

JUDICIAL REVIEW OF NFL DRUG CASES:

Backgrounder on the Minnesota Vikings steroids case and Judge Magnuson's injunction against discipline

PENN STATE INSTITUTE FOR SPORTS LAW, POLICY & RESEARCH

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[GENERAL NOTE: THIS IS FIRST IN A SERIES OF TOPICAL DISCUSSIONS WRITTEN FOR THE PUBLIC, WITH SPECIAL ATTENTION TO THE SPORTS MEDIA. FEEDBACK FROM REPORTERS ARE PARTICULARLY WELCOME, EITHER DIRECTLY TO STEVE ROSS AT SFR10@PSU.EDU OR VIA MY COLLEAGUE MALCOLM MORAN, KNIGHT PROFESSOR OF SPORTS JOURNALISM AT PENN STATE.]

Introduction

Last month, Judge Paul Magnuson of the United States District Court in Minneapolis issued an injunction barring the NFL from disciplining five players who had tested positive for the diuretic bumetanide and who were suspended pursuant to the NFL's Policy on Anabolic Steroids and Related Substances. (The drug itself is not performance-enhancing, but has been found to mask the presence of performance-enhancing steroids). Under the league's collective bargaining agreement with its players, discipline for violations of the Steroid Policy is not subject to review by a neutral labor arbitrator. This is in contrast to other provisions of the NFL/NFLPA agreement requiring arbitration before a neutral veteran labor arbitrator of disputes concerning the interpretation of a contract, or before a neutral medical doctor of disputes concerning whether an injury was football-related. This is also in contrast to provisions in the Baseball agreement that expressly provide that most off-field disciplinary matters are reviewable by a neutral arbitrator.

The players claimed that discipline was inappropriate given the particular facts of their cases: all five claimed to have ingested the banned diuretic as part of an over-the-counter weight loss supplement not on the NFL's list of banned substances, that they had called the NFL's "hotline" to inquire as to whether this supplement was free of banned substances, and that the NFL knew that the supplement contained a banned substance but declined to provide that information to these athletes. Because the collective bargaining agreement does not allow review by a neutral arbitrator, these appeals were considered by the NFL's designated "arbitrator," Vice President/General Counsel Jeffrey Pash. Pash concluded that the failure of NFL officials responsible for administering the drug policy to inform players of this banned substance did not excuse the players from discipline – in essence adopting the very strictest form of "strict liability" for drug violations.

Summary of Decision

Judge Magnuson appears to have granted an extension of the preliminary injunction for the following reasons:

- 1) the balance of equities clearly favors the plaintiff
- 2) since the NFL's justification for its strict liability policy was IN PART based on the ability of players to obtain information from a hotline, it is inequitable for the league to withhold factual information from players and then impose strict liability
- 3) Jeff Pash's determination that strict liability still applied here is proof that Pash was "prejudiced" by his "partiality"
- 4) the arbitration award is void as contrary to the public policy of New York (the site of the NFL), because NFL employees breached a fiduciary duty owed to the players and the failure to create an exception to the strict liability policy in the face of such a breach means that the award "appears to sanction" the breaches
- 5) the effect on a playoff contender of the suspension of key players constitutes irreparable harm to the players as well as fans

This is a far-reaching opinion which, if not reversed, would be a major loss to the NFL. I would expect them to refuse to settle and to appeal, in hopes that, like the Second Circuit in *Clarett* (the decision reversing a district court decision striking down the rule requiring players to spend three years in college before entering the NFL draft), the Eighth Circuit will reverse. The decision makes it extremely difficult for a league and union to agree on a non-neutral in-house arbitrator, and to agree on strict liability for banned substances. (The NFL's defenders are prone to overstate how bad adverse decisions are to their cause, but not here.)

Analysis: Public Policy

As a matter of sports policy, the result is not troubling. For highly publicized major sports, neutral arbitration of discipline cases is much preferred; it is not credible to think that even a very smart individual with high integrity, as NFL VP Jeff Pash clearly is, will decide cases irrespective of a complex mix of corporate strategies. The case for importing the international policy of strict liability onto our shores has not been made; specifically, it is not clear why a rule that places a strong burden on a positive-tested athlete to persuade a suitable neutral that they did not do anything worthy of discipline is not sufficiently effective to achieve the goals of controlled substance policies.

