in favor of a group of major broadcast networks on their claim against Aereo, Inc. (“Aereo”).<sup>3</sup> Aereo developed a business model that used thousands of dime-sized antennas to pick up free, over-the-air TV signals which were transmitted to customers via the Internet for a monthly subscription fee. Aereo was sued by the major broadcast networks on the ground that Aereo's service amounted to outright theft, because Aereo did not pay a retransmission fee to the broadcast networks. Aereo countered that no such retransmission fee was due because each viewer was temporarily assigned an antenna at one of Aereo's antenna farms. Under this arrangement, Aereo contended that its service transmitted “private performances” to individual viewers over a dedicated personal licensed antenna, rather than copyright protected “public performances.”

The U.S. Supreme Court found that Aereo had infringed copyrighted content of the broadcast networks by retransmitting such content to Aereo subscribers. In support of its ruling, the U.S. Supreme Court noted that Aereo's business model closely mimicked cable television systems which are prohibited under the Copyright Act from making unauthorized retransmissions.

*Copyright Infringement*—Tanit Buday sued the New York Yankees for copyright infringement alleging that the team did not pay her uncle for a logo he designed for the team in the 1930's and later revised in 1947.<sup>4</sup> As a result of the alleged logo not having been registered, the logo was found to be a common-law copyright, rather than a statutory copyright. Buday argued that the logo, as a common-law copyright, was “grandfathered in” and covered by the protections afforded under the federal 1976 Copyright Act. The U.S. Second Circuit Court of Appeals, however, ruled that the “grandfathering” provisions of the 1976 Copyright Act applied only to unpublished works. The logo was found to have been published when the logo was used by the New York Yankees on the 1947 team jerseys. The court further found that, even if publication of the logo was deemed not have occurred, the logo would have been considered a “work-for-hire” property right of the New York Yankees.

*Fantasy Sports*—Over the last several years, the daily fantasy sports (“DFS”) industry has evolved into a multi-billion dollar industry. However, the growth and popularity of daily fantasy sports sites (“DFS Sites”) has begun to raise numerous questions about their legality and the need for regulation. DFS Sites offer games whereby a player picks a roster of athletes, and plays against one or more players for money on a daily basis. The DFS Sites have been targeted by various state attorney generals and, in some cases, subjected to lawsuits—most notably in New York—on the basis that DFS are games of chance, rather than skill, and therefore constitute illegal gambling under state law.

The legality of DFS in the vast majority of the states is dependent upon the particular gambling standard applied by the state's judiciary. Most of these states apply a “dominant factor” standard under which the court will ask whether or not the contribution of risk to a game's outcome outweighs that of the participant's skill. Other states prohibit games where there is a material amount of risk, while other states employ an even lower threshold of whether the game involves any risk at all. The remaining small number of states which do not employ a judicial standard have either exempted DFS from the definition of gambling or outlawed DFS as a form of gambling.

There are many diverse and high-profile investors in the DFS Sites including professional team owners, media companies and private equity funds. Further, many of the major professional sports leagues and their respective member teams have entered into sponsorship deals with DFS Sites. The changes the DFS industry will undergo continue to evolve and will be influenced by such investors, sponsors, the DFS trade association and industry, and governmental intervention. In August 2016, legislation (the “New York DFS Law”) was enacted in New York defining DFS—which the New York DFS Law calls “interactive fantasy sports”—contests as “games of skill,” exempting them from the state's definition of illegal gambling. The New York DFS Law ended a legal threat from the New York State Attorney General, who had sought to shut down leading DFS operators DraftKings Inc. and FanDuel Inc. in New York State.

On October 5, 2016, a lawsuit was filed in a New York State trial court alleging DFS constitute gambling (regardless of how the New York DFS Law characterizes such activity) and as a result the New York DFS Law violates the New York State constitution's prohibition on authorizing new gambling operations.

*Franchise Sale*—In April 2014, *TMZ Sports* released a recording of a conversation between Donald T. Sterling and a female friend, V. Stiviano. At the time, Mr. Sterling and his wife Shelly were the co-owners of the NBA's Los Angeles Clippers. In the recording, Mr. Sterling was irritated over a photo Ms. Stiviano had posted on Instagram, in which she posed with Basketball Hall of Fame player Magic Johnson. On that tape Mr. Sterling made a number of racially offensive comments to Ms. Stiviano.

On April 29, 2014, NBA Commissioner Adam Silver announced that Mr. Sterling had been banned from the league for life and fined \$2.5 million, the maximum fine allowed by the NBA constitution. Commissioner Silver stripped Mr. Sterling of virtually all of his authority over the Clippers, and banned him from entering any Clippers facility. He was also banned from attending any NBA games. Commissioner Silver further announced that he would seek to force a sale of the Clippers, an action that would require the consent of three-quarters of the other NBA team owners.

On May 29, 2014, Mr. Sterling's wife, Shelly Sterling, reached a deal, pending NBA approval, to sell the Clippers to former Microsoft CEO Steve Ballmer for \$2 billion. The following day, Mr. Sterling sued the NBA for \$1 billion, alleging it had violated antitrust laws and his constitutional rights.

On August 12, 2014, the closing of the sale of the Clippers to Mr. Ballmer occurred. Following the closing, Mr. Ballmer commented, “There's real earnings in this business. There's real upside opportunity. So compared to things I looked at in tech, this was a reasonable purchase.”

*Gambling Business Operation*—The U.S. Second Circuit Court of Appeals overturned a lower court judge's ruling that found the operator of “Texas Hold'em” poker games not guilty of violating the Illegal Gambling Business Act (the

“IGBA”), a federal law that makes it a criminal offense to operate a gambling business.<sup>5</sup> The lower court ruled in favor of the poker game operator on the basis that poker is a game of skill, rather than a game of chance.

In reversing the lower court ruling, the court found that the plain language of the IGBA covered the “Texas Hold'em” poker operator. Specifically, the poker operation at issue satisfied the following three criteria for an illegal gaming business under the IGBA: (i) the poker operations were conducted in violation of New York state gambling laws; (ii) the poker operations required the attention of five or more persons; and (iii) the poker operations were conducted for more than 30 days or earned more than \$2,000 in one day. The court held that the question of whether skill or chance predominates in poker is inconsequential for purposes of IGBA liability.

*Health and Safety*—A group of former NFL players filed a concussion-related lawsuit against the NFL and one of its affiliated entities which was adjudicated in the U.S. District Court for the Eastern District of Pennsylvania. A proposed \$1 billion settlement plan was initially reached and approved by such court. However, an appeal was filed by approximately 90 former NFL players challenging the settlement plan. In December 2016, the U.S. Supreme Court rejected the challenge to the settlement plan. The settlement plan covers more than 20,000 retired NFL players for the next 65 years.

The lawsuit accused the NFL of hiding what it knew about the link between concussions and chronic traumatic encephalopathy, the degenerative brain disease found in dozens of former NFL players after their deaths. As part of the settlement plan, the NFL admitted no fault. As a result, the NFL was not required to disclose what it knew and when about the risks and treatment of repeated concussions.

*Health and Safety*—On May 20, 2014, former NFL players sued the NFL alleging that NFL team doctors and trainers distributed medications in ways that violated federal laws and the American Medical Association's Code of Ethics. After years of taking such medications without proper disclosure about medical side effects and risks, the former NFL Players claimed they suffered from debilitating physical and mental health issues. The NFL argued that the former players' negligence- and fraud-based claims were preempted by Section 301 of the Labor Management Relations Act. The court, in finding for the NFL, held that it is impossible to determine the scope of the NFL's duties in relation to misrepresentation of medical risks and whether the NFL breached those duties, without reference to specific CBA provisions. Therefore, it would be impossible to apply new and supplemental state common law duties on the League without taking into account the adequacy and scope of the CBA duties already set in place.<sup>7</sup>

*Labor—Unionization*—In January 2014, players from Northwestern University's football team submitted a petition to the Chicago chapter of the National Labor Relations Board (the “NLRB”) asking to be recognized as employees of the university. If the players were recognized as employees, then they would be eligible to hold a certification election to determine if a majority of the players were in favor of being represented by a union. In February 2014, the Chicago chapter of the NLRB held a hearing, where the Chicago chapter of the NLRB heard testimony from players indicating that they spend 50 hours a week on football activities and were pressured to take easier classes. In March 2014, the Chicago regional director of the NLRB ruled that the players were employees of the university, and had the right to seek unionization and engage in collective bargaining. The Chicago regional director of the NLRB reasoned that the players were employees because players devote up to 50 hours a week to football; coaches exercise a high degree of control over the players; and the players were compensated by their scholarships. Northwestern University appealed the decision to the NLRB panel in Washington, D.C. On August 17, 2015, the NLRB overturned the March 2014 ruling. The NLRB concluded that letting players unionize could lead to different standards at different schools—from the amounts of money players receive to the amount of time they practice. These different standards could lead to competitive imbalances.

*Labor—College Student-Athletes/Employees*—In January 2017, the U.S. Seventh Circuit Court of Appeals refused to change its dismissal of a lawsuit by the University of Pennsylvania student-athletes who said they should be considered employees, upholding a ruling that protects the National Collegiate Athletic Association's ideal of amateurism in college

sports.<sup>7.50</sup> The student-athletes sought to be considered employees under federal labor laws. The student-athletes alleged they were unlawfully denied minimum wage and overtime pay under the Fair Labor Standards Act.

The Seventh Circuit panel held that student participation in collegiate athletics “is entirely voluntary” and that, as amateurs, they participate in their sports for reasons entirely unrelated to immediate compensation and without any real expectation of earning an income.

The ruling was praised by the NCAA, which stated there is no basis for student-athletes to be considered employees as their primary goal is education. But it came amid several challenges to the NCAA's amateurism rules and ongoing wider debate over the treatment of college athletes as schools make millions from television rights, merchandising and ticket sales.

*Mixed Martial Arts*—A group of mixed martial arts promoters, athletes, trainers and fans brought an action in the U.S. District Court for the Southern District of New York challenging the constitutionality of the New York law banning the live performance of professional mixed martial arts competitions in New York.<sup>8</sup> In October 2013, the court determined that the ban on mixed martial arts did not violate the First Amendment because it lacked essential communicative elements and therefore no right of expression was suppressed by the ban. The court, however, did allow a claim based on the language of the mixed martial arts ban being unconstitutionally vague to proceed.

In April 2016, legislation was enacted in New York lifting the near-20-year ban on competitive mixed martial arts in the state. New York was the last state to legalize the sport of mixed martial arts. Mixed martial arts contests are supervised by the New York State Athletic Commission.

*Personal Injury—Spectator*—On December 20, 2012, a lawsuit (*Zlotnick v. New York Yankees Partnership and Major League Baseball*) was filed against the New York Yankees and MLB in New York Supreme Court in Bronx County by Andrew Zlotnick. Zlotnick was gathered with his teenage son and two friends to watch a 2011 Yankees game that had been repeatedly interrupted by the rain. Others in the stadium had umbrellas out, something that allegedly prevented Zlotnick from seeing a foul ball heading his way. The foul ball hit Zlotnick in his face, shattering all the bones around his left eye, fracturing his sinus and upper jaw and resulting in extensive surgery to repair the damage. Zlotnick claimed that the Yankees and MLB were negligent because they did not ban the umbrellas obstructing his view. The Yankees and MLB sought dismissal of the case on the principle of assumption of risk. Assumption of risk, also known in some circles as the baseball rule, says that a defendant is not liable for certain harms because the plaintiff assumed the risk that these harms might occur. Specifically, the Yankees and MLB argued that the fans who were seated along the foul lines understood the risk that they might get hit by a stray ball or broken bat and chose to remain in their seating location anyway. On December 18, 2015, the court granted the defendants' motion for summary judgment. In so ruling, the court found that the Yankees and MLB had met the duty of reasonable care to caution spectators seated in the un-netted part of Yankee Stadium through an abundance of repetitive written, auditory and visual warnings, and the possibility of alternative seating. On October 24, 2017, a New York appellate court unanimously affirmed the dismissal of the claim.

*Personal Injury—Spectator*—In November 2016, a U.S. District Court for the Northern District of California judge issued an order concluding that baseball fans Gail Payne and Stephanie Smith lack standing to seek an order requiring more safety netting and other protective measures at all MLB ballparks.<sup>8.50</sup> The judge pointed to MLB's evidence indicating that their risk of being injured is very slim.

In the order, the judge's analysis started with Payne, a longtime Oakland Athletics fan who claimed she has to duck foul balls at every game she attends. While Payne sought an injunction to prevent an injury she might suffer in the future, Payne has never been injured at a game at the Oakland Coliseum and didn't provide specifics about her plans to attend

future games. Further, MLB's evidence showed that Payne's risk of being injured while attending a baseball game at the Oakland Coliseum is far below 1%.

Although Smith was actually injured during a June 2015 Los Angeles Dodgers game, her efforts to establish standing fared no better. Smith testified that she had no intention of attending another MLB game during the 2016 or 2017 seasons. Her testimony led the judge to conclude that there was no imminent risk of her being injured. Moreover, even if Smith were to attend future baseball games at Dodger Stadium, the MLB's data showed that her risk of injury is also far below 1%.

*Publicity Rights*—Two federal appellate courts have ruled in favor of claims brought by former college football players for violation of their publicity rights.<sup>9</sup> In one case, Sam Keller, a former quarterback for Arizona State University and the University of Nebraska, filed a claim against video game maker, Electronic Arts (“EA”), alleging that EA's unauthorized depiction of a football player in its NCAA football game (the “Video Game”) used his likeness without compensation in violation of California's right of publicity law. The other case involved a nearly identical lawsuit filed by Ryan Hart, a former quarterback for Rutgers University, alleging that the unauthorized use of his image in the Video Game violated his right of publicity under New Jersey law.

In both cases, EA countered by arguing that its First Amendment rights were superior to the former players' publicity rights. In particular, EA claimed that the First Amendment protected the use of player likenesses in the Video Game as a work of free expression. Each court applied a “transformative test” for purposes of ascertaining whether EA's First Amendment rights should be afforded priority. Under this test, the First Amendment protects works that contain significant transformative elements or whose value is not derived primarily from the fame of the aggrieved party. Each court found that the Video Game was not transformative since the player at issue was not depicted in a different form.

*Publicity Rights*—On August 8, 2014, a judge for the U.S. District Court for the Northern District of California issued an injunction against the NCAA's prohibition on college athletes earning money from the use of their names and images in video games and television broadcasts.<sup>10</sup> The lawsuit was filed by Ed O'Bannon, a former U.C.L.A. basketball player, and 19 other former college athletes.

The injunction permitted universities to offer college football players in the top 10 conferences and all Division I men's basketball players trust funds that would first be accessible after graduation. The injunction further permitted the NCAA to cap the trust fund payment to \$5,000 per year.

In ruling against the NCAA, the court found unpersuasive the NCAA's argument that its amateur rules, while potentially restrictive in the marketplace, were vital to its business model.

The NCAA appealed the injunction to the U.S. Ninth Circuit Court of Appeals. On September 30, 2015, the Ninth Circuit upheld the lower court ruling that NCAA rules limiting what athletes can receive while playing sports violate antitrust laws. The Ninth Circuit, however, overturned the trust fund plan under which athletes could receive up to \$5,000 per year. The Ninth Circuit ruled that the athletes did not have to be paid beyond the cost of attending their college or university.

*Sports Betting Legislation*—In January 2012, New Jersey Governor Christie signed a state law permitting wagering on professional and collegiate sports (other than games involving New Jersey colleges or college games played in New Jersey) at New Jersey racetracks and Atlantic City casinos. Sports organizations, including the NCAA, NFL, NBA, NHL and MLB, along with the United States government, argued that the state law would undermine the integrity of professional sports. The opponents further argued that the state law was barred under the Professional and Amateur Sports Protection Act of 1992 (“PASPA”), a federal law that gives just four states (*i.e.*, Nevada, Delaware, Montana and Oregon) the right to authorize sports wagering to varying degrees.

In February 2013, a New Jersey United States District Court issued a permanent injunction blocking New Jersey's effort to legalize sports betting.<sup>11</sup> New Jersey appealed the case to the U.S. Third Circuit Court of Appeals and lost.<sup>12</sup> The Third Circuit ruled that PASPA presented the states with two options: (i) no sports gambling or (ii) completely unregulated sports gambling.

In September 2014, New Jersey enacted a new law which partially repealed (rather than authorized) state laws prohibiting wagering on professional and collegiate sports (other than games involving New Jersey colleges or college games played in New Jersey) at New Jersey racetracks and Atlantic City casinos. This law was challenged in court. A New Jersey United States District Court ruled that the law was preempted by PASPA.<sup>13</sup> The court viewed the repeal as a decision by New Jersey to selectively authorize in violation of PASPA the locations where sports wagering could be conducted. New Jersey appealed the case to the U.S. Third Circuit Court of Appeals and again lost.<sup>14</sup>

On October 14, 2015, the Third Circuit voted to reconsider its earlier ruling that banned New Jersey's attempt to offer sports betting at casinos and racetracks. On August 9, 2016, the Third Circuit, in a 10-2 en banc decision, affirmed the New Jersey United States District Court ruling that the law enacted by New Jersey in 2014 violated PASPA.<sup>14.50</sup> However, in June 2017, the U.S. Supreme Court granted New Jersey's petition for writ of certiorari.

In November 2014, NBA Commissioner Adam Silver became the first American sports commissioner to speak out in favor of uniform federal regulation of sports wagering. In his opinion, uniform federal regulation represented a business opportunity for leagues and teams, as well as the most effective means for regulating sports wagering.

*Taxes*—The Chicago Bears of the NFL brought an action for judicial review of an administrative decision which ruled in favor of the Cook County Department of Revenue's assessment for delinquent amusement taxes and interest. Cook County's Amusement Tax Ordinance imposed an “amusement tax” of “three percent of the admission fees or other charges paid for the privilege to enter, to witness or to view such amusement.”<sup>15</sup> From February 2002 through April 2007, the Chicago Bears calculated and paid the amusement tax on the value of a seat for home football games, without including the value of the other amenities available to the ticket holder that are charged to the ticket holder as part of the ticket price. The Cook County Department of Revenue contended that the value of such amenities is subject to the amusement tax and issued an assessment charging the Chicago Bears with a tax deficiency. An administrative law judge assessed delinquent amusement taxes and interest of \$4.14 million. The court confirmed the administrative law judge's decision after concluding that the Chicago Bears should have included the price of the other amenities included with the price of a ticket for tax purposes.

*Taxes*—Red Bull Arena filed a complaint seeking to vacate local property tax assessments on lands owned by the redevelopment agency of Harrison, New Jersey. Red Bull Arena also sought to vacate local property tax on a stadium constructed with taxpayer money. The tax court, in finding for the redevelopment agency, ruled that the redevelopment agency owned the land, Red Bull Arena owned the stadium and that neither the land nor stadium were tax exempt because they were not used for a public purpose.<sup>16</sup>

*Tickets*—A San Francisco 49ers fan and Nevada resident filed a complaint alleging various constitutional and statutory violations arising out of the Seattle Seahawks' restriction of primary-market ticket sales for a NFC Championship game between the Seahawks and the San Francisco 49ers to buyers with billing addresses in Washington and other nearby states. The claimant alleged that the geographic restriction on ticket sales injured him because he was not allowed to purchase tickets in the primary market. The claimant sought a declaration alleging that the geographic restriction was unlawful on the basis of economic discrimination and also sought damages for violations of the Washington Consumer Protection Act (“WCPA”), the Sherman Act and for unjust enrichment. The court held that the claimant (i) failed to

state a claim for economic discrimination; (ii) failed to state a claim under the WCPA; (iii) failed to state an antitrust claim; and (iv) could not allege unjust enrichment since he did not purchase a ticket on the secondary market.<sup>17</sup>

*Trademark Cancellation*—In June 2017, the U.S. Supreme Court struck down the federal government's ban on registering offensive trademarks, ruling that it violated the First Amendment.<sup>18</sup> The ruling will have direct implications for the NFL's Washington Redskins and other sports teams with names and logos that are arguably disparaging to a group of people.

