2 The WGA Strike | 6 Collegiate Trademark Protection | 9 Fantasy Sports Dispute | 11 Retroactive Copyright Licensing | 14 The NBA's Age Eligibility Rules | 18 Rangers' Digital Tussle with NHL | 23 Joint Authorship in Film | 26 Online Ticket Sellouts

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Foul Use?

FTC Declines to Take Action Against Allegedly Overbroad and Misleading Copyright Warnings

BY SCOTT L. WALKER AND MATTHEW SAVARE

Being avid fans of sports and entertainment and practicing attorneys in those fields, we can not help but take notice of the copyright warnings used by the various sports leagues, individual teams, studios, and publishers with respect to their intellectual properties. Whereas our involvement in this narrow area has usually involved impressing (or annoying) our friends and families with an occasional primer on copyright law, the Computer & Communications Industry Association ("CCIA")[1] took action regarding those warnings by filing a complaint with the Federal Trade Commission ("FTC"), alleging that the

CONTINUED ON PAGE 28

Taking Matters Into Their Own Hands

Athlete Lawsuits Against Supplement Companies Following Positive Drug Tests

BY HOWARD JACOBS

The issue of steroids in sports is discussed on a daily basis in print media, television, and radio; it has even been the subject of congressional inquiries. Typical subjects of these discussions include which athletes have tested positive for steroids, which athletes are suspected to be using steroids, and what (if anything) can be done to stop steroid use in sports. When an athlete tests positive for steroids, it is generally assumed that the test is accurate and that the only conclusion is that the athlete is a steroid user. Athlete protestations of innocence are generally ridiculed by the media. One of the more

CONTINUED ON PAGE 35

Profile: Debbie Spander, Entertainment *and* Sports Lawyer

BY HEATHER YEARWOOD

For some, an affinity for the world of sports and entertainment seems to be woven into their DNA. Not only do such people have a deep-rooted love for the dynamics of the industry, but they also possess an innate ability to shape its evolution. Debbie Spander, vice president of business and legal affairs for Comedy Central and AtomFilms, divisions of MTV Entertainment, is one such professional. Her story shows that entertainment and sports law are symbiotic, if not inseverable. Indeed, when planning to air a sports event on television, would the requisite lawyer be a sports lawyer or an entertainment lawyer? Even if there were a correct answer to the preceding rhetorical question, Spander could do the deal either way.

Growing up, she embraced her family's love of the sports business. Her father, Art Spander, was a successful sports writer for the *Oakland Tribune* and was eventually inducted into the NFL Hall of Fame for his reporting.

CONTINUED ON PAGE 33

Taking Matters Into Their Own Hands

Athlete Lawsuits Against Supplement Companies Following Positive Drug Tests

CONTINUED FROM PAGE 1

frequent athlete defenses is that the positive test was caused by a contaminated supplement.

Some athletes who claim supplement contamination after a positive drug test have no evidence to support their claim. Others, however, do have evidence, usually in the form of testing of their supplements that shows the presence of unlabeled steroids or steroid precursors. Because of the very strict rules that govern athlete drug testing and discipline, proof of supplement contamination is usually not a basis for the athlete to be cleared in a disciplinary hearing, but it can form the basis for an athlete to receive a reduced suspension.

Athletes who have been suspended from their sport, even after presenting evidence that the supplements that they were taking were contaminated, suffer tremendously. They are prevented from participating in their sport, often for a lengthy period of time, costing them significant sums of money in the form of lost salary, lost prize money, and lost endorsements. Many miss the opportunity to compete in their sports' ultimate competitions such as the Olympic Games or the Super Bowl. Most significantly, in today's "steroid era," these athletes are forever branded as "steroid users," a stigma that affects their reputation and their earning capacity for the rest of their lives. Some of these athletes have fought back by suing for monetary damages the supplement companies that caused them to be suspended and that have caused them to suffer these tremendous damages and to lose incalculable opportunities.

When the anti-doping agencies are not concerned with how or why athletes test positive for steroids, then the athletes unfairly take full blame for a supplement contamination problem over which they have no control. In addition, while Congress continues to call for hearings over steroid use in sports, further fueling the intense public scrutiny against any athlete who tests positive, it does not show the same willingness to address the issue of supplement contamination. As a result, the public has developed very strong opinions about steroid use in sports but remains largely ignorant about the problem with and issues surrounding supplements that are contaminated with steroids and steroid precursors.

The issues of anti-doping and steroid use in sports, like many issues in society, are not black and white, but, rather, are consumed with many grey areas. One of these grey areas involves athletes who test positive for steroids as a result of taking contaminated supplements. This article will discuss the supplement contamination problem generally, the strict liability standard in sports drug testing and how it has been applied in supplement contamination cases, and the interesting legal and evidentiary issues that arise when an athlete sues a supplement company alleging supplement contamination.