Dean Gary Roberts, who has balanced expertise as a Vikings fan and former outside counsel to the NFL, agrees with this policy assessment:

A neutral arbitration body or person would be better positioned to resolve these types of issues without the risk illustrated in this case of having a court or the public perceive some conflict of interest, which in reality doesn't exist since Jeff Pash was simply administering the league's policy, not arbitrating a dispute. Thus, the league would insulate itself from criticism and interference if it used non-league personnel to make these administrative judgments, but with a defense

that placed a heavy burden on the athlete who tests positive to prove with clear and convincing evidence that he did nothing wrong either intentionally or negligently. The fact that the substance involved here was not a performance enhancer, but rather simply a masking agent (which reminds me of the athletes barred from the Turin Olympics because they used a hair loss medicine), makes this case even more appealing for that view. Thus when the league's own general counsel renders a decision that seems extremely strict and unbending, it creates an unnecessary risk and invites unwanted judicial interference. The league would be better off leaving these kinds of decisions to neutral outsiders

Professor Abrams, a veteran labor arbitrator, concurs:

Pash's decision dramatically enlarges the scope of the Policy to cover any substance that contains masking substances and not just the list of proscribed substances. It provides the players with no way to discover whether they are actually taking the masking substances. The NFL's answer - just say no - is bizarre because presumably there are good things out there that players should take, but they will be deterred from taking them because they cannot know whether they will eventually fall into a hidden hole.

Under a collective agreement with real arbitration, a real neutral's decision that mirrors what Jeff did would be upheld in a nonce, but no real arbitrator I know (including me) would decide this case the way Jeff did. To ignore the NFL's wrongdoing would be to make the Policy a joke at which no one is laughing.

On the specific facts of this case, the league's position is very weak from a public policy perspective. Neither the integrity of the sporting competition nor the health of players is seriously endangered when 5 players unknowingly used a substance banned only because it could be used to mask performance-enhancing drug. (And this from a league that permits widespread use of a whole pharmacopia of health-harming, performance-enhancing drugs like cortisone.) Banning the players, in contrast, could have had a real effect on an exciting NFL season.

Professor Matt Mitten takes a somewhat more nuanced view:

The NFL drug testing policy, which provides for strict liability (same standard as for Olympic and NCAA sports) and appoints the NFL commissioner or his designee as the "arbitrator" to resolve player appeals, is a product of arms-length collective bargaining. The NFLPA did not insist on a mutually acceptable arbitrator independent of the parties. Unlike the WADA Code used in international sports and the Olympics, there apparently is no provision in the NFL drug protocol for reducing or eliminating a player's sanction (e.g., 4-game suspension) for a positive test based on no fault/negligence or no significant fault/negligence. If so, it appears that the NFL and NFLPA agreed on literal "strict liability" for a positive test unless there was a material defect in the collection, chain of custody, or testing of a player's urine sample (which would

negate a positive test).

Analysis: Legal Precedent

Despite what some may view as a correct result, the legal analysis used by Judge Magnuson in enjoining discipline is troublesome and has some quite broad implications:

1) In terms of interim equitable relief in sports cases, Judge Magnuson's analysis means that there is only one test: "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." (*See the Appendix for a detailed discussion of this legal point.*) Unlike the traditional test courts use, this single standard seems inappropriately Solomonic.

2) It is true that Jeff Pash adopted a position of VERY strict liability: not only does the league not have to prove that the players knowingly ingested a banned substance, not only is he unwilling to allow players to meet a heavy burden to demonstrate that they did not do anything wrong (keep in mind that the banned substance that the players unknowingly ingested is banned on prophylactic ground, not itself a performance-enhancing drug), but he is unwilling to let the players off despite wrongdoing from league officials. That said, the injunction is essentially grounded on Judge Magnuson's conclusion that the NFL has committed a breach of duty in violation of the public policy of the State of New York. Pash's refusal to deviate from this extreme view is not evidence of prejudice, nor does it "sanction" a breach of fiduciary duty. Like the exclusionary rule controversies in Fourth Amendment cases where police have seized evidence without a warrant or probable cause, Pash simply thinks that, like Justice Benjamin Cardozo famously observed, that the criminal should not go free because the constable blundered.

