Legal Aspects of Big Sports Event Management

Part II: Sponsorships

BY VERED YAKOVEE

Sponsors are essential to the commercial success of large-scale sports events. Conversely, such events provide a forum for sponsors to obtain benefits including increased brand recognition and affiliation with an event's goodwill. While the mutual benefits of sponsorship are contemplated, unforeseen disputes inevitably arise. Part II of this series describes some of those issues and explains how to plan for additional insured coverage by virtue of a sponsorship agreement. Part II's separate, spotlight feature, *Swimming with Sharks and Protecting a Good Name* (see page 28), draws on the trials and tribulations of the Father of Surfing, Duke Kahanamoku, to illustrate the issues faced by an individual athlete in attempting to maintain ownership and control of his or her name.

Among the first things to consider in sponsorship negotiations are the specific benefits sought. Various levels or categories of sponsorship include title or co-title sponsorship, team or vehicle sponsorship, associate or supporting sponsorship, broadcast sponsorship, or official supplier sponsorship. Beyond the fundamentals each provides, benefits can include on-site signage, on-court signage, other on-field exposure, other promotional rights in the stadium including inventory on the billboard, audio mention, tickets, and other hospitality. Moreover, benefits may include control over the sale of media rights. For example, a major beverage manufacturer had an exclusive sponsorship agreement with the one of the nation's major sports leagues. Meanwhile, the beverage company's main competitor purchased media spots directly from a network that aired that league's games at the time. Had the actual sponsor negotiated to control the sale of media rights to exclude competitors, it might have precluded its competitor from advertising during those games.

In the alternative, a sponsor may opt to purchase the naming rights of a facility, creating an exclusive venue in that facility. For example, the NHL's Avalanche and the NBA's Nuggets host their home games in the Pepsi Center in Denver, Colorado, where products of PepsiCo are served exclusively in the non-alcoholic beverage category. Despite venue exclusivity, there are permitted exceptions for certain events, including "jewel events" such as all-star games. For example, the Coca-Cola Company previously sponsored the NHL and sponsored the league's all-star game that was played at the Pepsi Center—presenting an obvious dilemma. The solution, therefore, was to serve Pepsi in generic, NHL cups under an exception for jewel events, which allows the league to impose conflicting rights.

For a sponsor, exclusivity is precious. Indeed, "[t]he value of an event sponsorship is often dependent on the scope of exclusivity."[1] When a sponsor negotiates for exclusivity, it will ask for exclusive sponsorship in its product "category." Defining such categories, however, is not always simple. The sponsor will want to define its category broadly, to exclude as many other sponsors as possible. The sponsored entity, however, will want to define each sponsor's category as narrowly as possible, to avoid limiting itself with respect to other contracts. For example, representatives from a popular beverage company have jokingly referred to the company's category broadly as "anything that rolls downhill." Potentially sponsored entities, however, will likely try to limit that company's category to a single or specific type of beverage.

FOR A SPONSOR, EXCLUSIVITY IS PRECIOUS.

A recent lawsuit between MasterCard and Fédération Internationale de Football Association (FIFA), soccer's international governing body, illustrates, inter alia, how categories are determined.[2] Among its activities, FIFA hosts its World Cup international soccer tournament every four years. MasterCard sponsored the FIFA World Cup in 1994, 1998, 2002, and 2006, as well as the FIFA Women's World Cup in 1999 and 2003. The court noted:

> Because, as FIFA acknowledges, the event "reaches an audience of a size and diversity that is unrivaled by any other single sports body," the FIFA World Cup is a "sporting, social and marketing phenomenon" that FIFA itself describes as "*the* most effective international marketing platform" in the world, "more valuable that the Olympics."[3]

As evidenced by the hundreds of millions of dollars paid to FIFA under the parties' sponsorship agreements over the years, MasterCard also realizes the value of its partnership with the World Cup. However, MasterCard views the Olympic Games alternative differently: "The only comparable sponsorship property [to the FIFA World Cup] is the Olympic Games, which indisputably is unavailable to MasterCard, as it is committed to VISA through 2012."[4] Thus, MasterCard places a high value on its FIFA sponsorships in part because no comparable alternative is available.