STRICT LIABILITY STANDARD

Most sports drug testing applies a strict liability standard of one form or another. Under such a system, it is the mere presence of a prohibited sub-

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stance in the athlete's urine or blood that constitutes a doping offense. For example, the World Anti-Doping Code ("WADC") article 2.1.1, Comment, provides: "Under the strict liability principle, an anti-doping rule violation occurs whenever a Prohibited Substance is found in an Athlete's bodily Specimen. The violation occurs whether or not the athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault." The rationale for this rule is often stated that it would be virtually impossible to establish that an athlete intended to dope. Whether or not this rationale is true, it has been repeated as the basis for the strict liability rule.

In a case where an athlete takes a contaminated supplement that causes him or her to test positive for steroids, the strict liability rule means that the athlete will still be suspended because it is irrelevant that the athlete did not intend to take steroids or even did not know that his or her supplement was contaminated with steroids or steroid precursors. Under the WADC, the proof of contamination, while irrelevant to the finding of a doping offense in the first place, is relevant to the length of sanction that will be imposed upon the athlete.

Under the WADC, article 10.2, the ordinary penalty for a first positive test for steroids is two years and the ordinary penalty for a second positive test involving steroids is a lifetime suspension. The WADC, at article 10.5, allows for the reduction of these otherwise applicable periods of suspension on a showing of exceptional circumstances. If an athlete can establish that he or she bears no fault or negligence for the positive test, then WADC article 10.5.1 provides that the otherwise applicable period of suspension can be eliminated. If an athlete can establish that he or she bears no significant fault or negligence for the positive test, then WADC article 10.5.2 provides that the otherwise applicable period of suspension can be reduced, but in no event can the suspension period be less than one year for a first steroid offense or less than eight years for a second steroid offense. The comments to WADC article 10.5.1 provide that proof that a contaminated supplement caused a positive test cannot be the basis for a finding of no fault or negligence but can be the basis for a finding of no significant fault or negligence. Therefore, under the WADC, if an athlete proves that his or her supplement was contaminated and that the contamination likely caused the positive test, the minimum possible suspension under the WADC is one year for a first positive test and eight years for a second positive test.

The application of the strict liability rule to supplement contamination cases is well illustrated in the decision in *Knauss v. FIS* (CAS 2005/A/847). In that case, skier Hans Knauss had tested positive for a very low level of a steroid metabolite, 19-norandrosterone. His supplements were tested, and testing of his multivitamin revealed the presence of contamination with a steroid precursor (19-norandrostenedione) that was consistent with the positive urine test. The Court of Arbitration for Sport ("CAS") Arbitration Panel accepted that the multivitamin was contaminated and accepted that the contamination was the likely cause of the positive urine test. Those factors led to a reduction of the otherwise applicable two-year suspension to 18 months:

THE VIOLATION OCCURS WHETHER OR NOT THE ATHLETE INTENTIONALLY OR UNINTENTIONALLY USED A PROHIBITED SUBSTANCE.

> The Appellant did not take the contaminated or mislabelled nutritional supplement for the purpose of benefiting from the prohibited substance. The Appellant did not know that the nutritional supplement contained the prohibited substance until the adverse findings were made. Furthermore, neither the packet itself nor the leaflet with the packet stated that the product contained a prohibited substance . . . Of course, the Appellant could have had the nutritional supplement tested for its content. He could also have avoided the risk associated with nutritional supplements by simply not taking any. However, in the Panel's opinion, these failures give rise to ordinary fault or negligence at most, but do not fit the category of "significant" fault or negligence . . . In examining and evaluating the above facts in their totality, the Panel finds that the present case deviates substantially from the "typical doping case" pursuant to Article 10.2 FIS-Rules and thus must be qualified as "exceptional" according to Article 10.5 FIS-Rules. The legal opinion argued here is also confirmed by the example contained in the (official) comments on Article 10.5.2 WADC.

SUPPLEMENT CONTAMINATION

Senator George Mitchell, in the recent *Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball*, at page 60, stated as follows:

> In 1994 Congress passed and the President signed into law the Dietary Supplement Health and Education Act. It was approved unanimously by the Senate, without objection. I was the Majority Leader of the Senate when DSHEA was approved. It was one of thousands of measures that the Senate considered during my tenure. Today, thirteen years later, I have only a vague recollection of the Senate's consideration of the Act. However, with the benefit of hindsight, knowing what I now know, I regret that I did not speak out against the manner of regulating supplements that resulted from enactment of that law.