The ruling was technically a win for the rock band The Slants—a member of the group had brought the case after being refused a trademark registration for the name on the grounds that it was disparaging to people of Asian descent—but the Washington Redskins has been engaged in its own legal battle over the same issue.

The Washington Redskins had registrations on its billion-dollar intellectual property revoked by the U.S. Patent and Trademark Office in 2014 under the same rule used to block the rock band's case, specifically the so-called disparagement clause of the Lanham Act's Section 2a. The Washington Redskins' case was on hold with the U.S. Fourth Circuit Court of Appeals pending outcome of the band's appeal to the U.S. Supreme Court.

The rock band's favorable ruling is expected to result in a similar outcome for the Washington Redskins' case and for the eventual renewal of the Washington Redskins' federal trademark registration, a valuable tool in claiming ownership over a trademark such as a team name or logo.

*Trademark Infringement*—The U.S. Eleventh Circuit Court of Appeals threw the University of Alabama for a loss in a case involving the use of its trademarks by the artist Daniel A. Moore.<sup>20</sup> The court found that Moore's images of the Crimson Tide football team were protected by the First Amendment.

The lower court found that the University's colors “were not especially strong marks on the trademark spectrum” and that Moore had a First Amendment right to paint Crimson Tide football events. The Eleventh Circuit Court of Appeals agreed with the lower court's decision that Moore's works were protected by the First Amendment.

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#### Footnotes

- 1 [City of San Jose v. Office of Commissioner of Baseball](#), 2013-2 Trade Cas. (CCH) ¶ 78549, 2013 WL 5609346 (N.D. Cal. 2013).
- 2 [City of San Jose v. Office of the Com'r of Baseball](#), 776 F.3d 686, 2015-1 Trade Cas. (CCH) ¶ 79024 (9th Cir. 2015), cert. denied, 136 S. Ct. 36, 193 L. Ed. 2d 25 (2015).
- 2.50 [Miranda v. Selig](#), No. 15-16938 (9th Cir. 2017).
- 2.70 [Wyckoff v. Office of the Commissioner of Baseball](#), No. 16-3795-ev (2nd Cir. 2017).
- 3 [American Broadcasting Companies, Inc. v. Aereo, Inc.](#), 134 S. Ct. 2498, 189 L. Ed. 2d 476, 42 Media L. Rep. (BNA) 1885, 110 U.S.P.Q.2d 1961 (2014).
- 4 [Buday v. New York Yankees Partnership](#), 486 Fed. Appx. 894 (2d Cir. 2012).
- 5 [U.S. v. DiCristina](#), 726 F.3d 92 (2d Cir. 2013), cert. denied, 134 S. Ct. 1281, 188 L. Ed. 2d 299 (2014).
- 7 [Dent v. National Football League](#), 2014 WL 7205048 (N.D. Cal. 2014).
- 7.50 [Berger v. National Collegiate Athletic Association](#), 843 F.3d 285, 337 Ed. Law Rep. 652, 27 Wage & Hour Cas. 2d (BNA) 136, 167 Lab. Cas. (CCH) P 36492 (7th Cir. 2016).
- 8 [Jones v. Schneiderman](#), 974 F. Supp. 2d 322 (S.D. N.Y. 2013).
- 8.50 [Payne v. Office of the Commissioner of Baseball](#), 4:2015-cv-03229 (D. Cal. (N.D.) 2016).

- 9 In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268, 107 U.S.P.Q.2d 1629 (9th Cir. 2013), cert. dismissed, 135 S. Ct. 42, 189 L. Ed. 2d 894 (2014); Hart v. Electronic Arts, Inc., 717 F.3d 141, 41 Media L. Rep. (BNA) 1985, 107 U.S.P.Q.2d 1001 (3d Cir. 2013), cert. dismissed, 135 S. Ct. 43, 189 L. Ed. 2d 894 (2014).
- 10 O'Bannon v. National Collegiate Athletic Association, 7 F. Supp. 3d 955, 308 Ed. Law Rep. 1049, 2014-2 Trade Cas. (CCH) ¶ 78865 (N.D. Cal. 2014), aff'd in part, vacated in part, 802 F.3d 1049, 322 Ed. Law Rep. 659, 166 Lab. Cas. (CCH) P 10814, 2015-2 Trade Cas. (CCH) ¶ 79311 (9th Cir. 2015).
- 11 National Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013), judgment aff'd, 730 F.3d 208 (3d Cir. 2013).
- 12 National Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).
- 13 National Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488 (D.N.J. 2014), aff'd, 799 F.3d 259 (3d Cir. 2015), reh'g en banc granted, opinion vacated, (Oct. 14, 2015).
- 14 National Collegiate Athletic Ass'n v. Governor of New Jersey, 799 F.3d 259 (3d Cir. 2015), reh'g en banc granted, opinion vacated, (Oct. 14, 2015).
- 14.50 National Collegiate Athletic Association v. Governor of New Jersey, 832 F.3d 389 (3d Cir. 2016), cert. granted, 137 S. Ct. 2327, 198 L. Ed. 2d 754 (2017) and cert. granted, 137 S. Ct. 2326, 198 L. Ed. 2d 754 (2017).
- 15 Chicago Bears Football Club v. Cook County Dept. of Revenue, 2014 IL App (1st) 122892, 384 Ill. Dec. 434, 16 N.E.3d 827 (App. Ct. 1st Dist. 2014), appeal denied, 386 Ill. Dec. 793, 21 N.E.3d 712 (Ill. 2014).
- 16 Red Bull Arena, Inc. v. Town of Harrison, 2014 WL 1875318 (N.J. Super. Ct. App. Div. 2014), certification granted, 219 N.J. 630, 99 A.3d 835 (2014).
- 17 Williams v. National Football League, 2014-2 Trade Cas. (CCH) ¶ 78949, 2014 WL 5514378 (W.D. Wash. 2014).
- 18 Matal v. Tam, No. 15-1293 (U.S. Sup. Ct. 2017).
- 20 University of Alabama Bd. of Trustees v. New Life Art, Inc., 683 F.3d 1266, 103 U.S.P.Q.2d 1070 (11th Cir. 2012).

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:61

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:61. Litigation—Routine

Certain routine legal matters that may be considered ministerial in nature require little or no outside counsel involvement. Such matters include lawsuits brought against the team based on negligence (*e.g.*, personal injury) or other types of lawsuits that are brought with relative frequency and involve repetitive types of claims. Most often, a team's insurance policy will cover routine litigation and in turn, the insurance provider's counsel will assume the lead on managing such litigation on a team's behalf.<sup>1</sup> Nevertheless, inside and outside counsel should work together to establish a protocol to manage and oversee the resolution of routine litigation and to ensure that such cases are handled with consistency.

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#### Footnotes

<sup>1</sup> See [Chapter 25 “Representing a Client with Insurance” \(§§ 25:1 et seq.\)](#).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:62

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:62. Litigation—Routine—Negligence claims

Negligence cases routinely arise from injuries which occur at a sporting event. To sustain a claim of negligence, a plaintiff must demonstrate that the team breached a duty of care which caused the plaintiff's injury and attendant damages. Inside counsel often handle routine negligence litigation given the frequency and relatively small size of potential liability. It is important for inside counsel to be mindful of settling such cases with relative consistency.

As previously discussed,<sup>1</sup> when negotiating service agreements, it is important for inside counsel to seek indemnification from service providers for negligence. These indemnification provisions should allow a team to terminate a service contract in the event of negligence by the service provider and provide that the service company will compensate the team for any harm, liability or loss arising out of the contract. For example, service contracts with elevator and escalator companies should indemnify a team for losses arising from injuries in connection with the use of such equipment. Such agreements should also require the service provider to maintain insurance and to provide the team with an insurance certificate confirming that the team is an additional named insured on the policy.

In addition, a team will also use disclaimers to safeguard against liability for routine matters. For example, tickets often include disclaimers indicating that a team is not responsible for lost, stolen or damaged property. A ticket will also provide a warning about the risk of injury involved with attending a sporting event and will state that spectators attend the event at their own risk.

In December 2015, after conducting an in-depth study, MLB recommended that MLB teams have protective netting between the dugouts for any field-level seats within 70 feet of home plate in order to increase fan safety. The recommendation was announced following a MLB season in which several fans were injured by foul balls, prompting MLB to study fan safety. MLB Commissioner Rob Manfred stated that the “recommendation attempts to balance the need for an adequate number of seating options with our desire to preserve the interactive pregame and in-game fan experience that often centers around the dugouts, where fans can catch foul balls, see their favorite players up close and, if they are lucky, catch a tossed ball or other souvenir.” Most MLB teams are expected to expand their use of netting. The individual MLB teams will have discretion as to the degree they will implement MLB's protective netting recommendation.

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#### Footnotes

<sup>1</sup> See § 74A:42 regarding operational agreements.

## 5 Successful Partnering Between Inside and Outside Counsel § 74A:63

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:63. Litigation—Non-routine/significant

In contrast, significant litigation, which may have increased public visibility, often requires engagement of outside counsel. Such litigation may involve relocation disputes<sup>1</sup> or sponsorship disputes.<sup>2</sup>

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#### Footnotes

<sup>1</sup> See § 74A:64.

<sup>2</sup> See § 74A:65.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:64

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:64. Litigation—Non-routine/significant—Relocation disputes

Given that professional sports teams are generally privately-owned organizations, it is possible for a team to relocate from one metropolitan area to another. The tension that exists between the desire of these private owners to maximize the value of their investment in a team and a league's interest in setting policies that benefit the entire league creates a fertile ground for litigation.<sup>1</sup>

Owners across professional leagues have engaged in litigation challenging these restrictions as a violation of antitrust laws.<sup>2</sup> To demonstrate an antitrust violation, an owner must show that the relocation involves interstate commerce, there is a restraint of trade and an agreement between at least two entities. Owners generally challenge restrictions on relocation on the grounds that league rules restrain an owner's ability to increase profits and that league owners act in concert with one another in restraint of trade. On the other hand, leagues argue that relocation rules have a pro-competitive effect because they promote league stability and preserve existing teams' fan bases.

As discussed in § 74A:13, the *Los Angeles Memorial Coliseum Commission v. National Football League* case stands for the proposition that professional sports leagues must have reasonable relocation policies or they may face future antitrust litigation. As further discussed in § 74A:13, MLB, unlike the other major professional leagues, has been afforded an exemption from the application of federal antitrust laws to certain of its activities.

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#### Footnotes

- <sup>1</sup> See § 74A:21 for discussion of non-relocation agreements.
- <sup>2</sup> See *National Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562, 1987-1 Trade Cas. (CCH) ¶ 67543 (9th Cir. 1987); *Los Angeles Memorial Coliseum Com'n v. National Football League*, 726 F.2d 1381, 1984-1 Trade Cas. (CCH) ¶ 65879 (9th Cir. 1984); *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966, 1974-2 Trade Cas. (CCH) ¶ 75203 (C.D. Cal. 1974).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:65

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:65. Litigation—Non-routine/significant—Sponsorship disputes

Sponsorship contracts involving professional sports teams and athletes constitute a billion dollar industry.<sup>1</sup> Due to the complexity and unique nature of sponsorship and endorsement contracts, inside counsel will engage outside counsel with expertise in this area. Outside counsel must be aware of the specific legal issues arising in this context, particularly those surrounding indemnification, force majeure, liability insurance and contract termination.

Though most sponsorship agreements function without dispute, inside counsel will typically engage outside counsel in the event that a conflict arises. In recent cases, the NFL has sued teams for entering into sponsorship contracts that were in direct conflict with NFL-wide sponsorship agreements. The NFL maintained that such conflicting agreements led the public to perceive the sponsors as official NFL sponsors, thus undermining the NFL's official sponsorship agreements. Such cases are generally settled out of court, but nevertheless illustrate the conflicts that may arise in the area of sponsorship and the issues of which inside counsel should be aware when approaching sponsorship agreements.

Furthermore, it is important for outside counsel to apprise inside counsel of potential ambiguities in proposed sponsorship agreements. For example, a sponsorship agreement for a particular event involving a team should specify which team representatives will be present, rather than describing the team's involvement generally. If a sponsor expects key players to attend a particular event, this requirement should be included, which will alleviate any subsequent confrontation over the interpretation of who was to attend the event on a team's behalf. Since these arrangements provide teams with a significant source of revenue, it is important for inside counsel to be aware of these potential issues and to resolve these ambiguities so each party receives a true benefit. Though inside counsel should be mindful of a sponsor's expectations, it is also important for inside counsel to consider the value added by a sponsor's proposals and to push-back where appropriate and in the team's best interest.

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#### Footnotes

<sup>1</sup> See §§ 74A:30 and 74A:32 for additional discussion of sponsorship agreements.

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:66. Internal investigations

In May 2015, fourteen people were indicted in connection with investigations of the International Federation of Association Football (“FIFA”) for wire fraud, racketeering and money laundering. The newly reelected President of FIFA, Sepp Blatter, was forced to resign within a week following the arrest of seven other FIFA officials. While the investigations shed light on the alleged corruption that ran through the FIFA organization, they also serve as a reminder that sports teams, just as much as any other business, need to develop a business code of conduct and related procedures for conducting internal investigations<sup>1</sup> (such code and procedures collectively being the “Program”). Given the high visibility and public following of a team, the implementation of an effective Program takes on added significance. Once a Program has been implemented, the personnel covered thereby should be trained and a compliance system<sup>2</sup> should be created. A team facing allegations of wrongdoing will be judged as much by how effectively it responds to the situation as by the occurrence of the wrongdoing itself, especially when the team has an effective Program in place.

Inside counsel should work with outside counsel to develop the Program. The Program can be expected to vary for each team based upon its ownership and management structure, the team's business operations and applicable league rules and regulations. The preferable position for a team is to have the Program in place prior to the discovery of potential wrongdoing. The implementation of the Program will help thwart wrongdoing and evince a willingness on the part of the team to foster an environment of compliance and integrity. The Program should be designed to (i) detect warning signs as to potential wrongdoing; (ii) identify the person(s) suspected to be responsible for violating the Program; and (iii) establish a protocol for addressing any alleged wrongdoing. Although beyond the scope of this Chapter, protocol elements typically found in a well-developed Program include (i) a listing of the circumstances which may give rise to an internal investigation; (ii) the individual(s) having the authority to initiate an internal investigation; (iii) identification of the internal investigation team members and their respective responsibilities; (iv) defining the scope of the investigation to prevent overbroad investigations and document production, and undue costs and expenses; (v) issuance of a “litigation hold” to hold and preserve any potentially relevant documents or communications; (vi) use of a credible and even-handed approach in conducting the internal investigation; (vii) collection and review of relevant documentation and communications; (viii) consideration of need to take interim action prior to the conclusion of the internal investigation; (ix) conduct of witness interviews; (x) timing and length of the internal investigation; (xi) degree and manner in which results of internal investigation are reduced to writing; and (xii) media relations policy.

Inside counsel will be better equipped to actively manage and oversee the Program on a day-to-day basis. Once alleged wrongdoing has been discovered, consideration will need to be given to the relative roles to be played by the team's inside and outside counsel in conducting the internal investigation. The use of inside counsel offers advantages in terms of familiarity with ownership and management team members, the team's business operations and cost efficiencies. The use of inside counsel may also be viewed as less threatening to individuals covered by the internal investigation. However, given the involvement of inside counsel with the team's business operations, inside counsel may have participated to some degree with respect to a matter under investigation—thereby potentially compromising the inside counsel's objectivity. Inside counsel may also be reluctant to aggressively pursue alleged wrongdoing due to work or personal relationships, or the level of seniority of the individual(s) under investigation.

Alternatively, the use of outside counsel will generally be viewed as more objective. Outside counsel can be expected to have greater resources and more experience in conducting internal investigations. Outside counsel may also provide a greater degree of privilege protection. In this regard, although the attorney-client privilege and attorney work product doctrine can apply to the work of inside counsel, courts have applied stricter standards in determining whether the work of inside counsel is protected. In particular, the work of inside counsel may be viewed as “business,” rather than “legal,” in nature and hence not entitled to protection.<sup>3</sup>

Depending upon the circumstances, a hybrid approach may be utilized to conduct an internal investigation. Under this approach, inside counsel would conduct the internal investigation during its early stages and consult with outside counsel as necessary. Outside counsel would stand ready to assume the conduct of the internal investigation if it escalates or an issue arises which may bear upon the inside counsel's objectivity.

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#### Footnotes

- 1 *See generally* Chapter 35 “Internal Investigations” (§§ 35:1 et seq.).
- 2 *See generally* Chapter 47 “Compliance” (§§ 47:1 et seq.).
- 3 *See* Chapter 33 “Attorney-Client Privilege” and “Attorney Work Product Protection” (§§ 33:1 et seq.).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:67

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:67. Ownership arrangements

The manner in which a team is owned is influenced by several factors including the number and composition of the team owners,<sup>1</sup> tax considerations and league<sup>2</sup> and contractually agreed upon ownership transfer restrictions.<sup>3</sup>

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#### Footnotes

- 1                    *See* § 74A:68.  
2                    *See* § 74A:69.  
3                    *See* § 74A:70.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:68

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### Chapter 74A. Sports

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#### § 74A:68. Ownership arrangements—Structure

With rare exception, teams are privately-owned. A team's ownership structure is determined in light of a number of considerations, including taxation, potential liability, capital formation and transferability of ownership. A team may be owned as a sole proprietorship, a C-Corporation, an S-Corporation, a partnership or a limited liability company. New team ownership groups in the United States can be expected to favor the use of a limited liability company structure. The members of a limited liability company are afforded limited liability and have pass-through taxes similar to a partnership. Unlike a partnership, a member of a limited liability company can be actively involved in the business of the limited liability company without jeopardizing the member's limited liability status.

Regardless of ownership structure, the responsibilities of owners must be well-defined. For example, often teams operate at a deficit so it is important for the obligation of owners to fund capital calls to be clearly defined. As such, operative documents governing ownership should set forth when a capital call is to be made, who is required to provide capital and how much, and how frequently capital calls can be made. Such operative documents may further specify the consequences for failure to make a required capital contribution. Typically, the failure to make a required capital contribution will result in equity dilution on either a “dollar-for-dollar” basis or a disproportionate “penalty burn-down” basis. Equity dilution on a “dollar-for-dollar” basis means that an owner's failure to make a capital contribution would result in the dilution of his interest in an amount equal to the amount of the required contribution. Similarly, equity dilution on a “penalty-burn-down” basis means that an owner's failure to make a capital contribution would result in the dilution of his interest in an amount greater than the amount of the required contribution.

The members of a team's management control group will generally have the authority to make management decisions. The management of most teams is concentrated in the hands of a few individuals, who control the team's administration.

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### Chapter 74A. Sports

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#### § 74A:69. Ownership arrangements—League ownership restrictions

Each major professional sports league has rules and regulations restricting ownership. For example, the NBA Constitution requires a deposit to be made to the Commissioner in addition to a written application describing the type of organization, the city in which the franchise will be located, the names of the people holding a proprietary interest in the team, a detailed balance sheet of the company proposing ownership along with financial statements for each underlying owner thereof, certified copies of the instrument creating the team organization, representations that the owners agree to be bound by the league constitution, bylaws, rules, regulations and any amendments or modifications thereto, and other information concerning financial wherewithal and integrity.<sup>1</sup> Moreover, if the Commissioner is not satisfied that an owner is adhering to league requirements, the Commissioner has the power to impose penalties on the owner.<sup>2</sup>

While each major professional sports league has its own culture, the leagues generally impose restrictions regarding the number of investors that can comprise a buying group and have certain minimum investment requirements to be eligible for both majority and minority ownership interests. There are also specific requirements as to how much equity the lead investor must own to hold a controlling interest in a team.