The dispute arose during negotiations for renewal for the 2010 and 2014 World Cups. The parties' prior agreement entitled MasterCard "the 'first right to acquire' any package of advertising and sponsorship rights that FIFA offers, in MasterCard's product cate-

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gory, during the next World Cup cycle."[5] The product category was originally referred to as the "financial services" category and defined as "'real or virtual payment or account access systems' (*e.g.*, credit cards, debit cards and ATMs)."[6] The parties subsequently modified the agreement so that "MasterCard shall have the first right to acquire '*the* package of advertising sponsorship rights offered by FIFA,' and not merely a package that is 'similar' to that offered by FIFA."[7]

After an overhaul of its entire sponsorship program, FIFA determined that "'[f]inancial services' [was actually] a combination of two then existing product categories (payment services and banking services)."[8] Thus, FIFA offered a renewal scenario that was not *the* package of agreements past. Rather, it was far broader and "included not only payment cards but also core banking services, such as current accounts and commercial and mortgage lending, which were outside MasterCard's line of business."[9] Because MasterCard could not efficiently make use of the broader rights, it rejected the offer.

AMBUSH MARKETING IS A WAY FOR A NONSPONSOR TO CREATE AMBIGUITY AS TO WHO THE OFFICIAL SPONSOR IS.

Meanwhile, according to the Southern District of New York in its decision, in breach of the "first right to acquire" provision in its agreement with MasterCard, FIFA simultaneously negotiated with VISA for the same sponsorship package. VISA, however, also rejected the offer "for the same reasons as MasterCard."[10] Thus, with no financial services sponsor at all, FIFA lowered the price of the package, lessened its scope, and appropriately called it "financial services light."[11] The "financial services light" package "is newly split into Payment Services (Credit cards) and Retail Banking whereas FIFA will carve out the retail banking rights in the host country . . . and will sell these rights as a National Supporter package."[12]

FIFA and MasterCard eventually both signed a contract that granted the latter exclusive sponsorship rights in a category that looked more like the "financial services" category than "financial services light."[13] Notwithstanding that contract, the court found that "FIFA's negotiating team continued to make 'concerted efforts' to reach agreement with VISA after . . . they already had reached agreement with MasterCard on all terms."[14] Thus, MasterCard sought to permanently enjoin FIFA from contracting with VISA and for specific performance under the FIFA-MasterCard agreement. Applying Swiss law, the court granted both of MasterCard's requests. However, finding it "fair and equitable" to do so, the court required FIFA to honor the agreement for the "financial services light" package only. Nonetheless, it was a substantial victory for MasterCard. Indeed, the court stated that "MasterCard's loss of the next FIFA World Cup sponsorship would be, in its now-famous words, 'Priceless.'"

ASSIGNMENT OF SPONSORSHIP RIGHTS

Problems also can arise when a sponsor-company is acquired by another company and the acquiring company seeks to substitute its own marks in place of those of the acquired company. Is sponsor status rightfully assigned to the acquiring company? The sponsorship agreement might contain an assignment clause dictating the answer and addressing contingencies such as a notice requirement—but not all scenarios are foreseen. A May 18, 2007, decision regarding a dispute between NASCAR and one of its sponsors provides an example.[15]

NASCAR is the sanctioning body of its Nextel Cup Series. For those title rights, a company now named Sprint Nextel Corporation (Nextel) contracted with NASCAR in June 2003 for exclusive rights in its category, which it defines as "wireline and wireless telecommunications services—local and long distance services, wireless services and two-way radio—and associated equipment such as wireless phones and PDAs,"[16] subject to a grandfather clause for preexisting sponsors of individual cars. In furtherance of the grandfather clause, NASCAR's subsequent agreement with Car #31, owned by RCR Team #31, LLC (RCR) and driven by Jeff Burton, provides that "NASCAR and Nextel will allow any and all existing product licensing relationships in the Category to continue through the current term of their agreement."[17]

Meanwhile, in 2001, RCR had contracted with Cingular Wireless for the latter to be Car #31's primary sponsor. Thus, despite Cingular falling into Nextel's category, its marks on Car #31 were grandfathered into the Nextel Cup Series. In June 2006, NASCAR and Nextel negotiated an endorsement to their sponsorship agreement prohibiting a preexisting sponsor to "activate their sponsorship under the name of a competitor."[18] Nonetheless, in December 2006, AT&T Inc. acquired Cingular Wireless and sought to replace Cingular's brand and logo on Car #31 with those of AT&T.

