Sports Litigation Alert

Volume 3, Issue 22 December 22 , 2006

Sports Litigation Alert (SLA) is a narrowly focused newsletter that monitors case law and legal developments in the sports law industry. Every two weeks, SLA provides summaries of court opinions, analysis of legal issues, and relevant articles. The newsletter is published 24 times a year.

Articles

What Is a Sanctioned Race and Why Does It Matter?: Insurance Coverage Implications of Sanctioning Sports

By Vered Yakovee

Vered Yakovee is an associate in the insurance coverage practice of Dickstein Shapiro LLP, and is the co-founder of the Firm's sports insurance initiative. She also volunteers on the executive board of the non-profit Southern California Outrigger Racing Association. Ms. Yakovee can be reached at yakoveev@dicksteinshapiro.com

Insurance policies issued to sports associations and other governing bodies contain exclusions, some of which are surprising to find in a policy written for an athletic entity. For example, the organizers of the boxing tournament known as the "Toughman Contest" recently found themselves without coverage for third-party claims because of an exclusion in their general liability insurance policy for "Athletic or Sports Participants." *National Fire & Marine Ins. Co. v. Adoreable Promotions, Inc.*, 451 F. Supp. 2d 1301 (M.D. Fla. 2006). Similarly, policies might exclude coverage for events that are not "sanctioned" by the governing body named in the policy.

To avoid loss of coverage under a "Sanctioned Events" exclusion, review the policy for such language, and negotiate an amendment to include such coverage, instead of excluding it, when appropriate. One problem is that case law does not provide a clear definition of what it means to "sanction" an event. However, there is enough guidance to conclude the following: The definition is sufficiently fluid so that a sports association can define "sanctioning" to suit its needs, rather than changing its activity to fit within a

pre-existing mold. Once appropriate "sanctioning" activities are identified as desired, put them in writing in internal corporate documents, in the public domain, such as on a website, and, in an endorsement explicitly providing coverage for "sanctioned" events to all relevant insurance policies.

It is helpful to look outside of insurance cases for guidelines as to what "sanctioning" means. Antitrust actions against sports associations are illustrative in this context. For example, the Kentucky Speedway recently brought an action against NASCAR and the International Speedway Association, alleging Sherman Act violations. There, the court recognized that "as a sanctioning body" of stock car races, "NASCAR establishes all the rules that govern sanctioned races and determines where these races will be held." *Kentucky Speedway v. National Ass'n of Stock Car Auto Racing, Inc.*, 410 F. Supp 2d 592, 593 (E.D. Ky. 2006) (denying motion to dismiss).

Another factor that indicates sanctioning is the provision of insurance. In another antitrust action, the Sports Car Club of America ("SCCA") was alleged to use "its sanction as a coercive lever or tying device" in violation of the Sherman Act and other regulations. *Seasongood v. K & K Ins. Agency*, 548 F.2d 729, 735 (8th Cir. 1977). The purpose of the SCCA was to promote and sanction car races, which it did via 29 clubs across the country, which were separate corporations and had their own sponsors.

> For each event the regional affiliate is issued a "sanction" by SCCA, and no event is "authentic" unless sanctioned by SCCA. One requirement for an SCCA sanction is the purchase by the regional affiliate of insurance coverage approved by SCCA.

Id. at 731 (rejecting SCCA's argument that they are exempt from antitrust laws by the McCarran-Ferguson Act, which applies to the insurance business).