While leagues generally prefer to deal with individual owners because of efficiency and to limit the discord that can exist among owners of a larger buying group, rising team valuations have limited the pool of individual purchasers capable of buying a major professional sports team on their own. The existence of an individual capable of purchasing a team without the assistance of an investment syndicate has a preemptive effect on a competing buying group, particularly in relation to a team bidding process. Leagues scrutinize and regulate debt and equity structures, and impose debt limitations relative to their respective franchises. The financial stability of an owner group obviously affects the owned team, but also affects the strength of the league as a whole. Accordingly, leagues are careful to ensure that prospective owners have the resources to undertake team ownership, including related financial obligations.

Outside counsel is typically engaged to review the significant agreements related to ownership and operations and assist in the preparation of league mandated due diligence submissions on behalf of a potential owner.

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#### Footnotes

- <sup>1</sup> NBA Constitution, at 3-4.  
<sup>2</sup> See § 74A:60 (Franchise Sale).

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:70. Ownership arrangements—Contractual restrictions on transfer of ownership

Given that ownership is largely concentrated among a few individuals, owners are generally contractually restricted from transferring their ownership interests. A standard exception to such restrictions often covers transfers between family members. Owners will typically look to outside counsel for advice on transfer restrictions, particularly whether certain restrictions apply to a proposed transfer. It is not uncommon for agreements to contain transfer restrictions in the nature of a right of first offer<sup>1</sup> or a right of first refusal<sup>2</sup> on third-party offers, a need for majority of owner consent,<sup>3</sup> tag-along rights,<sup>4</sup> or a combination of one or more of these restrictions.

Additionally, some leagues mandate league consent prior to a transfer of ownership. For example, the NBA requires an application of transfer to be made to the Commissioner, including the names of the transferees, the price to be paid, terms of payment, and banking references for such transferees.

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#### Footnotes

- 1 A right of first offer requires an owner to negotiate in good faith with the holder of such right before negotiating with third parties.
- 2 A right of first refusal permits the holder of such right to enter into a transaction on the same terms proposed by a third-party offeree.
- 3 An owner may be required to obtain the approval of all or a majority of the other owners for significant decisions.
- 4 A tag-along right affords the holder with a pro rata participation right in another owner's sale of its interest on the same price, terms and conditions as the other owner.

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:71

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### Chapter 74A. Sports

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#### § 74A:71. Ownership arrangements—Minutes/corporate housekeeping

Inside counsel may employ outside counsel to assist a team with the proper maintenance of its corporate records and board meeting minutes in accordance with corporate law.<sup>1</sup> As is standard with any business entity, good recordkeeping is an essential practice for a sports team.<sup>2</sup> Outside counsel is often invited to attend team meetings and will be asked to either prepare or review meeting minutes. In keeping such minutes, outside counsel should focus on documenting all significant matters discussed and deliberated with a view to potential for discovery in subsequent litigation. It is also important for outside counsel to prepare sufficiently detailed resolutions approving significant transactions.

Beyond proper corporate recordkeeping, sufficiently detailed minutes and corporate records help to establish a team's valuation. While financial statements and accounting records serve as a primary basis to value a team, corporate minutes provide important support for the valuation of a team's assets. Such records are useful in the context of a team's potential sale or merger with another team.

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#### Footnotes

<sup>1</sup> See generally Chapter 46A “Corporate Secretarial” (§§ 46A:1 et seq.).

<sup>2</sup> See generally Chapter 29 “Management of Corporate Documents” (§§ 29:1 et seq.).

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Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:71.50. eSports

eSports have become a rapidly growing form of entertainment, driven in part by the growing provenance of online gaming and online broadcasting technologies. Although still in a growth stage, the eSports industry has millions of international fans, dedicated arenas and facilities, sophisticated leagues, lucrative media rights agreements and other elements of traditional sports leagues. The rapid growth of eSports has created a variety of legal and business issues which need to be closely monitored by inside and outside counsel.

The commercial opportunity associated with eSports has led to a significant influx of investment capital from owners of teams in major U.S. professional sports leagues. These owners foresee synergies between their teams and eSports investments. For example, eSports appeals to a desirable, content hungry youth demographic that advertisers find appealing, and professional sports franchises have deep relationships with major corporations.

While the relevant metrics indicate that eSports has the potential to become a significant fixture on the sports landscape, counsel advising on an eSports investment should expect the unexpected, and be prepared to call in a range of specialists in areas such as employment, intellectual property, real estate and immigration. Team valuations and revenue opportunities can also vary to the extremes, making it hard to ascertain “what’s market.” Finally, many teams grew out of an underground gaming culture, resulting in the need for a thorough due diligence review of player contracts, financial statements, vendor contracts and other relevant documentation.

Set forth below are additional key factors and considerations associated with an eSports investment.

*Types of Teams*—Teams vary in their size, focus, stability and notoriety, and consequently in their valuation. Some teams focus their efforts on a single game, such as Dota 2, CS:GO or League of Legends. These teams typically consist of three to seven players, coaches and an administrative support staff. Alternatively, organizations such as Fnatic, Evil Geniuses and Team SoloMid field multiple squads that compete in different games. While such diversification enhances the ability to generate revenue, it comes at the cost of added infrastructure, employees and overhead.

Another key consideration is whether a team has a guaranteed slot in a major gaming league or competition, or whether it needs to buy one, or even compete for one through a promotion and relegation system. These slots are valuable for a number of reasons, including the fact that they provide significant branding and revenue generating possibilities. When teams with guaranteed slots become available, they usually attract intense interest and bidding.

Another option that exists is purchasing a permanent franchise. Several eSports leagues are starting to emulate the business models of the NFL, NBA and other major leagues. For example, Riot Games, the publisher of League of Legends, has adopted a more traditional franchise and revenue-sharing model. Blizzard Entertainment’s Overwatch League is based on a similar type of model.

Franchises typically provide owners with stability, a greater say in the league’s growth and operation, as well as a share of the league’s revenue streams, including the lucrative media rights revenue stream. Investors seeking to enter a franchise-

based league need to closely scrutinize the league regulations, the process for resolving disputes, the revenue sharing terms and the parties' other key rights and responsibilities.

*Sponsorship Revenue*—Traditional sports teams have diverse revenue streams, including ticket and merchandise sales, media rights, arena naming rights, concessions and event parking. In eSports, corporate sponsorships make up a significant portion of most team's current revenue. In many cases, teams directly strike marketing partnerships with companies that find the eSports demographic appealing. For a similar reason, major corporations seek to strike league-level sponsorships.

It is important to clearly understand the sponsorship rights of leagues, teams and players, and how league-generated sponsorship revenue flows to teams. For instance, traditional sports leagues often give category exclusivity protection to their top sponsors. One example is the PGA Tour's agreement with FedEx, which precludes golfers sponsored by a FedEx competitor from participating in the FedEx Cup tournament. Similar protections in emerging eSports leagues could similarly enhance or stifle the ability of teams and players to monetize their brands.

Other leagues, such as MLB and the NHL, also have the right to digitally replace a team's stadium or arena signage during a nationally televised game. Should this practice become prevalent in eSports, teams without a league revenue sharing agreement could lose out on lucrative advertising revenue.

*Media Rights*—Major eSports events attract audiences that rival some of the world's great sporting events. As a result of such exposure, media rights agreements should be closely scrutinized. Media rights agreements can take different forms. One example is a distribution deal that a league will strike with a streaming video provider. Many cable and streaming broadcasters are actively competing for eSports viewers, including ESPN, Turner Sports, Facebook, Amazon's Twitch and Activision-Blizzard's MLG.tv.

Teams also frequently have their own media rights agreement with a streaming video provider. These deals typically call for the team to produce exclusive content, such as game tutorials, practice matches and player interviews. In exchange, the team may receive a flat fee, a variable payment based on hitting certain milestones in viewable hours or another metric, or another type of arrangement based on the team's marketability. Investors need to ensure that contracts between players, leagues and broadcasters clearly delineate the rights and responsibilities of all parties. Even with clear language, subtle nuances may exist. For instance, a team could derive significant revenue from Twitch content created by or featuring the team's best player. Should that player fail to produce the required content, the revenue will be put in jeopardy.

Another consideration for investors is the existence of streaming video micropayments. A leading innovator in this area is Twitch, which lets viewers “cheer” for content using “Bits”—animated emoticons purchased by fans and then donated to the content creator. If the use of Bits becomes more popular, investors will need to pay close attention to content and revenue sharing.

Finally, the need to obtain and insure copyright ownership of all media content should not be overlooked. Any original content created by employees within the scope of their duties is considered a work-made-for-hire, which automatically makes the team the copyright owner.<sup>1</sup> However, if an independent contractor is hired to create the content, the copyright remains with the contractor, and the team only gets a limited license to use the material—unless a written work-made-for-hire or copyright assignment agreement is signed.

*Employment Agreements*—While athletes in traditional sports leagues have clearly defined contracts, eSports contracts are still evolving. Many of these contracts were handshake deals put to paper, while others were drafted without input from legal counsel. As such, gray areas often exist. For example, a provision may state that a team will provide a player with “top-notch” housing, computers and benefits, but the term “top-notch” is nebulous at best.

Contracts need to comply with federal and state regulations regarding wages, overtime and health insurance.<sup>2</sup> In addition, employment agreements should be scrutinized for what they don't state. For example, contracts with minors should include a provision that the player has reviewed the contract with legal counsel in order to avoid disputes regarding an imbalance in bargaining power. Further, investors should bargain for key man provisions in the franchise purchase agreement to ensure that valuable players and support staff do not depart from the team once the purchase has closed. On a related note, investors should ensure that appropriate incentive and noncompetition provisions are included in employment agreements.

*Trademark Filings*—Branding an eSports team is just as critical as it is for a traditional sports team. If an investor intends to rebrand a team, an important first step is researching a name and logo that will serve as the primary trademark and service mark brand(s). In the U.S., trademark rights can only be obtained after commencement of commercial use.<sup>3</sup> Accordingly, it is important at the outset to perform searches to clear a proposed mark for use and registration. If an investor intends to keep a team's existing branding, then due diligence must be done regarding the team's existing name, logos, Web site branding and domain. This due diligence includes a review of pending applications or issued registrations, and any upcoming registration or other government trademark office filing requirements.

Since eSports is a global phenomenon, marks must also be researched and registered in key markets, including the European Union, China, South Korea and Japan. Although the U.S. and many other countries are parties to a treaty that provides priority filing dates tied to the dates of U.S. applications, trademark rights are territorial. The availability or registration of a mark in the U.S. is no guarantee that the mark is available in other jurisdictions. In addition, most foreign countries grant trademark protection based on registration, which does not require use in commerce. Foreign trademark searches should be conducted early on, ideally through local counsel who can opine on the results, and foreign trademark applications should be filed promptly after filing in the U.S.

Bad faith trademark filings in foreign countries, particularly China, also require a proactive global trademark protection plan, working with foreign trademark counsel and agents. Numerous countries, including the U.S., are parties to an international classification system, which requires trademark applications to fall into one of 45 classes of goods and services. Using this system, eSports investors can protect their marks in multiple areas beyond gaming, such as apparel, posters and streaming match videos.

*Publicity Rights*—Investors in eSports need to ensure that they have rights to use each player's name, image, likeness and other elements for marketing purposes under applicable state rights of publicity laws. These laws vary from state-to-state, and some do not require state residency as a condition of asserting rights, an important fact when dealing with travelling players and events in multiple cities. In New York, for example, publicity rights only apply during a person's lifetime, but they also extend to a person's actual voice. In contrast, California has a broad statute which also covers a person's signature and lasts for 70 years after death. As there are no major eSports players unions yet, player contracts must include publicity rights sections, especially with respect to a star player who can help monetize the team's brand. Like any other professional sports league, it is much easier to acquire these rights now, but should unions be formed, the publicity rights can be expected to be harder and more expensive to acquire.

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#### Footnotes

- 1 See Chapter 70 “Copyright” (§§ 70:1 et seq.).
- 2 See Chapter 71 “Employment Law” (§§ 71:1 et seq.).
- 3 See Chapter 69 “Trademarks” (§§ 69:1 et seq.).

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:72

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### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:72. Practice Checklist

##### A. Preliminary Considerations

1. Inside and outside counsel need to assess impact of applicable league rules and regulations upon the business of the team. (See § 74A:3 and §§ 74A:13 to 74A:17)
2. Outside counsel should be aware of “market” terms and conditions for the transaction. (See § 74A:4)
3. Inside and outside counsel should monitor trends in the sports industry. (See § 74A:5)
4. Inside and outside counsel should create a system for the division of legal tasks in order to avoid duplication and otherwise achieve time and cost efficiencies. (See § 74A:6)
5. Inside and outside counsel need to consider effect, if any, of antitrust laws upon the transaction. (See § 74A:13)

##### B. Significant Agreements

1. Significant agreements often require active involvement by outside counsel due to complexity of transaction and number of legal practice areas involved. (See § 74A:18)
2. The drafting of significant agreements is of primary importance given the impact of these agreements upon the team's business. In many cases, these agreements tend to be long-term in nature. (See § 74A:18)
3. Significant agreements usually contemplate the entry into related ancillary agreements. (See § 74A:23)

##### C. Revenue Producing Agreements

1. The significant types of revenue producing agreement categories are (i) media rights, (ii) concession services, (iii) merchandise licensing and (iv) naming rights and premier sponsorships. (See § 74A:24)
2. A team's media right ownership varies from league to league. (See §§ 74A:25 to 74A:27)
3. A well drafted concession services agreement will clearly delineate the respective rights obligations of the team and concessionaire. (See § 74A:28)
4. Merchandise licensing agreements raise intellectual property issues regarding the use of team and/or league logos and other designs. (See § 74A:29)
5. Sponsor exclusivity and the ability of the team and sponsor to protect their respective image and reputation are key considerations in negotiating naming rights and premier sponsorship agreements. (See § 74A:30)

##### D. Template Revenue Producing Agreements

1. The common types of template revenue producing agreement categories are (i) advertising/sponsorship, (ii) suite license, (iii) ticket license, (iv) personal seat license, (v) food and beverage, (vi) catering, (vii) parking, (viii)

trademark and intellectual property, (ix) technology and (x) sweepstakes and other contests. (See §§ 74A:32 to 74A:41)

2. A well drafted template revenue producing agreement will afford “one size fits all” flexibility without detriment to the rights and interests of the team. (See §§ 74A:32 to 74A:41)

#### E. Operational Agreements

1. The major types of operational agreement categories are (i) cleaning services, (ii) security, (iii) maintenance, (iv) insurance, (v) utility, (vi) hotel, travel and supply and (vii) advertising and publicity. (See § 74A:42)
2. A well-drafted labor-intensive operational agreement (*e.g.*, cleaning services agreement) will specify (i) whose employees are to provide the various services; (ii) minimum standards of performance; (iii) the rights of the team in respect of disruptive service provider employees; and (iv) the indemnification protection to be afforded to the team. (See § 74A:43)
3. A team may seek to use the grant of an affiliation right to a service provider as a “form of currency.” (See § 74A:48)

#### F. Player Contracts and Salary Arbitration

1. Inside counsel typically takes the lead role in negotiating player contracts. (See § 74A:51)
2. Player contracts may address issues other than those relating to compensation and personal conduct. (See § 74A:51)
3. Player related disputes are typically resolved by resort to arbitration. (See § 74A:52)
4. The arbitration process is not uniform across all leagues. (See § 74A:52)

#### G. Labor Issues

1. Most team-related labor issues are covered by the league's collective bargaining agreement with the players' union. (See § 74A:53)

#### H. Governmental Relations

1. Changes in legislation can result in significant consequences to a team and sometimes the league and/or sports industry in general. (See § 74A:56)
2. Teams may engage lobbyists to monitor legislation and protect team interests. (See § 74A:56)
3. Ticket sales is an area of the law subject to significant legislative scrutiny and regulation. (See § 74A:57)
4. Local zoning ordinances and disability accommodation requirements directly affect team operations. (See § 74A:59)

#### I. Litigation

1. Routine litigation (*e.g.*, stadium “slip and fall”) often entails no involvement by outside counsel. (See §§ 74A:61 and 74A:62)
2. Non-routine/significant litigation often involves engagement of outside counsel. (See § 74A:63)
3. Non routine/significant litigation may consist of, among other things, team relocation and sponsorship disputes. (See §§ 74A:64 and 74A:65)

J. Ownership Arrangements

1. Teams need to develop a business code of conduct and related procedures for conducting internal investigations. (See § 74A:66)

K. Ownership Arrangements

1. With rare exception, teams are privately-owned. (See § 74A:68)
2. Each league has rules and regulations restricting team ownership. (See § 74A:69)
3. Transfers of ownership interests in teams with more than one owner are often subject to contractual transfer restrictions negotiated by the owners. (See § 74A:70)
4. Outside counsel is often engaged to assist a team with the proper maintenance of its books and records. (See § 74A:71)

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**5 Successful Partnering Between Inside and Outside Counsel § 74A:73**

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**Chapter 74A. Sports**

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§ 74A:73. Form—Personal Seat License Agreement

**PERSONAL SEAT LICENSE (PSL) AGREEMENT**

**LICENSEE NAME:**

**ACCOUNT NUMBER:**

**PSL FEE:**

**CONTRACT DATE:**

**NUMBER AND LOCATION OF SEAT(S):** This Agreement sets forth the terms and conditions of the Personal Seat License (“PSL”) granted to the person or entity executing this Agreement as the Licensee. The PSL granted hereby relates to the seat(s) listed below of the new ballpark that is being constructed at XXXXXXXXXXXX (the “Ballpark”) to serve as the home ballpark for the Major League Baseball club currently named XXXXXXXXXXXX (the “Team”) for Team home games:

*[Seat location(s)]*

**PSL FEE:** The total cash consideration to be paid by the Licensee for the PSL granted hereby is the Total PSL Fee (the “PSL Fee”) set forth above. (Season tickets will be sold to you and billed to you separately by the Team.)

**PSL TERM:** Unless otherwise terminated by any provision of this Agreement, the Personal Seat License Terms and Conditions or the Ticket Agreement, the PSL granted by this Agreement will commence upon the Licensee's full payment of the PSL Fee to the Licensor and will continue until the Team ceases playing its home games in the Ballpark, regardless of the reason for such cessation.

**VALIDATION PROCEDURE:** To validate this Agreement, the Licensee must sign and return it within ten (10) business days after the Contract Date set forth above, to XXXXXXXXXXXX.

**AGREEMENT:** The Licensee's rights, obligations and responsibilities with respect to the PSL granted hereby are described in the Personal Seat License Terms and Conditions attached to this Agreement as Exhibit A, and the Licensee acknowledges and agrees to be bound by this Agreement including Exhibit A and the Ticket Agreement included in the packet with this Agreement, all incorporated in and made a part of this Agreement.

LICENSEE:  
By: \_\_\_\_\_  
Print Name(s): \_\_\_\_\_  
Print Company and  
Title (if applicable): \_\_\_\_\_

XXXXXXXXXXXX  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

### **EXHIBIT A PERSONAL SEAT LICENSE TERMS AND CONDITIONS**

THIS EXHIBIT constitutes the “Terms and Conditions” referred to in and incorporated into, the Personal Seat License Agreement (the “Agreement”) executed by the person or entity identified therein as the “Licensee” and XXXXXXXXXXXX, or its assigns (the “Licensor”). Pursuant to the Agreement, the Licensee has received a license to purchase certain tickets to Team regular season home games to be held at the Ballpark. These Terms and Conditions shall be binding upon the Licensee, the Licensor and Team. Capitalized terms used but not defined herein shall have the meaning given them on the first page of the Agreement.