In the ensuing litigation, the court preliminarily enjoined NASCAR from interfering with AT&T's introduction of its logo to the paint scheme of Car #31—despite the June 2006 endorsement to the NASCAR-Nextel agreement. The court's reasons included that "the continued appearance of the 'Cingular' brand on the #31 Car, unaccompanied by any indication that 'Cingular' now does business as 'AT&T,' is likely to confuse NASCAR fans."[19]

The court also rejected NASCAR's arguments that if enjoined from interfering with AT&T's proposed paint scheme, it would put NASCAR in immediate breach of its agreement with Nextel and it would seriously under-

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mine NASCAR's ability to enter into exclusive sponsorship agreements in the future. Rather, the court stated that the burdens NASCAR may face if the court enforces the promises in the grandfather clause are the result of NASCAR's own making. NASCAR made a commitment to grandfather plaintiff into the sport. NASCAR cannot avoid honoring that commitment because it may lead to possible unfavorable consequences.[20]

However, the court acknowledged that the purpose of a preliminary injunction is merely to preserve the status quo pending final resolution of a dispute.[21] Thus, because this recent decision only preliminarily enjoined NASCAR, we are unlikely to have seen the last of this dispute.

AMBUSH MARKETING

Because sponsorship rights are valuable, the benefits that flow from them are also hot commodities. Thus, ambush marketing is a way for a nonsponsor to affiliate with the goodwill of an event and create ambiguity as to who the official sponsor is. Tactics can include a company's contest for tickets to the event or an advertisement of "Congratulations" to the winner of the event from the company.

Ambush marketing tactics also can be quite creative. An example is provided by American Express's response to VISA's sponsorship of the 1992 Olympic Games in Barcelona, Spain, and to its slogan stating that "the Olympics don't take American Express."[22] American Express responded by contracting with the Spanish government to become the official sponsor of tourism in Spain for a period encompassing the Games and it officially sponsored the U.S. swimming and cycling teams.[23] Together, those efforts placed American Express in the landscape of the event and might have created ambiguity as to the identity of the official sponsor of those Games.

While such tactics cannot always be avoided, they are at least acknowledged. During its negotiations with VISA for its financial services sponsorship, FIFA offered some protection from ambush marketing that it did not offer to MasterCard:

> VISA received superior protections from FIFA against "ambush marketing" by competitors that improperly seek to associate themselves with FIFA or the FIFA World Cup. The VISA Agreement commits FIFA to more extensive and detailed protections than FIFA committed to in the 2007–2014 MasterCard Agreement.[24]

Thus, precautionary steps can be taken to shield against known ambush marketing techniques and such steps can be bargained for as a benefit of the sponsorship agreement.

INSURANCE

The sponsorship agreement will generally contain an insurance provision. That provision might require one or both parties to provide "proof of insurance" or a "certificate of insurance." It could require that the parties reciprocate additional insured benefits under their respective policies or that only one party designate the other as an additional insured. None of these options are without complications.

CERTIFICATES OF INSURANCE

Certificates of insurance are problematic because they may not actually bind the insurance carrier or even extend any coverage to the entity receiving the certificate. Even if the certificates do bind the insurance carrier and do extend some coverage, they may, in fact, provide much more limited coverage than the recipient believes they provide. An endorsement, instead of a certificate, is generally what is required to actually change the terms of a policy to add obligations to a certificate-holder.

Nonetheless, certificates are routinely referred to in sponsorship agreements and routinely issued by an insurance broker or the insured itself. Some insurance brokers or agents have express authority to issue certificates. However, in many situations, neither the broker nor the insured actually is authorized to issue a certificate of insurance.