Judge Magnuson seems to be stretching the law in this regard because he otherwise felt bound to accept Pash's judgment as that of an arbitrator. Professor Abrams – a leading labor law expert and distinguished arbitrator himself -- observes that the Supreme Court, in the landmark *Steelworkers Trilogy* decisions, held that courts are not to disturb the judgment of the arbitrator designated by labor and management in a collective bargaining agreement as long as the arbitrator seems to be basing his decision on the terms negotiated by the parties. Pash's decision, however,

is not arbitration as Justice Douglas envisioned it in the *Steelworkers Trilogy*. It is an alternative to Alternative Dispute Resolution -- management has the power to decide what the Policy means and how should it be applied. There is nothing evil in that, especially in the hands of a man like Jeff Pash, but it is not "arbitration." It is rather the "administration" of a negotiated deal.

There is a long history of unilateral administration (which is called "arbitration") in sports. Under the first negotiated arbitration provision in baseball, the commissioner was the designated "arbitrator." None of Bowie Kuhn's decisions (if he made any) were contested in court, as far as I know. This type of administration system should not enjoy the broad presumptions neutral labor arbitrators enjoy. Jeff Pash is simply imposing one side's version of the Policy,

rather than attempting to apply the mutual intent of both parties. Although both parties set up this system, Pash's determinations should be seen for what they are, management's application of the Policy.

That said, Professor Abrams concludes that, even shorn of the deference given to neutral arbitrators, federal courts should not disturb Pash's judgment. Specifically, Abrams notes that

NFL management does not owe the players a "fiduciary duty." Employees are not owed a fiduciary duty by their employers. They are owed in this particular context whatever the Policy gives them as administered by the NFL management. If they want something better, they need to get it through negotiations.

3) The judge was not clear in addressing the plaintiffs' claim that the NFL's discipline violated Minnesota law concerning employee drug testing. (The relevant statutes can be found at

<http://www.house.leg.state.mn.us/hrd/pubs/dgaltest.pdf>

<https://www.revisor.leg.state.mn.us/statutes/?id=181.938&year=2008>

The court reasoned that federal labor law (specifically, §301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a)) did not permit unions and employers to agree on terms that violate state law. This misses the point. Under several precedents (*see appendix for details*), whenever a sports league rule needs to be uniform, application of state law would require the league to adopt the most restrict state law, which constitutes an undue burden on interstate commerce. Clearly, there can't be one steroid policy for Vikings players and another policy for the Green Bay Packers if Wisconsin law differs. Dean Roberts predicts: "If Judge Magnuson doesn't realize that the dormant commerce clause of the US Constitution precludes an individual state from regulating an inherently nationwide business practice, the Eighth Circuit Court of Appeals almost certainly will." Professor Mitten observes that the case seems similar to a Texas case involving an Olympic athlete (*also discussed in the appendix*) where the court found that state fiduciary duty law was preempted by federal law. In his view, "Judge Magnuson is going in the opposite direction."

It may be, as Professor Roger Abrams observes, that Judge Magnuson

does seem rather appalled by the NFL's sneaky two step - (1) we won't tell you anything about the stuff you are taking even though we know it contains a banned substance which you can't discover on your own and (2) then we will impose strict liability without fault when you take the stuff ignoring all the inequities we have created.

Nonetheless, the issuance of an injunction, even when the plaintiff's legal theory is ultimately likely to be found wanting, whenever a judge feels that the equities demand it, may seem too unrestrained for many observers. Moreover, the hostility to strict liability and non-neutral arbitration may hamstring the ability of the NFL and its players to reach agreement on this specific issue, either alone or as part of the broad package of issues on which they must agree.

Conclusion

For those not willing to completely bar non-neutral disciplinary arbitrators and strict liability, the clear course for the NFL is to abide by the preliminary injunction and to appeal Judge Magnuson's conclusions that (i) non-neutral arbitrators are subject to review if they display their "prejudice" by failing to agree with arguments that federal judges find persuasive and (ii) imposing discipline for rules violations despite blundering league officials amounts to a "sanction" of these blunders, which violates public policy.