#### **1. GRANT OF PSL.**

For and in consideration of the Licensee's payment of the PSL Fee and promise to pay any remaining installments of the PSL Fee, the Licensee shall receive a Personal Seat License (“PSL”) which shall entitle the Licensee to purchase, in accordance with the terms and conditions set forth in this Exhibit and the Ticket Agreement between the Licensee and the Team, tickets for the Ballpark seat or seats (the “Seat(s)”) licensed by the Licensee under the Agreement for all regular season Team home games to be played in the Ballpark (collectively “Season Tickets”). A PSL does not apply to, nor does it grant any right or interest in, any other events which may be held in the Ballpark.

#### **2. LOCATION OF SEAT(S).**

- (a) The PSL granted hereby relates to the Seat(s) in the Ballpark set forth in the Agreement. The Licensee acknowledges that the Ballpark is yet to be completed and that the actual location of the Seat(s) may vary from that set forth in the Ballpark Diagram. The Licensor has provided the Licensee the specific Seat(s) designations (section, row and seat number). If any change in seat location is necessary, the Licensor shall inform the Licensee of the new location as soon as reasonably possible.
- (b) If the Licensee requires seating (“ADA Seating”) in a designated Americans with Disabilities Seating Area and the Licensee has not previously advised the Licensor of the need for ADA Seating, the Licensee shall return with the Agreement a written statement addressed to the Licensor in which the Licensee advises as to the nature of his or her disability requiring ADA Seating and the need for any accommodations, aids and/or services (including, without limitation, the need to sit in an ADA Seating area designated for wheelchairs).

#### **3. CONSTRUCTION OF BALLPARK.**

- (a) The Licensor expects, but makes no guarantee, that construction of the Ballpark will be completed prior to the XXXXXXXXXXXX season. If the first Team home game is not played in the Ballpark prior to XXXXXXXXXXXX, at the option of the Licensee, the Licensee may request a return of its PSL Fee. In such event, the Licensor shall, as soon as reasonably practicable thereafter, return to the Licensee all paid PSL Fees; and no interest will be paid on any returned PSL Fees. Upon return of such paid portion of the PSL Fee to the Licensee, the Agreement will terminate and the parties will have no further liability or obligation to each other under the terms of the Agreement or in law or equity.
- (b) If the Seat(s) which is the subject of the Agreement is not included in the Ballpark or the Seat(s) is not available for licensing, then the Licensor will return all paid PSL Fees to the Licensee as soon as reasonably practicable thereafter; no interest will be paid on any returned PSL Fees. Upon return of such paid portion of the PSL Fee to the Licensee, the Agreement will terminate and the parties will have no further liability or obligation to each other under the terms of the Agreement or in law or equity.

#### **4. PSL RIGHTS AND OBLIGATIONS.**

- (a) Except as provided herein, the Licensee has the right and obligation to purchase, at a price determined by the Team (the “Ticket Fee”), Season Tickets for each Seat(s) for all Team regular season home games for as long as the Team plays its home games in the Ballpark. All payments of the Ticket Fee shall be made, without offset, deduction or counterclaim, to the Team pursuant to instructions provided by the Team from time to time.
- (b) If the Licensee does not purchase Season Tickets for the Licensee's designated Seat(s) by the date specified each year by the Team in its sole discretion, then the Licensee's rights to purchase Season Tickets hereunder will terminate automatically without any notice given or action taken by the Licensor, and the Licensee will forfeit all PSL Fees and Ticket Fees paid to the Licensor and the Team, respectively, all rights to buy Season Tickets associated with the Seat(s), the Licensee's PSL for the then upcoming season and all XXXXXXXX seasons that follow, and the Licensee's PSL will be terminated. The Licensor will have the right to relicense the forfeited PSL with no further obligation to the former Licensee.
- (c) Subject to the restrictions and guidelines set forth herein, the Licensee has the right to transfer its PSL by sale, gift, bequest or otherwise. However, PSLs may not be transferred prior to XXXXXXXX, except in the event of the death or disability of the Licensee. There will only be one Licensee for a given seat at any given time. Once a Licensee transfers a PSL, such Licensee will no longer have any rights associated with that Seat(s). No transfer will be complete until:
- 1) the transfer is approved in advance in writing by the Licensor which approval will not be unreasonably withheld;
  - 2) the transferee has assumed all obligations of the transferor;
  - 3) the transferor has completed all transfer documents, and the transfer has been recorded on the books of the Licensor; and
  - 4) the transferor has paid to the Licensor a per license transfer fee established by the Licensor.
- If the Seat(s) subject to this Agreement constitute ADA Seating, the Licensee may transfer such Seat(s) to a person with a disability as defined by the Americans with Disabilities Act or the XXXXXXXX Law Against Discrimination, (collectively “ADA Disability”). If an ADA Seating is transferred to a person who does not have an ADA Disability, then the PSL shall be reallocated to a comparable non-ADA Seating. Should there be no comparable non-ADA Seating available, the transfer may not proceed and the PSL may be surrendered to the Licensor in return for the unamortized portion of the PSL Fee (which unamortized portion shall be calculated on a straight line basis over a period of forty (40) years).
- (d) The Licensee shall, in addition to the other payments provided for in the Agreement and this Exhibit, reimburse the Licensor for costs incurred by the Licensor to repair any damage (other than normal wear and tear) caused by the Licensee or its invitees to the Seat(s) or other property in or around the Ballpark.
- (e) In addition to other events of termination set forth in the Agreement and this Exhibit, the Licensee's PSL shall terminate, at the option of the Licensor, without notice, upon the occurrence of any of the following events: (1) the failure of the Licensee or any of the Licensee's invitees to observe all laws, ordinances, rules and regulations applicable to attendance by ticket holders at Team games at the Ballpark; (2) the revocation by the Team of any Season Ticket purchased by the Licensee in accordance with policies and practices established by the Team from time to time regarding such revocation; or (3) any default by the Licensee under the Agreement and this Exhibit.

#### 5. RESERVATION OF RIGHTS BY LICENSOR.

In addition to all rights at law or equity or under the other terms of the Agreement, The Licensor hereby expressly reserves the following rights:

- (a) The right to check and verify the Licensee's creditworthiness;

- (b) The right to revoke the PSL granted to the Licensee and the Licensee's right to purchase Season Tickets if the Licensee's creditworthiness is not satisfactory to the Licensor;
- (c) The right to assign, pledge as collateral, otherwise encumber, transfer or sell all or any part of the rights and obligations of the Licensor under the Agreement to one or more third parties who acquires the Licensor or acquires the Ballpark; and
- (d) The right to assign, pledge or otherwise encumber the Licensor's rights under the Agreement and/or the Licensor's right, title and interest in and to the Ballpark and its appurtenant facilities as security to one or more lenders of the Licensor.

**LICENSEE AGREES THAT UPON ANY ASSIGNMENT OF THE AGREEMENT BY LICENSOR, LICENSOR WILL BE AUTOMATICALLY AND FULLY RELEASED FROM, AND LICENSOR'S ASSIGNEE WILL BE RESPONSIBLE FOR, ALL OBLIGATIONS AND LIABILITIES OF LICENSOR HEREUNDER.**

#### 6. REPRESENTATIONS OF LICENSEE.

The Licensee hereby represents and warrants as follows:

- (a) The Licensee represents that he/she is the current account holder or, in the case of a company account its authorized representative, and has read and understands the terms of the Agreement, this Exhibit and the Ticket Agreement;
- (b) The Licensee is not acquiring this PSL as an investment and has no expectation of profit as an owner of this PSL and is acquiring this PSL solely for the right to purchase Season Tickets to Team home games played in the Ballpark;
- (c) The Licensee is acquiring this PSL for the Licensee's own use and not with a view to the distribution of this PSL or Team Season Tickets to others, except in accordance with applicable Federal and State law;
- (d) The Licensee acknowledges that the Licensee will not have, by virtue of purchasing the PSL, any equity or other ownership interest in the Licensor, the Team, any manager of the Ballpark, any event promoter, the Ballpark or any of the Ballpark's facilities and will not have any rights to dividends or other distribution rights from the Licensor or any other party or entity described in the Agreement as a result of being a Licensee, and further will not have any voting rights of any kind as a result of being a Licensee;
- (e) The Licensee acknowledges that, although this PSL is transferable subject to the provisions of the Agreement and this Exhibit, the Licensor has not represented and does not guarantee that there is or ever will be a market for the resale of this PSL; and
- (f) The Licensee is eighteen (18) years of age or older and has full authority to enter into and sign the Agreement and carry out its terms and conditions and when signed, the Agreement will be a legal and binding obligation of the Licensee, enforceable in accordance with their terms.

#### 7. POSSESSION AND USE OF SEATS AND BALLPARK.

(a) The Licensee will have the privilege to enter the Ballpark and use the Seat(s) to which the Licensee's PSL relates only upon presentation of a ticket for admission to a Team regular season home game. The Licensee shall be bound by and shall observe the terms and conditions upon which tickets for admission to the Ballpark have been issued, including, without limitation, any policy adopted with respect to the cancellation or postponement of games or events. In addition, the Licensee shall observe all applicable laws, ordinances, regulations and rules of conduct (collectively, "Regulations") adopted from time to time by any government authority, the Licensor, the Team or other event sponsor, and that such Regulations may vary over time or under changing circumstances. the Licensee further understands (i) that such Regulations, among other things, are intended to promote the safety of all persons and property, protect the Ballpark, and enhance the pleasure of the game day experience and (ii) that patrons, their vehicles and belongings may be subject to search to enforce such Regulations. **OBSERVANCE BY LICENSEE AND ITS INVITEES OF ALL SUCH REGULATIONS FROM TIME TO TIME IN EFFECT IS THE CONTRACTUAL OBLIGATION OF LICENSEE. A VIOLATION BY LICENSEE OR SOMEONE USING ITS TICKETS MAY CAUSE LICENSEE'S RIGHTS UNDER THE AGREEMENT, THIS EXHIBIT AND THE TICKET AGREEMENT TO BE TERMINATED.** In addition, the Licensee shall not take any action which would cause any increase in premiums of any insurance policy of the Licensor, by causing the Licensor or any other party to fail to meet any requirement or condition of such policy or otherwise.

(b) If the Licensee has a temporary disability requiring a temporary accommodation at the Ballpark, then upon the Licensee's written request to the Team Ticket Office, temporary accommodations will be arranged in an ADA Seating area near the Seats. Seats constituting ADA Seating, like all Ballpark seats, are subject to availability. If the Licensee becomes disabled such that a permanent accommodation at the Ballpark is required, the Licensee may sell its PSL or may request the Licensor to transfer its PSL to an ADA Seating area. If there is no comparable ADA Seating available, the PSL will terminate and the unamortized portion of the PSL Fee shall be returned to the Licensee (which unamortized portion shall be calculated on a straight line basis over a period of forty (40) years).

#### 8. PARKING.

Provided there is no default by the Licensee hereunder, the Licensee may purchase regular season parking privileges from the Licensor, subject to availability and such prices and priorities as the Licensor will establish from time to time among seating categories at the Ballpark and in numbers, location and duration designated by the Licensor. If the Licensee has purchased a PSL, the Licensee may purchase up to two (2) parking passes in accordance with this Agreement.

#### 9. LATE FEE.

Any PSL Fee or other monetary obligation under the Agreement or this Exhibit not paid to the Licensor or the Team, as applicable, by the date specified in the Agreement, this Exhibit or the Ticket Agreement shall bear interest accruing from such date at the highest rate permitted by law.

#### 10. WAIVER.

Any waiver of any of the terms and provisions of the Agreement and this Exhibit shall be effective only if set forth in writing and signed by the party to be charged. No waiver by the Licensor of any default or breach by the Licensee of its obligations under the Agreement or this Exhibit shall be construed to be a waiver or release of any other subsequent default or breach by the Licensee or anyone else under the Agreement or this Exhibit, and no failure of or delay by the Licensor in the exercise of any remedy provided for in the Agreement or this Exhibit shall be construed as a forfeiture or waiver thereof or of any other right or remedy available to the Licensor.

#### 11. STRIKES, DAMAGES, DESTRUCTION, FORCE MAJEURE, ETC.

- (a) In the event of any strike or other labor disturbance which results in the cancellation of any Team regular season home game to be played at the Ballpark, no PSL Fee shall be returned to the Licensee.
- (b) In the event of any damage or destruction of a substantial portion of the Ballpark due to an act of God, natural disaster, contamination, act of terrorism or other force majeure that renders the Licensee's seats unusable, and the Licensor elects not to repair the damage or destruction, the Agreement and this Exhibit shall terminate as of the date of such damage or destruction, no PSL Fee will be returned to the Licensee, and the Licensor shall not have any further liability under the Agreement and this Exhibit.
- (c) In the event of any damage to or destruction of the Licensee's Seat(s) due to an act of God, natural disaster, contamination, act of terrorism or other force majeure that renders the Licensee's Seat(s) unusable, and the Licensor is unable to repair or replace the Seat(s) in a reasonable period of time, the Licensor shall provide the Licensee a comparable Seat(s) until the Licensee's Seat(s) is repaired or replaced. If there is no comparable Seat(s) available or the Licensee's Seat(s) cannot be repaired or replaced, then the Agreement and this Exhibit shall terminate as of the date of such damage or destruction, the Licensor shall return the Unamortized Portion of the PSL Fee to the Licensee, and the Licensor shall not have any further liability under the Agreement and this Exhibit.

12. DISCLAIMER OF LIABILITY, ASSUMPTION OF RISKS; INDEMNIFICATION.

- (a) **NONE OF THE LICENSOR, THE TEAM, OR XXXXXXXXX OR ANY OF THEIR OFFICERS, EMPLOYEES OR AGENTS SHALL BE LIABLE OR RESPONSIBLE FOR AND LICENSEE AGREES TO INDEMNIFY AND HOLD HARMLESS THE LICENSOR, THE TEAM, XXXXXXXX AND EACH OF THEIR OFFICERS, EMPLOYEES AND AGENTS FROM AND AGAINST ANY LIABILITY, LOSSES, CLAIMS, DEMANDS, COSTS AND EXPENSES, INCLUDING ATTORNEYS' FEES AND LITIGATION EXPENSES, ARISING OUT OF ANY PERSONAL INJURY OR PROPERTY DAMAGE OCCURRING IN OR UPON THE BALLPARK AND THE APPROXIMATELY XX ACRES OF PROPERTY SURROUNDING THE BALLPARK IN CONNECTION WITH THE USE BY LICENSEE OR LICENSEE'S INVITEES OR OCCUPANCY OF THE SEAT(S) OR DUE TO ANY CONTRAVENTION OF THE PROVISIONS OF THE AGREEMENT, THIS EXHIBIT OR OF ANY APPLICABLE LAWS, RULES, REGULATIONS OR ORDER OF ANY GOVERNMENTAL AGENCY HAVING APPROPRIATE JURISDICTION OVER ANY ACTIONS OF LICENSEE.**
- (b) The Licensee, for itself and its invitees, assumes all risks of personal injury to, or for any damage to or any loss of property of, the Licensee or its invitees, arising out of, during or relating to their attendance at events held in the Ballpark. The Licensee acknowledges that alcoholic beverages will be available in the Ballpark and that attendance at sporting events may expose attendees to certain risks of injury including, without limitation, incidents involving other patrons who have consumed alcoholic beverages, injury from thrown or dropped objects, spills of food or beverages, and the unruly behavior of other patrons. The Licensee, for itself and its invitees, hereby agrees to assume all responsibility and liability for the consumption in the Ballpark of alcoholic beverages by the Licensee and its invitees and for the conduct and behavior of the Licensee and its invitees.

13. MISCELLANEOUS.

- (a) Except in accordance with the terms of the Agreement and this Exhibit, the Licensee shall not sell, assign, sublease, pledge, mortgage, or otherwise transfer or encumber the Agreement and this Exhibit, or any of the Licensee's rights and obligations under the Agreement and this Exhibit, without the prior written consent of the Licensor which consent will not be unreasonably withheld. Any attempted sale, assignment, sublease, pledge, transfer or encumbrance in contravention of the foregoing shall be null and void and of no effect.
- (b) Any notice, demand or communication given under the Agreement or this Exhibit must be in writing and shall be effective only if delivered personally; or sent by facsimile transmission; or delivered by overnight courier service; or

sent by certified mail, postage paid, return receipt requested, to the recipient at the address indicated on the first page of the Agreement or this Exhibit or to such other address as the party being notified may have previously furnished to the other party by written notice in accordance with this Paragraph. All notices to the Licensor under the Agreement or this Exhibit should be sent to: XXXXXXXXXX. Notices under the Agreement or this Exhibit shall be effective and deemed received on the date of personal delivery or facsimile transmission (as evidenced by facsimile confirmation of transmission); on the day after sending by overnight courier service (as evidenced by the shipping invoice signed by a representative of the recipient); or on the date of actual delivery to the party to whom such notice of communication was sent by certified mail, postage prepaid, return receipt requested (as evidenced by the return receipt signed by a representative of such party).

(c) **THE AGREEMENT AND THIS EXHIBIT SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF XXXXX AND CALLS FOR PERFORMANCE IN XXXX COUNTY, XXXXX, AND JURISDICTION AND VENUE FOR ANY DISPUTES ARISING OUT OF OR RELATED TO THE AGREEMENT AND THIS EXHIBIT SHALL EXCLUSIVELY LIE IN THE STATE COURTS OF XXXXX COUNTY, XXXXX WITHOUT REGARD TO ANY OTHERWISE APPLICABLE PRINCIPLES OF CONFLICT OF LAWS. LICENSEE CONSENTS TO THE EXERCISE OF PERSONAL JURISDICTION OVER IT BY SUCH COURT AND IRREVOCABLY WAIVES ANY DEFENSE BASED ON A LACK OF PERSONAL JURISDICTION OR FORUM NON CONVENIENS. LICENSEE HEREBY UNCONDITIONALLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING OR COUNTERCLAIM RELATING TO OR ARISING OUT OF THE AGREEMENT AND THIS EXHIBIT.**

(d) The Agreement and this Exhibit contain the entire agreement of the parties with respect to the matters provided for herein, and supersedes any prior written or oral agreement or statement with respect to those matters. No amendment or modification to the Agreement or this Exhibit shall be effective unless the amendment or modification is in writing and signed by both the Licensor and the Licensee.

(e) The Agreement and this Exhibit and all the terms and provisions thereof, shall inure to the benefit of and be binding upon the parties thereto, and their respective heirs, executors, administrators, personal representatives, successors and permitted assigns.

(f) The Agreement and this Exhibit and the rights and interests of the Licensee hereunder shall be subordinate and subject to XXXXXX Agreement, dated as of XXXXX, by and between XXXXX and XXXXXX (the “Ballpark Lease”), as the same may be amended, restated, modified, supplemented, extended or assigned from time to time, and any and all amendments thereto. Upon the expiration or termination of the Ballpark Lease for any reason, the Agreement shall terminate as of such date.

(g) The maximum liability of the Licensor to the Licensee under any theory of law, including contract or tort, for a breach by the Licensor under the Agreement and this Exhibit shall not exceed the amount of the PSL Fee paid by the Licensee.

(h) Time is of the essence with respect to the performance by the Licensee of its obligations under the Agreement and this Exhibit.