Moreover, there may be a real question as to whether a certificate of insurance actually extends coverage at all. As the California Court of Appeal explained:

> A certificate of insurance is merely evidence of insurance of the insured and creates no rights in the recipient. A person who is added to a policy [by endorsement] as an additional insured, on the other hand, is actually insured by the policy and entitled to all the rights thereunder.[25]

And the Supreme Court of New Hampshire concluded that "[i]n effect, the certificate is a worthless document; it does no more than certify that insurance existed on the day the certificate was issued."[26]

Certificates of insurance typically identify the party who seeks to be added as an insured as a "certificate holder." Many people assume that this means that they are insured under the policy. All that being listed as a "certificate holder" typically does is identify the individual to whom certain things about insurance coverage are being "certified." In other words, the certificate of insurance may function simply to confirm that one party has insurance, not to extend insurance to another party. Indeed, as the RIMS Research Committee has observed:

> The biggest challenge for risk managers regarding the use of insurance certificates is that . . . certificate[s] . . . are what was referred to . . . as illusions. What this means is that many insurance certificates are, as is clearly stated on the forms, "a matter of information only."[27]

THE EXTENT OF COVERAGE AFFORDED

Even if a certificate of insurance does extend coverage, there still are numerous pitfalls to be faced. First, certificates of insurance often do not indicate what exclusions the policies may have. For example, one of the most preva-

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lent standard form commercial general liability policies, issued by the Insurance Services Office Inc., contains 15 exclusions alone with respect to claims of "bodily injury" and "property damage."[28] Many policies also contain exclusions found in endorsements or in "manuscripted" sections. Therefore, it is difficult, if not impossible, to tell from a certificate of insurance what a policy actually covers.

Second, certificates of insurance also do not always reflect the deductibles or self-insured retentions under a policy. Thus, while a certificate may indicate that an insured has a certain amount of insurance, it actually may have less than that because of deductibles or retentions.

Third, certificates of insurance typically do not address the potential for an early cancellation of the policy. Most insurance policies and state laws require that an insurance carrier notify its insured of any intent to cancel or not renew coverage. However, this does not mean that an insurance broker has such a duty or that the carrier must notify *all* parties who may be insured under a policy. Thus, it is a good idea to obtain a notification endorsement requiring the insurer to inform intended additional insureds if the coverage is canceled.

Finally, the fact that a certificate may add an entity as an "additional insured" does not mean that the "additional insured" has the same coverage as do the original insureds. It is fairly common, for example, for "additional insureds" to be protected only to the extent that their liability derives from an act or omission of the named insured. This invokes another important point—determining exactly who the "named insured" is under the policy. The named insured may be the ultimate parent, a holding company, the promoter, or some other entity not directly involved with the transaction or events giving rise to suits or liability. This may mean that the additional insured will not receive any insurance coverage if the named insured did not commit the act or omission involved.

ADDITIONAL INSUREDS

Whether it specifically asks for a certificate, endorsement, or other proof, it is common for a sponsor to ask to be named as an "additional insured" on the sponsored entity's insurance policies or vice versa. A party's status as either the named insured or the additional insured likely depends on its respective bargaining power, with the party possessing more bargaining power obtaining the additional insured coverage.

Many assume that there is some magic to being an "additional insured," or that "additional insured" is a term of art that means the same thing in all contexts. However, as described above, being an "additional insured" means only that a party has been—hopefully—added to the coverage provided by another party's insurance policies. Even if added, the additional insured faces the same obstacles as do certificate-holders.

For example, insurance carriers attempt to limit their exposure to additional insureds by arguing that coverage is limited to the additional insured's "vicarious liability" for the named insured's negligence, as described above. On the other hand, the additional insured may argue that the coverage is broader and extends to claims against an additional insured for its own negligence, even if that negligence was the sole cause of the damage or injury.

In addressing the issue, courts generally have held that the named insured's work or services need not be the "proximate" or "direct" cause of the loss in order to "arise out of" the named insured's work. In other words, a traditional "but for" causation is enough.