Supplement contamination has been a problem since the enactment of the Dietary Supplement Health and Education Act of 1994 ("DSHEA"). DSHEA essentially eliminated any requirement that supplement companies establish that their products were safe before offering them for sale. Instead,

the burden was placed on the already underfunded Food and Drug Administration to prove that a supplement was unsafe in order to remove it from the store shelves (as was eventually done with supplements containing ephedra). In addition, DSHEA did not require supplement companies to comply with any established Good Manufacturing Practices. The deregulation of supplements by DSHEA created a huge supplement industry that exceeds $18 billion in annual sales. With that deregulation have come a number of problems.

The Institute of Medicine of the National Academies recently issued a report titled *Complementary and Alternative Medicine ('CAM') in the United States* ("*IOM Report*"). That report contained an entire chapter on dietary supplements and the problems in the supplement industry. The *IOM Report* found, inter alia, that (1) 40 percent of the U.S. population routinely use vitamin or mineral supplements (*IOM Report*, pp. 258–59) and (2) multivitamins alone have annual sales of $839 million (*IOM Report*, p. 260). The *IOM Report* went on to criticize the supplement industry for poor quality control, citing the following examples: (1) a 2002 report that found 32 percent of Asian medicines contain undeclared pharmaceuticals or heavy metals (*IOM Report*, p. 270); (2) a 2003 study of 59 echinacea samples found that 10 percent contained no measurable echinacea (*IOM Report*, p. 271).

In its conclusion, the *IOM Report* stated in part as follows:

> The committee is concerned about the quality of dietary supplements in the United States. There is little product reliability, and because patent protection is not available for natural products, there is little incentive for manufacturers to invest resources in improving product standardization . . . To improve product consistency and reliability, the committee recommends that the U.S. Congress and federal agencies . . . amend [DSHEA] and the current regulatory scheme for dietary supplements, with emphasis on strengthening: Seed-to-shelf quality control; accuracy and comprehensiveness in labeling and other disclosure; enforcement efforts against inaccurate and misleading claims . . .

The IOM is not alone in its findings of poor quality control and general criticism of the supplement industry. In February 2002, the International Olympic Committee ("IOC")-accredited laboratory in Cologne, Germany, based on research funded by the IOC, issued its report titled *Analysis of Non-Hormonal Nutritional Supplements for Anabolic Androgenic Steroids* ("*Cologne Report*"). In that study, 634 nutritional supplements were obtained in 13 countries from 215 different suppliers. Out of the 634 samples analyzed, 94 (14.8 percent) contained steroid prohormones not declared on the label ("positive supplements"). Out of all the positive supplements, 23 samples (24.5 percent) contained prohormones of nandrolone and testosterone. The *Cologne Report* also noted that, with respect to U.S. companies, products of 106 companies were tested and that 43 of those companies, or 40.6 percent of the companies tested, had positive supplements.

THE ISSUE OF ANTI-DOPING IS NOT BLACK AND WHITE, BUT CONSUMED WITH GREY AREAS.

Other studies of supplement contamination also have confirmed the problem. For example, in 2002, a study by the World Anti-Doping Agency-accredited laboratory in Austria found steroid or steroid precursor contamination in 12 of 54 supplements tested, or 22 percent of all tested products. Similarly, in 2007, a study by HFL Laboratories found steroid contamination in 13 of 52 supplements tested, or approximately 25 percent of the tested supplements.

There are a limited number of possible causes of this supplement contamination. The most obvious possible causes are contamination in the raw materials themselves, cross-contamination during the encapsulation process, or intentional spiking of supplements by the supplement companies themselves.

An athlete who believes that his or her positive drug test was caused by a contaminated supplement faces a number of significant hurdles. First, many athletes do not keep any exemplar pills from bottles when they are near to being empty. That fact, combined with the frequent delay of the anti-doping agencies in notifying an athlete of his or her positive test, means in many cases that athletes simply do not have any supplements from the same bottle(s) they were using available for testing by the time that they are notified of their positive test. Second, scientific studies have shown that contamination can vary from lot to lot, from bottle to bottle, and even from pill to pill. Therefore, even if the athlete still has the supplement bottles that he or she was using at the time of the positive test, it is still often very difficult to identify the contamination. In addition, the testing that is done to determine contamination is very complicated because the supplement powders often contain many interfering ingredients. As a result, it takes a very specialized and skilled lab to do this type of testing. Finally, the testing involved can be very costly, particularly where an athlete was taking many different supplements at the time of the positive test.

CONTAMINATION LAWSUITS

A small number of athletes who have tested positive as a result of contaminated supplements have sued the supplement companies that they believed were responsible. These athletes include Kicker Vencill (U.S. Olympic hopeful swimmer who tested positive for a steroid and sued the manufacturer of a multivitamin); Hans Knauss (Austrian World Cup and Olympic alpine skier who tested positive for a steroid and sued the manufacturer of a multivitamin); Pavle Jovanovic (U.S. Olympic bobsled athlete who tested positive for a steroid and sued the manufacturer of a protein powder); Mike Cloud (NFL running back who tested positive for a steroid and sued the manufacturer of a protein powder); Guillermo Coria (Argentinean

professional tennis player who tested positive for a steroid and sued the manufacturer of a multivitamin); and Rebekah Keat (Australian professional triathlete), Amber Neben (U.S. professional cyclist), and Mike Vine (Canadian professional triathlete), all three of whom tested positive for a steroid and recently filed suit against the manufacturer of an electrolyte replacement supplement.