#### **TICKET AGREEMENT**

**LICENSEE NAME:**

**ACCOUNT NUMBER:**

**CONTRACT DATE:**

**Number and Location of Seats:** Pursuant to a separate Personal Seat License Agreement (the “PSL Agreement”) with XXXXXX (“Licensor”), you (“you” or “Licensee”) have purchased a Personal Seat License (“PSL”) that relates to the seat(s) in the new ballpark being constructed as the home ballpark for use by the Major League Baseball club currently named XXXXXX (the “Team”) in XXXXXX (the “Ballpark”). Under the PSL Agreement, Licensor designates the specific section, row and seat number for the seat(s) subject to the PSL(s) (the “Seat(s)”). Pursuant to an agreement with Licensor, the Team agreed to provide the Licensee with the right to purchase tickets for all regular season home games of the Team (“Season Tickets”), for the Seat(s) prior to each season in which the Ballpark will be used by the Team, in accordance with the Terms and Conditions attached to the PSL Agreement as Exhibit A, which are incorporated into and form a part of this Ticket Agreement.

**Agreement to Purchase Tickets:** Licensee hereby agrees to purchase the Season Tickets at a price determined by the Team (the “Ticket Fee”) for each Seat(s) for all Team home games and pay to the Team, the Ticket Fee, which may change from time to time.

**Fan Conduct Rules:** Licensee agrees to observe all rules, regulations, and policies, pertaining to fan conduct, use of the Ballpark seats and attendance at Ballpark events including any modification that may be adopted or administered from time to time. A copy of the rules, regulations and policies will be distributed to each Licensee and will be posted on the Team Website as well.

**Strikes, Damages, Destruction, Force Majeure, etc.:** In the event of: (a) any strike or other labor disturbance which results in the cancellation of any Team home game to be played at the Stadium; or (b) any damage to or destruction of Licensee's Seat(s) or the Stadium which renders Licensee's Seat(s) or the Stadium unusable, then, in the case of either of said events, the Ticket Fee payable under this Ticket Agreement shall, unless reasonably comparable seats are made available to Licensee, be abated during the period of time that Licensee's Seat(s) is unusable. The amount of the abatement shall be the face amount printed on the ticket multiplied by the number of games the Seat(s) is unusable. Any such abatement shall be offset against the next succeeding installment of the Ticket Fee payable by Licensee. No interest or processing fees shall be paid on any returned Ticket Fees. The Ticket Fee shall not be abated if the Seat(s) are rendered unusable due to the fault or neglect of Licensee or its invitees. Any delay in the performance of this Ticket Agreement as a result, directly or indirectly, of any of the foregoing will not constitute a breach of this Ticket Agreement or a ground for cancellation, suspension or termination hereof.

**Validation Procedure:** To make this Ticket Agreement valid and binding, Licensee must return a signed copy of the PSL Agreement to Licensor and a signed copy of this Ticket Agreement to the Team in the enclosed return envelope within ten (10) business days of the Contract Date set forth above.

Licensee acknowledges and agrees to be bound by this Ticket Agreement and the PSL Agreement and its Terms and Conditions.

LICENSEE:  
By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Print Title & Company (if applicable): \_\_\_\_  
Date: \_\_\_\_\_

XXXXXXXXXXXX  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:74

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:74. Form—Non-relocation agreement

#### NON-RELOCATION AGREEMENT

NON-RELOCATION AGREEMENT (“Agreement”) dated as of XXXXX is by and between XXXXX (the “Team Owner”) and the XXXXX (the “City”). The Team Owner and the City are collectively referred to as the “Parties.”

#### RECITALS

- A. The Team Owner holds the professional baseball franchise (the “Franchise”) issued by the XXXXX League for the Major League Baseball team currently named the XXXXX (the “Team”).
- B. The project known as “XXXXX” includes the design, development, construction, equipping and fitting out of the Major League Baseball stadium (the “Stadium”) currently known as “XXXXX” which is being constructed by the City.
- C. The City has invested and intends to continue to invest a significant amount of funds for the design, development, construction, equipping and fitting out of the Stadium.
- D. The City has a significant interest in assuring that Team Owner will cause the Team to play any regular season or postseason Major League Baseball game in which the Team has the right to designate the location at which the game will be played or in which the Team acts as the host for its opponent (“Baseball Home Games”) at the Stadium upon the completion of construction.
- E. As an essential inducement for the City to complete the Stadium and enter into a lease agreement for the Stadium (the “Stadium Lease”) with the Team Owner, the Team Owner has agreed, on the terms and conditions more particularly set forth below, to enter into this Agreement to assure the City that substantially all of the Baseball Home Games will be played at the Stadium during the Non-Relocation Term (as defined below).

NOW, THEREFORE, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Team Owner and the City, intending to be legally bound, hereby agree as follows:

1. Term. The term (“Non-Relocation Term”) of this Agreement shall begin on the date the first Baseball Home Game is played at the Stadium and, subject to earlier termination as provided in this Agreement, shall continue in full force and effect through December 31, XXXX.

## 2. Covenants of Team Owner.

### 2.1. Use of Stadium and Non-Relocation.

The Team Owner acknowledges and agrees that the City would not be willing to complete the construction of the Stadium or enter into the Stadium Lease in the absence of this Agreement. Accordingly, the Team Owner, subject to the Stadium Lease and the provisions of Section 2.2, hereby irrevocably covenants and agrees with the City as follows:

#### (a) Playing of Baseball Home Games.

During the Non-Relocation Term, the Team Owner shall (i) maintain the Franchise in effect with the XXXXX League and (ii) cause the Team to play all of its Baseball Home Games in the Stadium. Notwithstanding the foregoing, the Team shall be entitled to play, and the foregoing covenant shall not prevent the Team from playing up to the lesser of (i) XXXXX or (ii) X% of its Baseball Home Games, as scheduled by Major League Baseball, outside the Stadium during each Major League Baseball season, provided that none of such exempt Baseball Home Games shall include (i) any game in the opening homestand of a Major League Baseball regular or (ii) any postseason Major League Baseball games in which the Team participates. The right to play certain Baseball Home Games outside the Stadium as provided in the immediately preceding sentence shall be non-cumulative and any unused portion shall expire at the end of the applicable Major League Baseball season.

#### (b) No Relocation.

The Team Owner shall not transfer the Team outside of the boundaries of the City at any time during the Non-Relocation Term. In furtherance, but not in limitation of the foregoing, if the Team plays more than the lesser of (i) XXXXX or (ii) X% of its Baseball Home Games, as scheduled by Major League Baseball, outside the Stadium during any Major League Baseball season in violation of Section 2.1(a), then such action shall be deemed to be a relocation of the Team which shall constitute a breach of this Section 2.1(b).

### 2.2. Untenantability of the Stadium.

In the event the Stadium becomes untenable during the Non-Relocation Term due to damage, destruction, a temporary taking by a governmental authority, or an act of God or other force majeure event, and the City, in its capacity as the landlord under the Stadium Lease, has an obligation to repair or rebuild under the Stadium Lease and confirms its intention to do so, then the Team Owner may relocate the Team during the Major League Baseball season(s) in which the Stadium remains untenable.

## 3. Defaults and Remedies.

### 3.1. Team Owner Default.

The occurrence of any of the following shall be a “Team Owner Default”:

- (a) failure of the Team Owner to keep, observe, or perform any of the terms, covenants, or agreements contained in this Agreement or the Stadium Lease;
- (b) any representation or warranty confirmed or made in this Agreement by the Team Owner shall be found to have been incorrect in any material respect when made or deemed to have been made; or
- (c) the (i) filing by the Team Owner of a voluntary petition in bankruptcy; (ii) adjudication of the Team Owner as a bankrupt; (iii) the filing of any petition or other pleading in any action seeking reorganization, rearrangement, adjustment or composition of, or in respect of the Team Owner under the United States Bankruptcy Code or any other similar state or federal law dealing with creditor's rights generally, unless within ninety (90) days after such filing the Team Owner causes such proceeding or appointment to be stayed or discharged; or (iv) appointment of receiver, trustee or other similar official for the Team Owner or its property.

### 3.2. City Remedies.

Upon the occurrence of any Team Owner Default, the City may, in its sole discretion, have the option to pursue any one or more of the following remedies without any notice or demand whatsoever, other than any notice expressly provided for in this Agreement:

- (a) the City may seek and obtain injunctive or declaratory relief pursuant to Section 3.3 including, without limitation, specific performance;
- (b) the City may recover liquidated damages pursuant to Section 3.4, but only in the event of a violation of Section 2.1;
- (c) the City may terminate this Agreement pursuant to Section 3.6; and
- (d) the City may exercise any and all other remedies available to the City at law or in equity.

### 3.3. Declaratory or Injunctive Relief.

- (a) Either Party shall be entitled to seek injunctive relief prohibiting or mandating action by the other Party in accordance with this Agreement, or declaratory relief with respect to any matter under this Agreement. In addition, the Team Owner (i) recognizes that the Stadium is being constructed, certain taxes are being imposed by the City, and certain debt is being incurred in order to permit the Baseball Home Games in the Stadium during the term of the Stadium Lease and (ii) acknowledges and agrees that monetary damages could not be calculated to compensate the City for any breach by the Team Owner of the covenants and agreements contained in this Agreement. Accordingly, the Team Owner agrees that (i) the City may restrain or enjoin any breach or threatened breach of any covenant, duty, or obligation of the Team Owner contained in this Agreement without the necessity of posting a bond or other security and without any further showing of irreparable harm, balance of harms, consideration of the public interest or the inadequacy of monetary damages as a remedy; (ii) the administration of an order for injunctive relief would not be impractical and, in the event of any breach of any covenant, duty or obligation contained in this Agreement, the balance of hardships would weigh in favor of entry of injunctive relief; (iii) the City may enforce any such covenant, duty or obligation of the Team Owner contained in this Agreement through specific performance if so awarded; and

(iv) the City may seek injunctive or other form of ancillary relief from a court of competent jurisdiction in order to maintain the status quo and enforce the terms of this Agreement on an interim basis pending the outcome of any legal proceeding instituted in respect of this Agreement. The Parties hereby agree and irrevocably stipulate that the rights of the City to injunctive relief pursuant to this Agreement shall not constitute a “claim” pursuant to [Section 101\(5\) of the United States Bankruptcy Code](#) and shall not be subject to discharge or restraint of any nature in any bankruptcy proceeding involving the Team Owner.

(b) The Team Owner, on behalf of itself and its successors and assigns, hereby unconditionally and fully and absolutely waives each of the following:

(i) In any action by the City for specific performance or injunctive relief under this Agreement, the Team Owner hereby waives any right to assert against the City any defense or counterclaim which the Team Owner may now or at any time hereafter may have under applicable law that specific performance or injunctive relief is not an appropriate remedy.

(ii) The Team Owner hereby waives any claim or defense it may have at any time based upon the City's enforcement or attempted enforcement of this Agreement or any provision hereof or any other agreement related hereto, including, but not limited to, any claims of tortious interference with contractual relationships or any and all similar claims.

3.4. Liquidated Damages. The Parties recognize, agree, and stipulate that the financial, civic, and social benefits to the City from the presence of the Team and the playing of its Baseball Home Games in the City are great, but that the precise value of those benefits is difficult to quantify due to the number of citizens and businesses that rely upon and benefit from the presence of the Team in the City. Accordingly, the magnitude of the damages that would result from a violation of Section 2.1 would be very significant in size, but difficult to quantify including, without limitation, damages to the reputation and finances of the City. Therefore, the Parties agree that in the event of a violation of Section 2.1, the City shall be entitled to recover from the Team Owner the following sums, which are stipulated to be reasonable estimated damages in the event of a violation of Section 2.1, as reasonable liquidated damages and not as a penalty:

<u>Date of Breach</u>	<u>Liquidated Damages</u>
XXXXX	\$ XXXXX

The Parties hereby acknowledge that they have negotiated the above amounts in an attempt to make a good faith effort in quantifying the amount of damages due to a violation of Section 2.1 despite the difficulty in making such determination. In the event the City collects the above referenced liquidated damages, then the City hereby waives any right to collect additional monetary damages (other than as provided pursuant to Section 6.8) including, but not limited to, lost or prospective profits, or for any other special, indirect, incidental, consequential, exemplary, or punitive damages.

3.5. Team Owner's Termination Right.

The occurrence of either of the following shall be a “City Default:”

- (a) Substantial Completion (as defined in the Stadium Lease) of the Stadium has not occurred by the final date therefore as specified in the Stadium Lease;
- (b) the City, in its capacity as the landlord under the Stadium Lease, is in material breach of its obligations thereunder, the Team Owner has sent notice of such breach to the City and the City has not cured such breach within the applicable cure period, provided that the Team Owner, concurrently with its termination of this Agreement, has also terminated the Stadium Lease under and pursuant to the terms of the Stadium Lease; or
- (c) a Condemnation (as defined in the Stadium Lease) or permanent taking of the Stadium by a governmental authority occurs and such Condemnation or permanent taking of the Stadium prevents the playing of Major League Baseball games at the Stadium.

3.6. Termination. Upon the occurrence of a Team Owner Default or City Default, the non-defaulting Party shall have the right, but not the obligation, to give to the defaulting Party notice (a “Final Notice”) of the non-defaulting Party's intention to terminate this Agreement after the expiration of a period of thirty (30) days from the date such Final Notice is given, unless the default is cured, and upon expiration of such thirty (30)-day period, if the default is not cured, this Agreement shall terminate without liability to the non-defaulting Party. If however, within such thirty (30)-day period, the defaulting Party cures such Team Owner Default or City Default, as the case may be, then this Agreement shall not terminate by reason of such Final Notice. Notwithstanding the foregoing, in the event any legal proceeding is instituted between the Parties with respect to the Team Owner Default or City Default, as the case may be, covered by such Final Notice, the foregoing thirty (30)-day period shall be tolled until a final non-appealable judgment or award, as the case may be, is entered with respect to such legal proceeding. In the event of a termination of this Agreement by either Party under this Section 3.6, then (except for the provisions herein that expressly are to survive termination hereof), all obligations of the Parties under this Agreement shall also automatically terminate. Termination of this Agreement shall not alter any existing claim of either Party for breaches of this Agreement occurring prior to such termination and the obligations of the Parties hereto with respect thereto shall survive termination.

### 3.7. Cumulative Remedies.

- (a) Each right or remedy of the Team Owner and the City provided for in this Agreement shall be cumulative of and shall be in addition to every other right or remedy of the Team Owner or the City provided for in this Agreement, and the exercise or the beginning of the exercise by the Team Owner or the City of any one or more of the rights or remedies provided for in this Agreement shall not preclude the simultaneous or later exercise by the Team Owner or the City of any or all other rights or remedies provided for in this Agreement or the Stadium Lease, or hereafter existing at law or in equity, by statute or otherwise.
- (b) Notwithstanding Section 3.7(a), the City hereby unconditionally and irrevocably (i) agrees that should any legal proceeding be instituted against it in relation to this Agreement or any transaction contemplated hereunder, no immunity (sovereign or otherwise) from such legal proceeding shall be claimed by or on behalf of the City and (ii) waives any such right of immunity (sovereign or otherwise) which the City now has or may acquire in the future.

### 4. Assignments and Permitted Transfers.

4.1. Assignments of the Team Owner's Interest. Except as otherwise permitted by this Section 4.1 or Section 4.2, the Team Owner may not voluntarily, involuntarily, by operation of law or otherwise (including, without limitation, by way of

merger or consolidation), sell, assign, transfer, pledge, mortgage or encumber this Agreement (each, a “Transfer”), without first obtaining the consent of the City as provided for herein, which consent shall not be unreasonably withheld, delayed or conditioned. For purposes of this Agreement, the term “Transfer” shall also include any issuance or transfer of any securities or interests having ordinary voting power for the election of directors (or other comparable controlling body) of the Team Owner or any transfer of an equity or beneficial interest in the Team Owner that results in a change of the Controlling Person (as defined in the Stadium Lease) of the Team Owner. Notwithstanding anything to the contrary contained in this Agreement, it is understood and agreed that the Team Owner shall have the right to grant a security interest any of the Team Owner's assets (other than the Franchise) to obtain financing from one or more lenders without first obtaining the consent of the City.

#### 4.2. Permitted Transfers.

The City's consent to the following Transfers (each, a “Permitted Transfer”) shall be deemed to have been obtained, provided no uncured Team Owner Default for which the City has delivered notice to the Team Owner shall then exist:

- (a) any Transfer that contemporaneously includes (i) an assignment or transfer of the Franchise in accordance with the terms of this Agreement to the same person who is the Team Owner's successor by assignment under this Agreement (the “Team Owner Transferee”); (ii) an assignment or transfer of the Team Owner's rights under the Stadium Lease to the Team Owner Transferee; and (iii) the full and unqualified assumption (by operation of law or otherwise) by the Team Owner Transferee of responsibility for performance of all of the obligations of the Team Owner under this Agreement and the Stadium Lease arising on and after the date of the Transfer or
- (b) any issuance or transfer of any securities or interests having ordinary voting power for the election of directors (or other comparable controlling body) of the Team Owner that results in a change of the Controlling Person of the Team Owner if during the five (5) years preceding the date of such Transfer, none of the following events have occurred with respect to the person who is the new Controlling Person of the Team Owner unless the same shall have been subsequently reversed, suspended, vacated, annulled or otherwise rendered of no effect under applicable governmental rule:
  - (i) the initiation of any federal or state bankruptcy or insolvency proceeding by or against, or the appointment of a receiver, conservator, physical agent or similar officer for the business or assets of any such person or
  - (ii) the conviction of such Person in a federal or state felony criminal proceeding (including a conviction entered on a plea of nolo contendere) or such person is a defendant in a felony criminal proceeding (excluding traffic violations and other minor offences) that is pending on the date of such Transfer.

#### 4.3. Release of the Team Owner.

No Transfer shall relieve the Team Owner from any of its obligations under this Agreement, except that the Team Owner shall be relieved from any obligations arising under this Agreement after the date of a Permitted Transfer if, and only if, all of the following occur:

- (a) the Team Owner has notified the City of the name and address of the Team Owner Transferee and the Controlling Person, if any, of such the Team Owner Transferee by the time of the Permitted Transfer;

- (b) the Team Owner Transferee must also be the successor by assignment of the Team Owner's rights under the Stadium Lease;
- (c) such Transfer is a Permitted Transfer described in Section 4.2(a);
- (d) the Team Owner Transferee shall have assumed responsibility for performance of all of the obligations of the Team Owner under this Agreement and the Stadium Lease arising on and after the date of the Transfer pursuant to an instrument of assignment and assumption substantially in the form of the Assignment and Assumption Agreement attached as Exhibit X to the Stadium Lease;
- (e) During the five (5) years preceding the date of the Permitted Transfer, none of the following events have occurred with respect to the Team Owner Transferee or any person who is a Controlling Person of the Team Owner Transferee as of the date of the Transfer, unless the same shall have been subsequently reversed, suspended, vacated, annulled or otherwise rendered of no effect under applicable Governmental rule:
  - (i) the initiation of any federal or state bankruptcy or insolvency proceeding by or against, or the appointment of a receiver, conservator, physical agent or similar officer for the business or assets of any such person or
  - (ii) the conviction of such person in a federal or state felony criminal proceeding (including a conviction entered on a plea of nolo contendere) or such person is a defendant in a felony criminal proceeding (excluding traffic violations and other minor offenses) that is pending on the date of such Permitted Transfer; and
- (f) As of the date of the Permitted Transfer (after giving effect to the Transfer), (i) the net worth of the Team Owner Transferee (*i.e.*, the Team Owner Transferee's consolidated total assets on such date less the Team Owner Transferee's consolidated total liabilities on such date, in each case determined in accordance with GAAP) shall be no less than an amount equal to \$XXXXXX Million Dollars and (ii) the debt to equity ratio of the Team Owner Transferee (*i.e.*, the ratio of the Team Owner Transferee's consolidated total liabilities on such date determined in accordance with GAAP, after giving effect to the Transfer, to the Team Owner Transferee's net worth (as determined in accordance with clause (i) of this sentence) shall not be greater than X to X.