In response, the insurance industry in 2004 introduced revised additional insured forms,[29] which appear designed to limit an additional insured's coverage to liabilities that arise, at least in some part, for the acts of the named insured. Thus, it is important for a party that wishes to be an additional insured to make sure that the endorsement naming that party as an "additional insured" conforms to the parties' intent. If the parties intend for the additional insured to be covered for liabilities arising out of its own acts or omissions, the revised standard form might not suffice.[30]

The revised additional insured forms also may have an unintended consequence: If a plaintiff is motivated by the possibility of a defendant's insurance coverage and a defendant's additional insured coverage is not broad enough, the plaintiff simply might elect to sue the named insured as well. A plaintiff could reason that it might be able to force a settlement of the entire lawsuit, funded in substantial part by the named insured's policy. Indeed, there is a substantial body of law holding that a carrier may be obligated to fund a settlement even if the settlement includes uninsured parties.[31]

"AUTOMATIC" ADDITIONAL INSURED STATUS

Some insurance policies have provisions that permit third parties to obtain additional insured status without the issuance of a certificate or endorsement specifically adding that party at all. These policies and some common endorsements specify that if the named insured has a contractual obligation to add a third party to its insurance coverage, then the party is added. In essence, the addition is accomplished automatically. A recent Wisconsin District Court decision provides an example.[32]

> The policy Liberty Mutual issued to Lambeau Field Redevelopment, LLC, provides coverage to the Named Insured and to Additional Named Insureds, including "all subcontractors of any tier . . . for whom the First Named Insured has agreed by contract to provide General Liability coverage under the Owner Controlled Insurance Program, excluding vendors, suppliers . . . and others who merely make deliveries to or from the Project Site(s).[33]

One of the subcontractors that was named as an additional insured subsequently sustained a loss and filed a claim under the Liberty policy issued to Lambeau Field Redevelopment, LLC. The court's lengthy coverage analysis only briefly explained the subcontractor's additional insured status and instead focused on the merits of coverage. Ultimately, the court found that no coverage existed for reasons independent from the subcontractor's status.

However, provisions that permit other parties to be

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additional insureds without the issuance of an endorsement typically have limitations. Some require that the insurance carrier be notified at the commencement of the policy period or when the contract is entered. Others limit the timing of coverage to a period when the additional party is conducting operations at the insured's request. Thus, it is critical that an insured review the policy to determine if it has any such provision and, if so, what its particulars are.

For example, a general and subcontractor entered into an agreement for roofing work for the UNI-Dome, the University of Northern Iowa's premier sporting event and entertainment complex.[34] The subcontractor agreed to provide additional insured coverage under three of its policies, which provided that "an insured" under the policies would be any person or organization for which the named insured was required by written contract or because of the issuance or existence of a permit to provide coverage. Two of the policies required specific notice of would-be additional insureds and the third did not. However, the subcontractor did not give notice to any of its insurers. Problems subsequently arose with the sheet metal roofing on the exterior surface of the Dome, creating a loss. The court held that the general contractor was an additional insured under the policy that did not require notice but not under those that did, due to the lack of notice and because the parties' contract "*clearly and unambiguously* required [the named insured] to add the [contractor] as a primary insured to its liability policies . . ."[35] However, the court noted that this policy applied only with respect to the additional insured's liability arising out of the named insured's "ongoing operations," which it found because the general contractor had an ongoing duty "to correct any faulty or defective work" by the subcontractor.[36]

BUSINESS INTERRUPTION AND EVENT CANCELLATION COVERAGE

Business interruption and event cancellation coverage for named insureds are detailed in Part I of this series. Such coverage should apply similarly to sponsors and sponsored entity-insureds.

It is good practice to address the potential for business interruption and event cancellation in the sponsorship contract. For example, the sponsor may wish to include a provision that the sponsorship fee is refundable in part or in whole under some circumstances such as sub-par television ratings, weather cancellation, labor strike or lockout, or other force majeure event. A typical force majeure clause will require prompt notice between the parties, their agreement on a mutually acceptable schedule for performance of their respective obligations, and a description of events that qualify as force majeure.[37]

Under the circumstances of most such events, the sponsor received at least part of its bargained-for benefit by, for example, being advertised as a sponsor or otherwise affiliating itself with the goodwill of the event. Thus, the sponsor might be limited to a partial refund if the parties do not reschedule performance. In the alternative, the sponsor could ask for the option to tender its sponsorship fee in installments, with no future installments becoming due in the case of a force majeure event. Either way, both parties should be required to reschedule performance under that scenario. Otherwise, one of them could avoid its obligations under the agreement if a more appealing alternative became available.[38]

Thus, certain terms can be negotiated to mitigate ambiguities regarding potential disputes and to maximize insurance coverage for both the sponsor and the sponsored entity.