APPENDIX TO BACKGROUNDER ON MINNESOTA STEROID DECISION

A: *Legal Standard for Granting Injunctions*

Each circuit court of appeals has its own standards for when to grant injunctions pending a full trial (the Supreme Court tolerates this diversity). Judge Magnuson is bound by the standards set forth by the Eighth Circuit Court of Appeals (who has jurisdiction over cases in Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Missouri and Arkansas). Their precedent, cited in his opinion, is a fairly conventional four-part test; the plaintiff seeking an injunction needs to show (1) a likelihood of success on the merits; (2) the plaintiff's harm cannot be compensated after the fact by money or other means ("irreparable harm"); (3) the plaintiff would suffer greater harm from withholding relief than the defendant would suffer if the injunction issues; (4) the public interest favors the plaintiff.

Judge Magnuson explicitly (without explanation) departed from the first of the 8th Circuit's test, likelihood of success on the merits. He concluded that the second test - irreparable harm - is always met in sports cases whenever a suspension could jeopardize the player's team's chances for the playoffs. He concludes that the fourth test - the public interest - is met whenever a plaintiff is unfairly going to be punished. So we are entirely back to test #3, balance of the equities.

B: *Precedents on state law application to sports leagues* (thanks to Prof Mitten for discussion of *Walton-Floyd*)

In *Flood v. Kuhn* (1972), the U.S. Supreme Court famously re-affirmed the 1922 *Federal Baseball* opinion exempting baseball from a challenge to its rules limiting competition among clubs for players' services, concluding that the issue must be resolved by Congress. At the end of the opinion, Justice Blackmun briefly dismissed a claim that state antitrust statutes might apply. The Court found that application of state law would constitute an undue burden on interstate commerce, which states may not do without explicit congressional approval (this is the so-called "Dormant Commerce Clause," because states' inability to burden interstate commerce is implied from the Constitution's grant of authority to Congress to regulate interstate commerce).

In *Partee v. San Diego Chargers* (1983), the California Supreme Court applied *Flood* in rejecting a lawsuit based on a non-antitrust state statute. Again, the Court noted that certain rules must necessarily be uniform throughout a league. If an individual state's law barred teams within that state from following the law, the league would either have to stop doing business in that state, or change all its rules to conform to the dictates of that single state. This constituted an undue burden on interstate commerce.

In *Walton-Floyd v United States Olympic Committee*, 965 SW 2d 35 (Tex Ct App 1998), an Olympic track and field athlete asked the court to overturn her suspension for a positive drug test on the ground she received negligent advice from the USOC's drug hotline concerning Sydnocarb, a carbohydrate supplement she took that contained a banned substance (amphetamines). She alleged the USOC hotline operator negligently told her this product was

not on the banned list, but she acknowledged the operator did not tell her it was safe to use or provide any other assurances. She alleged, inter alia, that the USOC was negligent for "not keeping its list of banned substances up to date to include Sydnocarb, despite actual knowledge and industry knowledge concerning Sydnocarb, and the fact that it represented an amphetamine derivative." In addition, she asserted "that the USOC owed her a duty, because the USOC represented itself as an expert in the field of illegal substances, instructed athletes to use its hotline to obtain information on those substances, provided her with inaccurate information, and intentionally or negligently misled her regarding the risk of taking Sydnocarb." The court held that her state law claims were preempted by the federal Amateur Sports Act, which provides that final and binding AAA arbitration is an Olympic athlete's exclusive avenue for obtaining external legal relief in an eligibility dispute. The result in *Walton-Floyd* (which presents a more compelling factual case because the athlete was allegedly given incorrect information) is consistent with the cases holding that the Dormant Commerce Clause precludes the use of state law to resolve disputes that arise out of the terms of a CBA. In both types of cases, federal law governs to achieve consistency nationwide.

These precedents can be illustrated by considering a state's effort to impose occupational safety rules on the NFL. If Pennsylvania imposed a rule barring blocking below the knee, the rule would be unconstitutional: obviously, the NFL can't function with different blocking rules whenever the Steelers or Eagles are playing at home. However, Florida could lawfully impose a rule barring playing football on artificial turf: the NFL has no uniform rule concerning this topic, allowing each team to select its own playing surface. Thus, the Bucs, Dolphins, and Jaguars could comply with Florida law without it affecting others.