#### 5. Representations and Warranties of Team Owner.

The Team Owner represents, warrants and covenants as follows, as of the date hereof:

- 5.1. Valid Existence: Good Standing. The Team Owner is a limited liability company duly organized and validly existing under the laws of the State of XXXXX. The Team Owner has all requisite power and authority to own its property, including, but not limited to, the Franchise, and conduct its business as presently conducted. The Team Owner has made all filings and is in good standing in the jurisdiction of its organization, and in each jurisdiction in which the character of the property it owns or the nature of the business it transacts makes such filings necessary or where the failure to make such filings could have a material, adverse effect on the business, operations, assets or condition of the Team Owner.

5.2. Authority. The Team Owner has all requisite power and authority to execute and deliver this Agreement and to carry out and perform all of the terms and covenants of this Agreement.

5.3. No Limitation on Ability to Perform. Neither the Team Owner's limited liability company agreement or certificate of formation nor any rule, policy, constitution, by-law or agreement of the XXXXX League, the Office of the Commissioner of Baseball or any other Major League Baseball authority, nor any other agreement, law or other rule in any way prohibits, limits or otherwise affects the right or power of the Team Owner to enter into and perform all of the terms and covenants of this Agreement. No consent, authorization or approval of (except solely for the approvals of the Office of the Commissioner of Baseball and any other Major League Baseball authorities whose approval is required, all of which approvals the Team Owner represents and warrants that it has already obtained), or other action by, and no notice to or filing with, any governmental authority, regulatory body or any other person is required for the due execution, delivery and performance by the Team Owner of this Agreement or any of the terms and covenants contained herein. There are no pending or threatened suits or proceedings affecting the Team Owner before any court, governmental agency, or arbitrator which might materially adversely affect the enforceability of this Agreement or the business, operations, assets or condition of the Team Owner.

5.4. Valid Execution. The execution and delivery of this Agreement by the Team Owner has been duly and validly authorized by all necessary action. This Agreement will be a legal, valid and binding obligation of the Team Owner, enforceable against the Team Owner in accordance with its terms.

5.5. Defaults. The execution, delivery and performance of this Agreement (a) do not and will not violate or result in a violation of, contravene or conflict with, or constitute a default under (i) any agreement, document or instrument to which the Team Owner is a party or by which the Team Owner's assets, including, but not limited to, the Franchise, may be bound or affected; (ii) any law, statute, ordinance, regulation or Major League Baseball rule or regulation applicable to the Team Owner; or (iii) the limited liability company agreement or certificate of formation of the Team Owner and (b) do not and will not result in the creation or imposition of any lien or other encumbrance upon the assets of the Team Owner.

5.6. Team Ownership. The Team Owner is the sole owner of the Franchise as of the date hereof.

## 6. General.

6.1. Address for Notices. Any notice, consent or approval required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been given upon (i) hand delivery, against receipt, (ii) one day after being deposited with a reliable overnight courier service, or (iii) five (5) days after being deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, and addressed as follows:

If to the Team Owner:

XXXXX

If to the City:

XXXXX

or to such other address as either Party may from time to time specify in writing to the other upon five (5) days prior written notice in the manner provided above.

6.2. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the Parties hereto and their respective successors and permitted assigns.

6.3. Amendments. Except as otherwise provided herein, this Agreement may be amended or modified only by a written instrument executed by the City and the Team Owner, as approved by the Office of the Commissioner of Baseball and any other required Major League Baseball authorities.

6.4. Waivers. No action taken pursuant to this Agreement by either Party shall be deemed to be a waiver by that Party of the other Party's compliance with any of the provisions hereof. No waiver by either Party of any breach of any provision of this Agreement shall be construed as a waiver of any subsequent or different breach. No forbearance by either Party to seek a remedy for noncompliance hereunder or breach by the other Party shall be construed as a waiver of any right or remedy with respect to such noncompliance or breach.

6.5. Governing Law; Selection of Forum. This Agreement shall be governed by and construed in accordance with the laws of the State of XXXXX without regard to principles of conflicts of law. All actions or proceedings arising directly or indirectly under this Agreement may, at the sole option of City, be litigated in courts having situs within the State of XXXXX, and the Team Owner expressly consents to the jurisdiction of any such local, state or federal court, and consents that any service of process in such action or proceeding may be made by personal service upon the Team Owner wherever the Team Owner may then be located, or by certified or registered mail directed to the Team Owner at the address set forth in this Agreement for the delivery of notices.

6.6. Merger of Prior Agreements. The Parties intend that this Agreement shall be the final expression of their agreement with respect to the subject matter hereof and may not be contradicted by evidence of any prior or contemporaneous oral or written agreements or understandings. The Parties further intend that this Agreement shall constitute the complete and exclusive statement of its terms and that no extrinsic evidence whatsoever (including, without limitation, prior drafts or changes therefrom) may be introduced in any judicial, administrative or other legal proceeding involving this Agreement.

6.7. Interpretation of Agreement. The Section headings of this Agreement are for convenience of reference only and shall not affect the meaning or interpretation of any provision contained herein. Whenever the context so requires, the use of the singular shall be deemed to include the plural and vice versa, and each gender reference shall be deemed to include the other and the neuter. This Agreement has been negotiated at arm's length and between persons sophisticated and knowledgeable in the matters dealt with herein. In addition, each Party has been represented by experienced and knowledgeable legal counsel. Accordingly, any rule of law or legal decision that would require interpretation of any ambiguities in this Agreement against the Party that has drafted it is not applicable and is waived. The provisions of this Agreement shall be interpreted in a reasonable manner to effect the purposes of the Parties and this Agreement.

6.8. Attorneys' Fees and Expenses. If either Party hereto fails to perform any of its respective obligations under this Agreement or if any dispute arises between the Parties hereto concerning the meaning or interpretation of any provision

of this Agreement, then the defaulting Party or the Party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other Party on account of such default and/or in enforcing or establishing its rights hereunder, including, without limitation, reasonable attorneys' fees and expenses. Any such attorneys' fees and expenses incurred by either Party in enforcing a judgment in its favor under this Agreement shall be recoverable separately from and in addition to any other amount included in such judgment, and such attorneys' fees and expenses obligation is intended to be severable from the other provisions of this Agreement and to survive and not be merged into any such judgment.

6.9. Severability. If any provision of this Agreement, or the application thereof to any person, place, or circumstance, shall be held by a court of competent jurisdiction to be invalid, unenforceable or void, the remainder of this Agreement and such provisions as applied to other persons, places and circumstances shall remain in full force and effect.

6.10. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but both of which taken together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

TEAM OWNER:

XXXXX

By: \_\_\_\_\_

ACCEPTED AND AGREED:

CITY:

XXXXX

By: \_\_\_\_\_

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## 5 Successful Partnering Between Inside and Outside Counsel § 74A:75

Successful Partnering Between Inside and Outside Counsel | May 2018 Update

### Chapter 74A. Sports

by Lonn A. Trost, Irwin A. Kishner and Daniel A. Etna

#### § 74A:75. Form—Sponsorship agreement

### SPONSORSHIP AGREEMENT

Dear \_\_\_\_\_:

In consideration of the covenants, agreements, representations, warranties and obligations herein, together with all of the exhibits annexed hereto—Exhibit A (Sponsorship Fee), Exhibit B (Terms and Conditions), Exhibit C (Advertising Category), Exhibit D (Signage Space), Exhibit E (Advertising and Sponsorship Benefits) and Exhibit F (Certain Definitions)—which are, by reference, incorporated herein and form a part of hereof (collectively, this or this “Agreement”) and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each of us, intending to be legally bound, have entered into this Agreement, pursuant to which you (“you” or “Sponsor”) have agreed to license from the [•] (the “Team”) certain rights and Advertising and Sponsorship Benefits. All of the rights granted hereby are subject in all respects to all of the terms and conditions of this Agreement. Unless otherwise defined herein or the context requires a different definition, all capitalized terms herein and in the Exhibits shall have the meanings assigned to such terms in Exhibit F (Certain Definitions).

1. **TERM.** The term of this Agreement will commence on \_\_\_\_\_ and shall expire on (i) \_\_\_\_\_ or (ii) the conclusion of the final game of the \_\_\_\_ Season, whichever is later (the “Term”), unless terminated earlier in accordance with this Agreement, in which case, the Term shall expire on such termination date.

2. **TOTAL SPONSORSHIP FEE.**

(a) Sponsor shall pay to the Team a Total Sponsorship Fee of \_\_\_\_\_ (\$\_\_\_\_\_), consisting of \_\_\_\_ separate Sponsorship Fees for each of the \_\_\_\_ Regular Season(s) during the Term, as set forth on Exhibit A (Sponsorship Fee).

(b) Each Regular Season's Sponsorship Fee during the Term will be due and payable in installments as follows:

(i) \_\_\_\_\_ and

(ii) \_\_\_\_\_.

3. **ADVERTISING AND SPONSORSHIP BENEFITS.** During the Term and subject to the terms and conditions of this Agreement, Sponsor is granted the right to display certain Advertisements in the Stadium in accordance with the terms and conditions of this Agreement and will be entitled to the Advertising and Sponsorship Benefits set forth in Exhibit E (Advertising and Sponsorship Benefits).

AGREED & ACCEPTED:

[SPONSOR]

[TEAM]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:

WIRE INSTRUCTIONS:

Bank:

ABA:

Acct:

Name:

Federal I.D.:

**EXHIBIT A**  
**Sponsorship Fee**

Regular Season

Sponsorship Fee

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**EXHIBIT B**  
**Terms and Conditions**

1. GRANT OF RIGHTS

1.1. Subject to Section 11, in consideration of the covenants, agreements, representations and warranties and obligations of the Sponsor provided for in this Agreement, and provided no breach or default by Sponsor shall have occurred hereunder and be continuing, during and for the Term, the Team grants to Sponsor: (i) the right and license to display each Advertisement on the relevant signage space (including the Signage Space) in the Stadium during each Regular Season covered by the Term and (ii) the Advertising and Sponsorship Benefits provided for herein.

1.2. The Team reserves the right to require that each Advertisement: (i) be displayed at and during any Event and (ii) not be displayed at and during any Event if the display of such Advertisement is prohibited by governmental rules or regulations or by the determination of organizers or promoters of the Event. In the event an Advertisement is displayed during an Event, Sponsor hereby grants a royalty-free, nonexclusive, assignable license to use such Advertisement in connection with any recording, depiction or photograph of such Event and the advertising, promotion, use, distribution, exhibition, performance, display, reproduction, transmission, retransmission, creation of derivative works and/or exploitation of such recording, depiction or photograph in any means and media now known or hereafter developed. If the Team (for any reason or no reason) or any Event promoter or organizer determines, in its sole and absolute discretion, that the circumstances of the Event would require the entire or partial covering, removing, obscuring or hiding of the Advertisement, all reasonable means shall be used to accomplish this in a manner designed not to cause any physical damage to the Advertisement. In no event shall the Sponsor be entitled to any compensation, credits, rebates, refunds, offsets, make-goods or other remedies based upon any of the circumstances or conditions described in this Section 1.2.

1.3. Sponsor understands that the Team has no, and will have no, control over preventing other persons or entities that offer products or services in the Advertising Category (each a “Competitive Company” and collectively the

“Competitive Companies”) from being advertised, marketed and/or promoted at any Event or as otherwise required under applicable League documents. Under all circumstances, the Team will have the right to: (i) license tickets, suites and suite seats to Competitive Companies and (ii) engage in other business activities, provided that: (a) no sponsorship or other official relationship with the Team or the Stadium is created as a result thereof (whether through the use of the Marks or otherwise) and (b) none of the exclusive rights (if any) granted to Sponsor are made available to any Competitive Company. Sponsor further understands that the Team has no, and will have no, control over preventing suite licensees from advertising, marketing and/or promoting the Competitive Companies or products of the Competitive Companies and/or distributing products of the Competitive Companies in those areas of the Stadium covered by the licenses held by such licensees.

## 2. TERM

2.1. Term. The term shall commence on the date specified on the first page of this Agreement and, subject to early termination as provided in this Agreement, shall continue for the number of Regular Seasons specified on the first page of this Agreement and terminate on the date specified on the first page of this Agreement.

## 3. PAYMENTS

3.1. Payment of Sponsorship Fee; Payment Dates. Sponsor shall make the payments to the Team in the amounts set forth in Exhibit A (Sponsorship Fees) such payments to be made on the dates and in installments in accordance with the terms set forth on the first page of this Agreement. All such payments shall be made without any offset, abatement, deduction or counterclaim. All payments shall be made in lawful money of the United States: (i) by check made payable to [•] drawn on a New York Clearinghouse bank and sent to the Team at the address set forth in Section 15; (ii) by wire transfer of immediately available funds, to the address or account set forth in this Agreement; or (iii) pursuant to such other commercially reasonable written instructions as may be given by the Team. Each Sponsorship Fee shall be due and payable each Regular Season regardless of the cancellation or postponement of any Games during the preceding Regular Season (or threatened cancellation or postponement of any Games during the forthcoming Regular Season), whether due to any Force Majeure Event or otherwise.

3.2. Taxes. Sponsor shall pay and/or be responsible for paying all Taxes regardless of: (i) when levied, assessed or imposed; (ii) upon whom levied, assessed or imposed; and (iii) the Regular Season (past, present and/or future) or portion of the Term (past, present and/or future) that is subject to said levy, assessment or imposition. If such Taxes are not collected directly from the Sponsor by the charging or collecting authority and/or entity, all such Taxes shall be immediately due and payable by Sponsor to and upon demand by the Team. Sponsor shall reimburse the Team for any fees, penalties, interest or other charges paid by the Team in respect to any Taxes.

3.3. Interest. Any and all sums due hereunder from Sponsor, if not paid when due, shall bear interest at the lesser of: (i) [•] percent per month or (ii) the maximum rate then permitted by applicable law, from the date due until paid. Sponsor agrees that the interest charges reflected in both clauses (i) and (ii) are reasonable and represent a fair estimate of the additional expense that may be incurred by the Team in handling, collecting and accounting for delinquent payments. Such interest charge shall be in addition to, and not in lieu of, all other rights and remedies of the Team under this Agreement.

## 4. REQUIREMENTS FOR ADVERTISEMENT(S)

4.1. Sponsor must submit all samples, copies, camera-ready artwork and/or digital displays for each proposed Advertisement to the Team for approval. The Team may refuse, in its reasonable discretion, any Advertisement or element thereof that, among other things: (i) is of poor taste; (ii) is of a political nature or makes an appeal for funds; (iii) is not of a suitable artistic and technical quality; (iv) contains any false or misleading statement or representation or unauthenticated testimonial; (v) advertises any habit-forming drug, tobacco product, weapon, firearm or ammunition;

(vi) gives rise to any colorable claim of infringement, misappropriation or other form of unfair competition or includes elements of intellectual property without such intellectual property owner's consent to such use; (vii) purports to advertise any product or service outside the Advertising Category and/or unrelated to Sponsor's line of business(es) which is/are granted rights hereunder; or (viii) depicts the consumption of alcoholic beverages in violation of applicable law. Any such determination by the Team shall not constitute a termination of this Agreement and Sponsor shall not be entitled to any compensation, credits, rebates, refunds, offsets, make-goods or other remedies based upon any such determination.

4.2. Sponsor shall be responsible for any and all charges, costs and expenses including those directly or indirectly related to the installation, fabrication, insertion, erection, development and/or affixation of an Advertisement on any signage space (including the Signage Space) (the "Installation"). In addition, in the event Sponsor desires to replace, change or substitute any Advertisement on any signage space (including the Signage Space), Sponsor must: (i) submit all samples, copies, camera-ready artwork and/or digital displays for such proposed Advertisement to the Team for approval and (ii) be responsible for any and all Installation charges, costs and expenses for such replacement Advertisement. Sponsor must pay to, or on behalf of, the Team any and all charges, costs and expenses related to the Installation of any replacement Advertisement no later than seven (7) days following the Team's request. The Installation must comply with all applicable laws, regulations and ordinances. Moreover, the Installation must be completed, or caused to be completed, before the start of each Regular Season on the date specified by the Team. In the event the Installation is otherwise permitted to take place during a Regular Season, then the Installation may only occur when the Team is not playing at the Stadium. Furthermore, the Installation may only occur at a time and in a manner that is acceptable to the Team's Stadium Operations Department and Sponsor and its contractors must follow all directives of the Team in connection with their movement in or around the Stadium. Sponsor further agrees that no Installation will require that a signage space (including the Signage Space) be cut, drilled, built into, disfigured or otherwise damaged or modified. The Team may at its election direct Sponsor to use only contractors designated and approved by the Team in connection with the fabrication and installation of an Advertisement on any signage space in the Stadium. Any nondisplay of any Advertisement due to maintenance of the signage space (including the Signage Space) by or at the Team's direction will not constitute a breach of this Agreement or a ground for cancellation, suspension or termination hereof or entitle Sponsor to any compensation, credits, rebates, refunds, offsets, make-goods or other remedies.

4.3. Sponsor will not use any Advertisement for commercial or other announcements unrelated to goods and/or services offered by Sponsor within the Advertising Category or to advertise or provide information concerning any person, entity, good or service other than goods and/or services offered by Sponsor within the Advertising Category. Each proposed Advertisement shall not feature more than one good and/or service offered by Sponsor within the Advertising Category without the prior written approval of the Team, which approval may be withheld in the Team's reasonable discretion. Furthermore, Sponsor may not co-op, resell, sublicense, sublease, license, sublicense or otherwise subdivide, directly or indirectly, any of its rights hereunder, or grant any interest in all of its rights or any portion thereof to any person or entity that is not a party to this Agreement, including suppliers, distributors, resellers or wholesalers of Sponsor's goods and/or services.

4.4. Sponsor is responsible, at its sole cost and expense, for securing and clearing any consents, licenses, waivers, and premiums concerning any advertising content subject to this Agreement, including with respect to any third party copyrights, trademarks, service marks, publicity or privacy rights.

## 5. USE OF MARKS

5.1. As applicable, and subject to the prior written approval of the Team, which may be granted or withheld in its sole and absolute discretion, with respect to each such use and any other restrictions contained in this Agreement, Sponsor is granted the limited, nontransferrable, nonexclusive license during the Term to use the Marks in the Stadium, in

general advertising of the Sponsor in all means and media, other than [•], and for charitable purposes throughout the Territory, to advertise, promote and market Sponsor's Advertising Category. No Marks and/or Advertising and Sponsorship Benefit set forth in Exhibit E, shall be: (i) coupled with any trademark to create a combination trademark and/or otherwise create a naming sequence perception; (ii) used as part of any third party advertisement or promotion without the Team's prior written consent; (iii) used in any manner which creates an association or perception, or could reasonably be expected to create an association or perception, between any third party and the Team; or (iv) used in any manner which conflicts with any exclusive rights granted by the Team to any third party in any advertising category or classification. Except as otherwise provided in this Agreement, Sponsor is not authorized to use the Marks in connection with any business activity or otherwise.