Of all of the above-mentioned lawsuits, only the case filed by Kicker Vencill has gone to a jury verdict. In that case, an Orange County, California, jury awarded Kicker Vencill almost $600,000; the judgment was subsequently vacated as an agreed condition of a settlement between the parties.

In these lawsuits, the athletes have alleged causes of action for, among other things, negligence, products liability, breach of implied warranty, negligent misrepresentation, and unfair competition/false advertising. In each of these lawsuits, the athlete has had some evidence (in the form of testing) that the manufacturer's supplement or supplements were contaminated with a steroid or steroid precursor. Issues raised by the manufacturers on the issue of liability have included attacks on the scientific validity of the testing showing contamination; challenges to the chain of custody of the supplements that were tested; evidence of testing on other bottles done by the manufacturer showing that the bottles tested by the manufacturer showed no contamination; allegations that the supplement company complied with good manufacturing practices or with the industry standards; allegations that the athlete actually used steroids; and personal attacks on the athlete's character.

Damage allegations in these lawsuits have generally involved loss of income (salary, prize money, and endorsements); loss of earning capacity (salary, prize money, and endorsements); damage to reputation; emotional distress; and claims for punitive damages. In the case of nonsalaried athletes who earn a living from prize money and endorsements, damage issues have been hotly contested. For example, in the case of Kicker Vencill, post-verdict interviews with the jurors revealed that there were vastly different opinions among the jury members as to the proper amount of damages, both economic and noneconomic.

CONCLUSION

With today's steroid-obsessed fans and media, many take a very simplistic view that all athletes who test positive for steroids are cheaters and should be punished severely. This simplistic view is often fueled by the rhetoric of certain members of the anti-doping institutions themselves, who are all too eager to portray themselves as the saviors of sport, by demonizing any and all athletes who test positive. The truth is that the issue of anti-doping, like many issues in society, is not black and white, but, rather, is consumed with many grey areas. One of these grey areas involves athletes who test positive for steroids as a result of taking contaminated supplements.

To date, there has been little if any effort on the part of anti-doping agencies to provide elite and professional athletes with supplements that are free from contamination with steroids or steroid precursors. Even when sports federations and anti-doping agencies have funded comprehensive studies of the nature and extent of supplement contamination, they have been unwilling to divulge the names of the companies or products that their studies have revealed have issues with supplement contamination. As a result, this vast databank of dangerous supplement companies and supplements remains hidden from the very athletes who could benefit from this information.

The anti-doping agencies have made the decision that at least with respect to sport, athletes bear the full responsibility for the contamination problems that became much more frequent with the passage of DSHEA. The passage of the Anabolic Steroid Control Act of 2004, which removed most over-the-counter steroid precursors (including androstenedione, norandrostenedione, and norandrostenediol) from the grocery and vitamin stores by classifying them as Class III substances, was predicted by many in the anti-doping community as a major achievement that would solve the problem of positive steroid tests caused by contaminated supplements. That has not proven to be the case, as athletes have shown as recently as August 2006 that their positive tests were caused by contaminated supplements. Furthermore, a recent study published in December 2007 by HFL Laboratories found that the frequency of contamination of over-the-counter supplements remains largely the same as before the passage of the Anabolic Steroid Control Act of 2004.

While the supplement industry continues to register astronomical profits, and the anti-doping frenzy continues to capture the attention of Congress and the public at large, it is the athletes who are caught in the middle, whose careers and reputations can be forever tainted by taking a contaminated supplement that causes them to test positive for steroids. Some of these athletes have fought back by suing the supplement companies that caused them to be suspended and that have caused them to suffer this tremendous damage.

While Congress seems obsessed with the issue of steroid use in sports, going so far as to summon professional athletes to testify about their alleged steroid use, it has taken little notice of these lawsuits or of the problems that the enactment of DSHEA has caused to some athletes, who have been branded as steroid users as a result of poor supplement manufacturing practices and nonexistent governmental regulation of the supplement industry. ❖

Howard Jacobs is a solo practitioner in the Los Angeles area. His law practice focuses on the representation of athletes in all types of disputes, with a particular focus on the defense of athletes charged with doping offenses. Recent clients include former 2006 Tour de France champion Floyd Landis, 2004 Olympic gold medalist Tyler Hamilton, and former 2000 Olympic gold medalist Marion Jones. Mr. Jacobs can be reached at howard.jacobs@athleteslawyer.com.