Another characteristic of a sanctioning body is that its rules govern specification ("spec") equipment. The "oldest auto racing sanctioning body in the United States," International Motor Contest Association ("IMCA"), was sued for Sherman Act violations because of its rule requiring certain spec transmissions, to the exclusion of transmissions made by plaintiffs. *Brookins v. International Motor Contest Ass'n*, 219 F.3d 849, 851 (8th Cir. 2000) (affirming summary judgment for defendants due to plaintiffs' failure to show IMCA's requisite market power or detriment to competition). Among the IMCA's sanctioning activities in that case were the operation of five racing divisions, each with its own uniform rules set by the IMCA executive committee, the franchising of racetracks, and the offering of advertising and

merchandising programs to companies that sponsored auto sport events. *Id.*

In addition, setting rules promulgating safety requirements is a sanctioning activity. For example, the USA Triathlon, Inc. "is the governing body of triathlon races and promulgates safety requirements for use by organizers of sanctioned triathlon races." *Lautieri v. Bae*, No. 01-4078, 2003 WL 22454645 (Mass. Super. Ct. Oct. 29, 2003) (holding that a sanctioning body owes no duty of care to a participant when the sport takes place on public property, where the only involvement of the sanctioning body was to promulgate safety rules, and provide insurance to a third party sponsoring organization).

Other sanctioning bodies, as such, set qualifying standards for participation. For example, the International Motor Sports Association required that "each car and driver had to qualify by recording a certain lap time during qualifying rounds" in order to race under its code. *Barbazza v. International Motor Sports Ass'n, Inc.*, 538 S.E.2d 859, 861 (Ga. 2000).

"Sanctioning" designations can even differ with respect to various aspects of the same event. For example, in a negligence action against Major League Baseball's Philadelphia Phillies, the court distinguished those parts of the game that are officially sanctioned from those that are customary, but not sanctioned:

> When determining what is "customary" part of the game, it is our opinion that we cannot be limited to the rigid standards of the Major League Baseball rule book; we must instead consider the actual everyday goings on that occur both on and off the baseball diamond; we must consider as "customary" those activities that although not specifically sanctioned by baseball authorities, have become as integral a part of attending a game as hot dogs, cracker jack, and seventh inning stretches.

Loughran v. The Phillies, 888 A.2d 872, 875 (Pa. Super. Ct. 2005). The customary, but unsanctioned, underlying activity was Phillies' centerfielder Marlon Byrd tossing a ball into the crowd, injuring a spectator. The court affirmed summary judgment on the negligence action in favor of the team and player because "injuries received by appellant from actions taken by Phillies centerfielder Byrd constituted an inherent risk of the game." *Id.* at 876.

The limit to an association's allowance to define sanctioning for itself might be when the designation of an event as sanctioned or not makes the event subject to, or exempt from, certain legislation. For example, an amendment to

Illinois' Environmental Protection Act exempts certain sanctioned sporting events from noise limitations. The Act defined "sanctioned sporting event" as follows:

> Sanctioned sporting event means any contest or demonstration conducted in accordance with the standards, rules, and with the endorsement of the United States Auto Club, or the National Association for Stock Car Auto Racing [NASCAR], or the Association for Motor Sports, or the American Athletic Union, or the National Collegiate Athletic Association [NCAA], or the Illinois High School Association.

People v. Pollution Control Board, 404 N.E.2d 352, 353-54 (Ill. 1980) (citation omitted). The amendment was held to give improper legislative power to private entities by virtue of giving the named entities discretion to classify events as sanctioned or not, and therefore determining which events are subject to the noise regulations. *Id.* at 355.

In sum, insureds can take some steps to avoid loss of coverage due to a "Sanctioned Event" exclusion. Sanctioning can be defined to suit the function of the governing bodies and their respective sports using the following indicia of sanctioning from the cited authorities, in addition to others: (1) establishment of rules; (2) determination of race location; (3) provision of insurance; (4) requirement of spec equipment; (5) operation of various racing divisions, with distinct race rules; (6) franchising of racetracks or other venues; (7) offering of advertising and merchandising programs; (8) promulgation of safety rules and requirements, and (9) establishment of qualifying standards. The definition should be reflected in internal records, on a website or other public domain, and in an endorsement providing coverage for sanctioned events to any potentially applicable insurance policies, using the same, clear language in all places to avoid future speculation about the intended effect.

Sports Litigation Alert is a bi-monthly publication of Hackney Publications.

Hackney Publications
P.O Box 684611
Austin, Texas 78768
Voice: (512) 632-0854
Fax: (512) 478-8873