- 5.2. Sponsor acknowledges that the Team owns the Marks and all rights therein and that nothing in this Agreement shall give Sponsor any right, title or interest in, to or under the Marks other than such limited rights of use expressly set forth in this Agreement. All uses of the Marks shall inure to the Team's sole benefit. In addition, Sponsor agrees that it will do nothing inconsistent with the Team's ownership of the Marks and it shall not claim adversely to the Team, or assist any third party in attempting to claim adversely to the Team, with regards to such ownership. Sponsor agrees that it will not challenge the title of the Team to the Marks, oppose any registration thereof, or challenge the validity of this Agreement or the licenses granted herein. Furthermore, Sponsor will neither register, nor attempt to register, any trade name or trademark which, in whole or in part, incorporates or is confusingly similar to the Marks or harm, misuse or bring the Marks into disrepute. Sponsor recognizes the great value of the publicity and goodwill associated with the Marks and, in such connection, acknowledges that such goodwill belongs exclusively to the Team and that the Marks have acquired a secondary meaning in the minds of the purchasing public.
- 5.3. Sponsor shall assist the Team, to the extent necessary, in the procurement of any protection or to protect any of the Team's rights to the Marks and the Team, if it so desires and in its sole and absolute discretion, may commence or prosecute any claims or suits in its own name or join Sponsor as a party thereto. Sponsor shall render the Team all reasonable assistance in connection with any matter pertaining to the protection, enforcement or infringement of Marks used by Sponsor, whether in the courts, administrative or quasi-judicial agencies, or otherwise. Sponsor shall notify the Team in writing of any infringements or imitations by others of the Marks of which it is aware. The Team shall have the sole right to determine whether or not any action shall be taken on account of such infringements or imitations. Sponsor shall not institute any suit or take any action on account of any such infringements or imitations without first obtaining the written consent of the Team, which consent may be granted or withheld in the sole and absolute discretion of the Team. Sponsor agrees that it is not entitled to share in any proceeds received by the Team (by settlement or otherwise) in connection with any formal or informal action brought by the Team hereunder.
- 5.4. Should Sponsor desire to develop a trademark using the Marks and/or name of the Team in any form other than the Marks, it must first consult with and obtain the written approval of the Team, which may be withheld in its sole and absolute discretion. If the Team approve of such newly developed trademarks, the same will be registered in the name of the Team. Such approved newly developed trademarks will be deemed to be Marks that Sponsor would be permitted to use pursuant to this Agreement and will be subject to all of the terms and conditions of this Agreement. Such approval will not be contingent upon the payment of any fee or royalties to the Team; provided, however, that the cost of obtaining, clearing and maintaining such new trademarks shall be borne solely by Sponsor.
- 5.5. Sponsor is granted no rights hereunder, directly or by implication, to, and will make no use whatsoever (including in publicity for itself) of the name of the Stadium or the names or likeness of any of the Team's staff, players, coaches or owners without the express prior written consent of the Team (which may be withheld in its sole and absolute discretion) and the specific individual(s) involved (as the case may be). Without the express prior written consent of the Team, any Content owned by the Team and provided to Sponsor in connection with any Advertising and Sponsorship

Benefits may only be used for commemorative and noncommercial purposes. Without the prior written approval of the Team, Sponsor may not, directly or indirectly, use such Content or the Marks as an endorsement or certification by the Team of Sponsor or any of Sponsor's goods and services.

## 6. TICKETS

If any Tickets are provided to Sponsor as part of the Advertising and Sponsorship Benefits, such Tickets are provided subject to the condition that if this Agreement is terminated, all barcodes on Tickets on and/or following the termination date will be voided and such Tickets will not permit entry into the Stadium. Notwithstanding the foregoing, all such Tickets must be returned to the Team no later than thirty (30) days following the termination of this Agreement. Sponsor will be required to pay the face value of each Ticket that has not been returned within thirty (30) days following the termination date. No Ticket(s) may be used for advertising, promotion (including contests, giveaways or sweepstakes) or other trade or commercial purposes without the express prior written consent of the Team. The Team reserves the right to cancel, not honor, confiscate or request the return of any Ticket that it reasonably suspects has been used for advertising, promotional (including contests, giveaways or sweepstakes) or other trade or commercial purposes without the express prior written consent of the Team. The exercise of such right by the Team will not result in any liability on the part of the Team or entitle Sponsor to any compensation, credits, rebates, refunds, offsets, make-goods or other remedies.

## 7. REPRESENTATIONS AND WARRANTIES

7.1. The Team represents and warrants to Sponsor as follows:

- (a) it is a [•] duly organized, validly existing and in good standing under the laws of the State of [•];
- (b) this Agreement has been duly executed and validly delivered and, subject to Section 11, constitutes a valid and binding obligation legally enforceable against the Team in accordance with its terms;
- (c) the execution and delivery of this Agreement by the Team and the performance of its obligations hereunder are not in violation of, and do not conflict with or constitute a default under, any of the terms and provisions of its organizational documents, any agreement, indenture or instrument by which it is bound, or any law, regulation, order, decree, judgment or award to which it is subject and aware; and
- (d) it has the legal right, power, authority and capacity to execute, deliver and perform this Agreement.

7.2. Sponsor represents and warrants to the Team as follows:

- (a) it is duly organized, validly existing and in good standing under the laws of the state in which Sponsor is organized and/or registered;
- (b) this Agreement has been duly executed and validly delivered and constitutes a valid and binding obligation legally enforceable against it in accordance with its terms;
- (c) the execution and delivery of this Agreement by Sponsor and the performance of its obligations hereunder are not in violation of its organizational documents and do not conflict with or constitute a default under, any of the terms or provisions of or any agreement, indenture or instrument to which it is bound, or any law, regulation, order, decree, judgment or award to which it is subject and aware;

- (d) it: (i) has the legal right, power, authority and capacity to execute, deliver and perform this Agreement; and (ii) it possess all rights, licenses, bonds and clearances to perform this Agreement;
- (e) all elements, content and/or material included in any Advertisement or provided by Sponsor in connection with any Advertising and Sponsorship Benefits will comply with the requirements set forth in Section 4.1; and
- (f) it will maintain in good standing its qualification to do business in the State of New York and in every other jurisdiction in which the failure to be so qualified or authorized to do business could have a material adverse effect on this Agreement and will comply in all material respects with all applicable governmental laws, rules, regulations and orders.

## 8. SPECIAL TERMINATION AND AMENDMENT RIGHTS OF THE TEAM

8.1. The Team has the right to terminate and/or amend this Agreement, upon thirty (30) days prior written notice to Sponsor if:

- (a) the Team desires, at any time during the Term, to change, structurally alter or demolish the Stadium in a manner which would materially affect the Team's ability to fulfill its obligations under and/or perform the Agreement;
- (b) the Team grants naming rights to the Stadium or enters into an agreement or agreements whereby the Team grant rights similar to naming rights to the Stadium without effectively changing the name of the Stadium (*i.e.*, "Premier Partnership(s)") and doing the foregoing materially affects the Team's ability to fulfill its obligations under and/or perform this Agreement; or
- (c) the Team, in its reasonable discretion, determines that the continued association with Sponsor will be injurious to the goodwill and reputation of the Team.

8.2. In the event the Team exercises the right to terminate the Agreement as set forth in Section 8.1, at any time after the commencement but prior to the conclusion of a Regular Season, Sponsor's sole remedy will be to receive a refund equal to a pro rata portion of the Sponsorship Fee paid with respect to the unexpired portion of the relevant Regular Season. Such refund will be equal to the product obtained by multiplying: (i) the number of Games remaining in the relevant Regular Season following the date of the termination of this Agreement by (ii) the Sponsorship Fee for such Regular Season divided by the number of Games in a Regular Season, which is currently [•].

8.3. In the event the Team exercises the right to terminate the Agreement as set forth in Section 8.1 at any time during the period after the conclusion of a Regular Season (other than the final Regular Season of the Term) and prior to the start of the immediately following Regular Season, then Sponsor's refund will be calculated as follows: STEP 1: multiply the Sponsorship Fee paid for the Regular Season which just concluded by a fraction whose numerator is equal to the number of Advertising and Sponsorship Benefits that extend beyond the Regular Season which just concluded and whose denominator is equal to the total number of Advertising and Sponsorship Benefits Sponsor is to receive each Regular Season pursuant to this Agreement; and STEP 2: multiply the result from STEP 1 by a fraction whose numerator is the number of whole months between the termination date and the start of the immediately following Regular Season and whose denominator is twelve (12) months. The foregoing shall not apply to the final Regular Season of the Term.

8.4. In the event the Team exercises its right to amend the Agreement as set forth herein and such amendment materially decreases the value of the rights and/or Advertising and Sponsorship Benefits granted to Sponsor hereunder, the parties will negotiate in good faith to adjust the terms of this Agreement to provide Sponsor with a reasonable make-good for such decrease and/or reduce the remaining Sponsorship Fee(s) to be paid under this Agreement. If, after thirty (30) days of good faith negotiations, the parties are unable to agree on a reasonable make-good and/or a reduction in each remaining Sponsorship Fee, Sponsor shall have the right to terminate this Agreement upon providing the Team with thirty (30) days' prior written notice.

8.5. If this Agreement is terminated by the Team or Sponsor in accordance with this Section 8, Sponsor's sole remedy shall be a refund of the Sponsorship Fee paid calculated in accordance with Sections 8.2 or 8.3, as the case may be.

## 9. DEFAULT AND TERMINATION

9.1. Sponsor shall be in default under this Agreement upon the occurrence of any one or more of the following events (any such event, an "Sponsor Default"):

- (a) Sponsor fails to pay the Team, when due, any Sponsorship Fee or any other amount due under this Agreement;
- (b) Sponsor fails to perform or observe any of the other material terms, conditions, covenants or obligations under this Agreement or makes any material misrepresentation or materially breaches any warranty under this Agreement and fails to cure such failure, misrepresentation or breach of warranty within thirty (30) days after the Team provides Sponsor written notice thereof; provided, however, the Team, in its sole and absolute discretion, may agree to a longer cure period if such breach cannot be cured within thirty (30) days, but Sponsor has commenced action to effect such cure within the thirty (30) day period and thereafter is diligently pursuing same;
- (c) Sponsor either voluntarily files for bankruptcy, receivership, insolvency, reorganization, dissolution, liquidation or any similar proceedings, as applicable, or involuntarily has a proceeding instituted against it and such proceeding is not dismissed within thirty (30) days; or
- (d) it makes a general assignment for the benefit of creditors.

9.2. Upon the occurrence of any Sponsor Default, the Team may, in addition to all other rights and remedies that it may have, at its option and without notice to Sponsor, do any one or more of the following:

- (a) withhold any and all Advertising and Sponsorship Benefits including Tickets (if applicable) until such Sponsor Default is cured or, if Tickets already have been distributed to Sponsor, void the barcodes on such Tickets and deny holders of Tickets access to the Stadium until such Sponsor Default is cured;
- (b) continue to hold Sponsor responsible for Sponsor's obligations under this Agreement, and all amounts that would have been due during the remainder of the Term, including all remaining Sponsorship Fees until the expiration of the Term shall be due and payable in accordance with this Agreement without any further demand by the Team; and/or
- (c) terminate this Agreement, whereupon: (i) all licenses and rights granted to Sponsor hereunder shall immediately terminate; (ii) Sponsor shall return to the Team all Advertising and Sponsorship Benefits including Tickets (if applicable); (iii) the Team shall have no further obligation of any kind to Sponsor; (iv) Sponsor will not be entitled to a

refund of any amounts paid to date; (v) Sponsor will be responsible for all costs and expenses related to the removal of all Advertisements from all signage space (including the Signage Space); and (vi) the Team may recover from Sponsor, and Sponsor shall pay to the Team, all damages the Team may incur by reason of the Sponsor Default, including all unpaid amounts due with respect to periods prior to termination.

9.3. The Team shall have no duty to mitigate its damages as a result of failure, misrepresentation or default by Sponsor hereunder. The decision whether to grant rights which were granted to Sponsor to any other party and the terms and conditions (including any sponsorship fees payable) of such grant shall be made by the Team in its sole and absolute discretion. Any amounts received by the Team, whether during or after the originally scheduled Term of this Agreement, from any grant of rights specified herein after termination of this Agreement shall not reduce any of Sponsor's obligations and/or liabilities under this Agreement.

9.4. Notwithstanding the provisions of this Section 9 to the contrary, in the event that, pursuant to the Bankruptcy Code, a trustee of Sponsor or Sponsor as debtor-in-possession is permitted to assume this Agreement and does so and, thereafter, desires to assign this Agreement to a third party, which assignment satisfies the requirement of the Bankruptcy Code, the trustee or Sponsor, as the case may be, must notify the Team of the terms and conditions of such proposed assignment in writing. The giving of such notice will constitute an offer to the Team to have this Agreement assigned to it or to its designee for the consideration, or its equivalent in money, and upon such terms and conditions, as is specified in the notice. This offer may be accepted only by written notice to the trustee or Sponsor, as the case may be, by the Team within fifteen (15) days of the Team's receipt of notice from the trustee or Sponsor. If the Team fails to give its notice to the trustee or Sponsor within fifteen (15) days, the trustee or Sponsor may complete the assignment referred to in its notice, but only if such assignment is to the entity named in the notice and for the consideration and upon the terms and conditions specified therein. Nothing contained herein will preclude or impair any rights which the Team may have as a creditor in any proceeding.

9.5. The Team shall be in default under this Agreement if the Team fails to perform or observe any of the material other terms, conditions, covenants or obligations under this Agreement or makes any material misrepresentation or materially breaches any warranty under this Agreement and fails to cure such failure, misrepresentation or breach of warranty within thirty (30) days after Sponsor provides the Team written notice thereof (each a "Team Default"); provided, however, that Sponsor, in its sole and absolute discretion, may agree to a longer cure period if such breach cannot be cured within thirty (30) days, but the Team has commenced action to effect such cure within the thirty (30) day period and thereafter is diligently pursuing same. Upon the occurrence of a Team Default, in addition to all other rights and remedies that Sponsor may have, Sponsor may elect to terminate this Agreement, in which case Sponsor shall have the right to receive a refund of the pro-rata portion of the Sponsorship Fee paid with respect to the unexpired portion of the relevant Regular Season equal to the product obtained by multiplying (i) the number of Games remaining in the relevant Regular Season following the date of termination of this Agreement by (ii) the Sponsorship Fee paid for such Regular Season divided by the number of Games in a Regular Season, which is currently [\*].

## 10. INDEMNIFICATION

10.1. Sponsor agrees to indemnify, defend and hold harmless the Team and each of its direct or indirect partners, owners, parent and affiliated and subsidiary entities including all corporations, limited liability companies, general and limited partnerships and their respective general partners, limited partners, stockholders, owners, members, directors, officers, employees, agents and representatives and, in all cases, each of their respective affiliates (each a "Team Indemnatee") from and against, and to reimburse such Team Indemnatee with respect to, any and all losses, damages, liabilities, costs or expenses (including reasonable attorneys' and professionals' fees and disbursements as they are incurred in connection with investigating, preparing, pursuing or defending any action, claim, suit, investigation or proceeding

related to, arising out of or in connection with any of the following (whether or not pending or threatened and whether or not any Team Indemnitee is a party)): (i) any breach or alleged breach of this Agreement by Sponsor; (ii) any breach or alleged breach of any representation, warranty or covenant of the Sponsor herein contained; (iii) any personal injuries or property damage caused or allegedly caused by the negligence or intentional acts of the Sponsor, its employees, agents, invitees, licensees, contractors, representatives and their respective affiliates or other persons under their control or any user of the Tickets; (iv) any alleged or actual false advertising, fraud, misrepresentation, libel, slander, illegal competition or trade practice, infringement of trademarks, trade names or titles, violations of rights of privacy or publicity or infringement of copyrights or other proprietary and intellectual property rights resulting from or arising out of or in connection with the use or display of any Advertisement or any Advertising and Sponsorship Benefit; or (v) otherwise resulting from any acts or omissions of the Sponsor, its agents, representatives, employees or contractors, whether or not taken in furtherance of this Agreement or otherwise contemplated hereby except to the extent that such claims arise solely as a result of the intentional and deliberate misconduct of any Team Indemnitee.

10.2. The Team agrees to indemnify, defend and hold harmless Sponsor and each of its direct or indirect partners, owners, parent and affiliated and subsidiary entities including all corporations, limited liability companies, general and limited partnerships and their respective general partners, limited partners, stockholders, owners, members, directors, officers, employees, agents and representatives and, in all cases, each of their respective affiliates (each a “Sponsor Indemnitee,” collectively with the Team Indemnitee, the “Indemnified Party”) from and against, and to reimburse such Sponsor Indemnitee with respect to, any and all losses, damages, liabilities, costs or expenses (including reasonable attorneys' and professionals' fees and disbursements as they are incurred in connection with investigating, preparing, pursuing or defending any action, claim, suit, investigation or proceeding related to, arising out of or in connection with any of the following (whether or not pending or threatened and whether or not any Sponsor Indemnitee is a party)): (i) any breach or alleged breach of this Agreement by the Team; (ii) any breach or alleged breach of any representation, warranty or covenant of the Team herein contained; (iii) any alleged or actual false advertising, fraud, misrepresentation, libel, slander, illegal competition or trade practice, infringement of trademarks, trade names or titles, violations of rights of privacy or publicity or infringement of copyrights or other proprietary and intellectual property rights resulting from or arising out of or in connection with the use of any Marks; or (iv) otherwise resulting from any acts or omissions of the Team, its agents, representatives, employees or contractors, whether or not taken in furtherance of this Agreement or otherwise contemplated hereby except to the extent that such claims arise solely as a result of the intentional and deliberate misconduct of the Sponsor Indemnitee. (For purposes of this Section 10, each of the Team and Sponsor is referred to as an “Indemnifying Party.”)

10.3. The Indemnified Party must give the Indemnifying Party reasonable notice of any matter that the Indemnified Party has determined has given or could give rise to a right of indemnification as soon as reasonably possible, stating the amount of the loss, if known, and method of computation thereof, and containing a reference to the provisions of this Agreement in respect of which such right of indemnification is claimed or arises (the “Indemnification Notice”); provided, however, the failure to provide the Indemnification Notice will not release the Indemnifying Party from any of its obligations under this Section 10 except to the extent the Indemnifying Party is materially prejudiced by such failure and will not relieve the Indemnifying Party from any other obligation or liability that it may otherwise have to the Indemnified Party. The Indemnified Party will permit the Indemnifying Party the option to participate in and, at the Indemnifying Party's option, fully control any compromise, settlement, litigation or other resolution of the claim or litigation, but the Indemnifying Party shall not make any agreement that prospectively compromises or limits the Indemnified Party's substantive rights or admits liability on the part of the Indemnified Party without the Indemnified Party's prior written consent (which consent will not be unreasonably withheld). The Indemnified Party may, at its own expense, assist in the defense of any claim to which the indemnification obligation applies. The Indemnified Party will cooperate with the Indemnifying Party in the defense and make available to the Indemnifying Party, at the Indemnifying Party's expense, all witnesses, pertinent records, materials and information in the Indemnified Party's possession or under the Indemnified Party's control relating thereto as is reasonably required and requested by the

Indemnifying Party. In no case will any compromise or limitation implicate rights, obligations or property beyond the subject matter of this Agreement. Without limiting the generality of the foregoing, if the Indemnifying Party fails or refuses to assume the defense of any claims, action or cause of action to which its indemnity applies (whether or not suit has formally been brought), or if, in the reasonable judgment of the Indemnified Party, the Indemnifying Party is failing to provide a suitable defense, the Indemnified Party may, at the sole cost and expense of the Indemnifying Party, assume control of the defense thereof and the Indemnifying Party will be responsible for payment of any settlement of such claim, action or cause of action reached by the Indemnified Party, as well as the costs and expenses (including reasonable attorneys' and professionals' fees) incurred by the Indemnified Party in defending such claim, action or cause of action and/or in reaching such settlement.

10.4. This indemnification provision is in addition to, and not in lieu of, all other remedies that the parties may have and will survive the termination or expiration of this Agreement.

10.5. Sponsor warrants and represents that it has, or will secure, prior to the Installation and will maintain at its sole cost and expense, effective as of the date hereof and continuing for at least three years after the end of the Term: [Insert applicable insurance coverages.]

10.6. All Sponsor's insurance policies must be issued by an admitted insurance carrier with an A.M. Best rating of A- [•] or better. The Team, its parent and affiliated and subsidiary entities, and each of their respective general partners, limited partners, owners, stockholders, members, directors, officers, employees, agents and representatives and, in all cases, each of their respective affiliates (“Additional Insureds”) must be named as Additional Insureds under the [•] insurance policies. All of Sponsor's liability insurance policies must contain cross liability endorsements or their equivalents. Further, coverage for the Additional Insureds shall apply on a primary basis irrespective of any other insurance, whether collectible or not. Any policy deductibles or retentions, whether self-insured or self-funded, shall be the obligation of Sponsor and shall not apply to the Additional Insureds. All Sponsor's policies shall be endorsed to provide a waiver of subrogation in favor of the Additional Insureds and to provide that in the event of cancellation, nonrenewal or material modification the Team shall each receive at least thirty (30) days written notice thereof. Sponsor shall furnish the Team with certificates of insurance evidencing compliance with all insurance provisions noted above prior to the commencement of the Installation and annually at least ten (10) days prior to the expiration of each required insurance policy. The [•] insurance policies must contain the following Additional Insured endorsement:

“ADDITIONAL INSURED: [•], ITS RESPECTIVE PARENT, AFFILIATED AND SUBSIDIARY ENTITIES, AND EACH OF THEIR RESPECTIVE PAST AND PRESENT OFFICERS, LIMITED AND GENERAL PARTNERS, STOCKHOLDERS, OWNERS, MEMBERS, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS AND REPRESENTATIVES, AND, IN ALL CASES, EACH OF THEIR RESPECTIVE AFFILIATES AND [•].”

## 11. LEAGUE SUBSERVIENCE

11.1. Notwithstanding any other provision of this Agreement, [insert applicable League subservience language].

## 12. LIMITATION OF LIABILITY

NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY HEREUNDER FOR ANY PUNITIVE, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES (UNDER ANY THEORY OF LAW), INCLUDING DAMAGES FOR LOST REVENUE, LOST PROFITS OR OTHER ECONOMIC DAMAGE, EVEN IF IT HAS BEEN ADVISED OF OR HAS FORESEEN THE POSSIBILITY OF SUCH DAMAGES, UNLESS SUCH DAMAGES ARISE FROM GROSS NEGLIGENCE, INTENTIONAL ACTS OR FRAUD.

### 13. DISPUTE RESOLUTION

13.1. Dispute Resolution. In the event of any material dispute, controversy or claim of whatever nature arising out of, in connection with, or in relation to the interpretation, performance or breach of this Agreement or the respective rights and obligations of the parties, including any claim based on contract, tort, equity or statute (each a “Dispute”), such Dispute will be resolved by resort to [insert applicable dispute resolution provisions (e.g., cooling off period, mediation, arbitration, litigation)].

### 14. FORCE MAJEURE

14.1. Any delay in the performance of this Agreement by reason of any Force Majeure Event will not constitute a breach of this Agreement or a ground for cancellation, suspension or termination hereof.

14.2. Notwithstanding Section 14.1, if, as a result of any Force Majeure Event, there are [•] or more Lost Games in any Regular Season during the Term, and the number of Lost Games in excess of [•] exceeds the Game Credit for such Regular Season, then Sponsor will be entitled, as its sole remedy, to a refund of the Sponsorship Fee paid in respect of such Regular Season equal to the product obtained by multiplying: (a) the number of Lost Games in excess of [•], recognizing that this Section 14.2 will not be applicable until such time as the number of Lost Games, if any, exceeds [•], after subtracting the Game Credit amount; by (b) the applicable Sponsorship Fee divided by the number of Regular Season Games, which is currently [•].

### 15. NOTICES

All notices, requests, claims, demands and other communications must be in writing and shall be deemed to be duly given on the date of delivery, if transmitted by a nationally recognized courier service or by facsimile (provided a copy of such facsimile is also sent at the time of such facsimile transmission to the recipient by any other means permitted under this Section 15), so as to be received during the hours of 8:00 AM to 5:00 PM, Monday through Friday, or on the date of receipt, if mailed to the person to whom notice is to be given by certified or registered mail, postage prepaid and properly addressed to the address set forth herein or such other address as may be set forth in a written notice of change of address transmitted in the manner set forth in this Section 15.

(a) If to the Team:

[•]

[•]

[•]

Attention: [•]

Phone: [•]

Facsimile: [•]

(b) If to Sponsor: To the person, address and contact information set forth below Sponsor's signature.

## 16. MISCELLANEOUS

16.1. Severability. In case any one or more of the provisions contained in this Agreement or any application thereof shall be deemed invalid, illegal or unenforceable in any respect, such affected provisions shall be construed and deemed rewritten so as to be enforceable to the maximum extent permitted by law, thereby implementing to the maximum extent possible, the intent of the parties hereto, and the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.

16.2. Waiver. Any breach of any term or provision of this Agreement shall be waived only by means of a writing signed by the nonbreaching party which sets forth with particularity the breach being waived and the scope of the waiver. Neither any failure to exercise nor any delay in exercising on the part of either party of any right, power or privilege hereunder shall operate as a waiver thereof; nor will any single or partial exercise of any right, power or privilege hereunder preclude any or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided are cumulative and may be exercised singly or concurrently and are not exclusive of any rights or remedies provided by law.

16.3. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, both written and oral, of the parties regarding the subject matter of this Agreement. Subject to Section 8.4, this Agreement may be amended only by means of a written agreement executed by each of the parties.

16.4. Binding Effect; Assignment. This Agreement and all obligations of the parties are binding upon, shall inure to the benefit of and be enforceable by the parties and successors and permitted assigns of the parties. Neither party may assign or otherwise transfer its rights or obligations under this Agreement without the prior written consent of the other party; provided, however, either party may assign or otherwise transfer this Agreement to any affiliate of such party and/or in connection with the sale or transfer (by merger, consolidation or otherwise) by such party of all, or substantially all, of such party's assets and/or business. In the event Sponsor is authorized to assign this Agreement, and actually assigns this Agreement, Sponsor will nevertheless remain fully bound and liable under this Agreement.

16.5. Counterparts. This Agreement may be executed in counterparts, each of which when executed will be an original but both of which taken together will constitute one and the same agreement. This Agreement may be executed and delivered via facsimile machine or other form of electronic delivery by the parties, which shall be deemed for all purposes as an original.

16.6. Specific Performance; Remedies. Each party acknowledges and agrees that the other party's remedies at law for a material breach or threatened material breach of any of the provisions of this Agreement would be inadequate and, in recognition of that fact, agrees that, in the event of a material breach or threatened material breach of the provisions of this Agreement, in addition to any remedies at law, the nonbreaching party shall, without posting any bond, be entitled to obtain equitable relief in the form of specific performance, a temporary restraining order, a temporary or permanent injunction or any other equitable remedy which may then be available. No remedy herein conferred or reserved is intended to be exclusive of any other available remedy or remedies and each and every remedy shall be cumulative and shall be in addition to every remedy each party may have under this Agreement now or hereafter existing at law or in equity.

- 16.7. No Third Party Beneficiaries. The provisions of this Agreement are not intended to be for the benefit of any creditor, person or other entity (other than League) to whom any debts, liabilities or obligations are owed by (or who otherwise has any claim against) Sponsor or any related party. No such creditor, person or other entity shall obtain any benefit from such provisions or shall, by reason of any such foregoing provision, have any claim in respect of any debt, liability, or obligation against the Team or any related party.
- 16.8. Governing Law; Choice of Venue. [Insert applicable provisions corresponding to dispute resolution provision contained in Section 13.]
- 16.9. Service of Process. EACH OF THE PARTIES HERETO HEREBY ACKNOWLEDGES AND CONFIRMS THAT SERVICE OF ANY PROCESS, SUMMONS, NOTICE OR DOCUMENT BY U.S. CERTIFIED OR REGISTERED MAIL TO SUCH PARTY'S RESPECTIVE ADDRESS SET FORTH IN SECTION 15, ABOVE, SHALL BE EFFECTIVE SERVICE OF PROCESS AND WILL TO THE FULLEST EXTENT ENFORCEABLE BY LAW, BE VALID PERSONAL SERVICE UPON AND PERSONAL DELIVERY TO IT.
- 16.10. Relationship of Parties. Nothing in this Agreement will create any association, partnership, joint venture or agency relationship between the parties. All persons employed by Sponsor in connection with its performance under this Agreement will be Sponsor's employees and Sponsor will be fully responsible for them, except as otherwise explicitly provided in this Agreement.
- 16.11. Survival. The parties agree that all representations and warranties contained in this Agreement will survive the termination and/or expiration of this Agreement. In addition, the parties agree that Sections 10, 11, 12, 13, 15, 16.3, 16.6, 16.7, 16.8, 16.9, 16.11 16.13, 16.16, 16.17 and 16.18 will survive the termination and/or expiration of this Agreement.
- 16.12. Sophistication. Each party to this Agreement represents that it is a sophisticated commercial party capable of understanding all of the terms of this Agreement, that it has had an opportunity to review this Agreement with its counsel and that it enters this Agreement with full knowledge of the terms of this Agreement.
- 16.13. Confidential Information. Each of the parties acknowledges and agrees that the terms of this Agreement and all information imparted to or learned by such party from the other in connection with or pursuant to the negotiation and execution of this Agreement or any rights and obligations associated with any of the foregoing, including any estimates, budgets, proposals, projections, financial statements or other documents prepared in connection with the relationship proposed in the Agreement are confidential. Should a party be required to disclose confidential information received hereunder by an order of a governmental agency, legislative body, or court of competent jurisdiction or pursuant to a subpoena or civil investigative demand, the recipient of the confidential information required to make such disclosure (the "Recipient") shall promptly notify the party who disclosed the confidential information (the "Disclosing Party"), and, upon the request of the latter, shall reasonably cooperate with the Disclosing Party (at the Disclosing Party's expense) in contesting such disclosure. If after such contest, disclosure is still required, then the Recipient shall request confidential treatment of such information from such governmental agency, legislative body or court. Except in connection with failure to discharge responsibilities set forth in the preceding sentence, neither party shall be liable in damages for any disclosures pursuant to such order. Furthermore, each party agrees that such party will not, unless specifically consented to in writing in advance by the other party concerned, divulge, transmit or otherwise disclose any confidential information by any means or media whatsoever to any other person or entity and will not use any confidential information other than as required in the performance of the respective party's duties and obligations

under this Agreement, except when disclosure is: (i) appropriate in order to protect the rights of such party in the event of a default or breach by the other party; (ii) required by the League Documents; or (iii) for either party's attorneys, accountants, bankers, consultants and/or investment bankers. In addition to the foregoing circumstances, the Team shall be permitted to disclose confidential information received hereunder pursuant to any offerings of debt and/or equity by the Team or their past, present and future subsidiaries, parent and sister corporations, limited liability companies, partnerships, affiliates and successors and the like.

16.14. Further Assurances. Each party shall execute, acknowledge, deliver, file and record such further certificates, amendments, instruments and documents, and do all such other acts and things, as may be required by law or as, in the reasonable judgment of the other party, may be necessary or advisable to carry out the intent and purposes of this Agreement.

16.15. Fees and Expenses. Each of the parties shall pay its own fees and expenses incurred in connection with the negotiation, preparation, execution and delivery of this Agreement and any other agreement or document contemplated hereby.

16.16. No Recourse Against the Team's Owners. No direct or indirect owner of the Team shall have any personal liability with respect to any of the Team's obligations under this Agreement by reason of his or its ownership status. In addition, no officer, director or employee of the Team shall have any personal liability with respect to the Team's obligations under the Agreement by any reason of his or her status as officer, director or employee.

16.17. No Presumption. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party which drafted or caused this Agreement to be drafted.

16.18. Certain Rules of Interpretation. For purposes of this Agreement, whenever the words "include," "includes," or "including" are used, they shall be deemed to be followed by the words "without limitation," and, whenever the circumstances or the context requires, the singular shall be construed as the plural, the masculine shall be construed as the feminine and/or the neuter and vice versa. As used in this Agreement, the words "herein," "hereof," "hereby" and "hereunder" shall refer to the Agreement as a whole, and not to any particular section, provision or subdivision thereof. All references to a "Section" shall mean section of this Agreement, unless the context otherwise requires. The captions used in this Agreement are intended for convenience of reference only, shall not constitute any part of this Agreement and shall not modify or affect in any manner the meaning or interpretation of any of the provisions of this Agreement.

**EXHIBIT C**  
**Advertising Category**

1. The content and format of each Advertisement will: (i) be subject to the prior written approval of the Team pursuant to Section 4.1 of Exhibit B (Terms and Conditions) and (ii) only market, promote or advertise the following goods and/or services: \_\_\_\_\_ (the "Advertising Category").

[2. Unless otherwise provided in this Agreement, nothing contained herein grants Sponsor any exclusive rights in the Advertising Category.]

[2. Subject to Section 11 of Exhibit B (Terms and Conditions) and any other restrictions set forth in this Exhibit C, Sponsor and the goods and services offered by Sponsor in the Advertising Category will be the exclusive sponsor,

goods and services in the Advertising Category permitted to be advertised, marketed and/or promoted in the Stadium and permitted to be associated with the Team and the Marks in the Territory. Notwithstanding the foregoing, the exclusivity granted herein does not apply to the following means, media and properties: [•].

**EXHIBIT D**  
**Signage Space**

[Insert picture and description.]

**EXHIBIT E**  
**Advertising and Sponsorship Benefits**

In consideration of the covenants, agreements, representations, warranties and obligations set forth in the Agreement, Sponsor will receive the following Advertising and Sponsorship Benefits (as applicable) during each Regular Season and each period of time between Regular Seasons during the Term: [Insert applicable Advertising and Sponsorship Benefits.]

**EXHIBIT F**  
**Certain Definitions**

For purposes of this Agreement, unless otherwise defined herein or the context requires a different definition, the following terms shall have the following meanings:

“Additional Insureds” shall have the meaning assigned thereto in Section 10.6 of Exhibit B (Terms and Conditions).

“Adverse Weather Condition(s)” mean(s) rain, freezing rain, snow, sleet, hail, fog, tornado, flood, hurricane, tsunami (caused by hurricane), lightning or any other adverse atmospheric condition with respect to temperature, pressure, humidity, wind and/or any combination thereof.

“Advertisement” means any visual display advertisement, sign, other advertisement and/or display, including replacement(s) thereof, exhibited on any signage space (including the Signage Space) in the Stadium provided by Sponsor (including any print materials) which includes any of Sponsor's logos, trademarks or trade dress.

“Advertising and Sponsorship Benefits” means the advertising and sponsorship benefits set forth in Exhibit E (Advertising and Sponsorship Benefits).

“Advertising Category” shall have the meaning assigned thereto in Section 1 of Exhibit C (Advertising Category).

“Agreement” shall have the meaning assigned thereto in the introductory paragraph of the Agreement.

“Competitive Company(ies)” shall have the meaning assigned thereto in subsection 1.3 of Exhibit B (Terms and Conditions).

“Content” means any trademarks, text, graphics, audio, video, information, copyrightable rights, photographs and other pictures, images, moral rights, literary names, voices, biographical data, publicity, privacy or other personality rights

of any person, domain names and other intellectual property, including all derivative works therefrom, recorded or unrecorded in any medium, now existing or hereafter created.

“Disclosing Party” shall have the meaning assigned thereto in Section 16.13 of Exhibit B (Terms and Conditions).

“Event” means all charitable, religious, civic, political, sport, private, public and other productions and/or events that are held in the Stadium (other than the Games).

“Force Majeure Event” means any (i) act of God, (ii) disease, (iii) epidemic, (iv) hostility (whether war is declared or not), (v) civil war, (vi) rebellion, (vii) revolution, (viii) insurrection, (ix) military or usurped power or confiscation, (x) nationalization, (xi) government sanction, regulation or restriction, (xii) riot, (xiii) crime, (xiv) act of terrorism, (xv) enemy action, (xvi) civil commotion, (xvii) unavoidable casualty, (xviii) fire, (xix) earthquake, (xx) interruption or failure of electricity or utilities, (xxi) electrical, utilities or mechanical difficulty, (xxii) inability to obtain labor, (xxiii) lack of materials, (xxiv) strike, (xxv) lockout, (xxvi) work stoppage or other labor disturbance, (xxvii) Adverse Weather Condition or (xxviii) any other cause or condition, whether similar or dissimilar to any of the foregoing, beyond the reasonable control of the Team.

“Game(s)” mean(s) the annual League home games participated in by the Team in the Stadium during the Regular Season for determining the participants in the Postseason Games, but excluding all pre-season games, exhibition games and Events.

“Game Credit” means, for any given year during the Term, the total number of Games which will be credited against Lost Games; such credit being equal to the sum of [•].

“Indemnification Notice” shall have the meaning assigned thereto in Section 10.3 of Exhibit B (Terms and Conditions).

“Indemnified Party” shall have the meaning assigned thereto in Section 10.2 of Exhibit B (Terms and Conditions).

“Indemnifying Party” shall have the meaning assigned thereto in Section 10.2 of Exhibit B (Terms and Conditions).

“Installation” shall have the meaning assigned thereto in Section 4.2 of Exhibit B (Terms and Conditions).

“Lost Game” means a Game that is (i) cancelled, (ii) not rescheduled to be played and (iii) not played at the Stadium at a later date within the same Regular Season.

“Marks” mean all nicknames, slogans, emblems, logotypes, insignia, designs, devices, colors, artwork, coats of arms, trophies, uniforms, uniform designs, helmet designs, trademarks, trade names, service marks, trade dress and copyrights in each of the above, mascots (including all names and designs), and the commercial goodwill associated therewith, that at any time were or are owned, applied to be registered or registered (irrespective of class of goods/services), controlled, cleared for use by, or on behalf of, or licensed by the Team.

“League” means [•].

“Postseason Game(s)” mean(s) the League Home games participated in by the Team in the Stadium after the conclusion of the Regular Season and through the conclusion of the ultimate championship round of the playoffs.

“Recipient” shall have the meaning assigned thereto in Section 16.13 of Exhibit B (Terms and Conditions).

“Regular Season” means the regular League season during which the Team participates in Games and which commences and ends on such dates as determined by League.

“Signage Space” means the visual display advertising space specified in Exhibit D (Signage Space). Except as otherwise agreed to, all Advertisements will be produced, supplied and installed (if applicable) by Sponsor at its sole cost and expense.

“Sponsor” shall have the meaning assigned thereto in the introductory paragraph of this Agreement.

“Sponsor Default” shall have the meaning assigned thereto in Section 9.1 of Exhibit B (Terms and Conditions).

“Sponsor Indemnitee” shall have the meaning assigned thereto in Section 10.2 of Exhibit B (Terms and Conditions).

“Sponsorship Fee” means the portion of the Total Sponsorship Fee payable by Sponsor to the Team for each Regular Season as set forth in Exhibit A (Sponsorship Fee).

“Stadium” means the stadium currently located at [•].

“Taxes” mean any and all use, sales, privilege, rental, admission, amusement, entertainment, occupancy or other taxes, charges, impositions, levies, fees and assessments, that are or may be assessed, levied or imposed with respect to any of the rights granted pursuant to the Agreement and/or any Advertising and Sponsorship Benefits regardless of whom the tax, charge, imposition or levy is assessed, levied or imposed upon (i.e., the Team or the Sponsor) but specifically excludes the Team's income taxes.

“Team” shall have the meaning assigned thereto in the introductory paragraph of this Agreement.

“Team Default” shall have the meaning assigned thereto in Section 9.5 of Exhibit B (Terms and Conditions).

“Team Indemnitees” shall have the meaning assigned thereto in Section 10.1 of Exhibit B (Terms and Conditions).

“Term” shall have the meaning assigned thereto on the first page of this Agreement.

“Territory” means [•].

“Ticket(s)” mean(s) ticket(s), pass(es), code(s) or equivalent(s) permitting admission to the Games and Events in the Stadium and which correspond to specific seating location(s) designated thereon.

“Total Sponsorship Fee” means the aggregate sum of all Sponsorship Fees payable by Sponsor to the Team during the Term as set forth in Paragraph 2 of the Agreement.

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