Vered Yakovee is an associate in the Los Angeles office of Dickstein Shapiro LLP. She is the co-founder and co-leader of the firm's sports insurance initiative. Her e-mail is yakoveev@dicksteinshapiro.com.

Jeffrey Gewirtz contributed his ideas and inspiration for the sponsorship article. He is senior vice president and general counsel for NETS Basketball and Brooklyn Sports & Entertainment. His email is jgewirtz@njnets.com.

[Part III of this series, on television rights, will appear in the Summer 2007 issue of *Entertainment and Sports Lawyer*.]

1. Mary Hutchings Reed, *IEG Legal Guide to Sponsorship* 3 (1990).
2. Mastercard Int'l Inc. v. Fédération Internationale de Football Ass'n, 464 F. Supp. 2d 246 (S.D.N.Y. 2006).
3. *Id.* at 252 (emphasis in original).
4. *Id.* at 298.
5. *Id.* at 254.
6. *Id.*
7. *Id.* at 256–57.
8. *Id.*at 257.
9. *Id.* at 264.
10. *Id.* at 268.
11. *Id.* at 269.
12. *Id.* at 277.
13. *Id.* at 284.
14. *Id.* at 284–85.
15. AT&T Mobility LLC v. Nat'l Ass'n for Stock Car Auto Racing Inc., 2007 U.S. Dist. LEXIS 36299 (May 18, 2007).
16. *Id.* at *2.
17. *Id.* at *5–6.
18. *Id.* at *3.
19. *Id.* at *7.
20. *Id.* at *8.
21. *Id.* at *9.
22. Martin J. Greenberg & James T. Gray, Sports Law Practice 789 (2d ed. 1998).
23. *Id.* at 789–90.
24. Mastercard Int'l Inc. v. Fédération Internationale de Football Ass'n, 464 F. Supp. 2d 246, 296 (S.D.N.Y. 2006).
25. Roger H. Proulx & Co. v. Johnson & Higgins Inc., No. B107755, slip op. at 3 n.1 (Nov. 18, 1997).
26. Bradley Real Estate Trust v. Plummer & Rowe Ins. Agency Inc., 136 N.H. 1, 6, 609 A.2d 1233, 1235 (1992).
27. RIMS Research Committee, Certificates of Insurance 8 (2000).
28. *See* Commercial General Liability Coverage Form, § I, ¶ 2 (ISO Properties Inc., 2000).
29. *See* Revisions to Additional Insured Endorsements, ISO Commercial General Liability Forms Filing GL-2004-OFGLA, at 2.
30. But note, some courts have rejected insurance carriers' proposed interpretations of additional insured endorsements that only provide coverage for the additional insured's vicarious liability as illusory. *See, e.g.*, Marathon Ashland Pipeline, LLC v. Maryland Cas. Co., 243 F.3d 1232, 1240 n.5 (10th Cir. 2001).
31. *See, e.g.*, Nordstrom Inc. v. Chubb & Son, 54 F.3d 1424, 1432 (9th Cir. 1995) (recognizing that the full amount of an

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insured's settlement will be covered by its insurance policies unless the settlement was increased by the presence of uninsured parties or noncovered claims); Caterpillar Inc. v. Great Am. Ins. Co., 62 F.3d 955, 964 (7th Cir. 1995) (carrier may attempt to allocate settlement, but only to "the extent to which the settlement was larger because of claims against uninsured persons . . .").

32. Tweet/Garot-August Winter, LLC v. Liberty Mut. Fire Ins. Co., slip copy, 2007 WL 445988 (E.D. Wis. Feb. 7, 2007).

33. *Id.* at *4.

34. Gen. Cas. Ins. Co. of Wisconsin v. Penn-Co Constr. Inc., 2005 WL 503927 (N.D. Iowa Mar. 2, 2005).

35. *Id.* at *21.

36. *Id.* at *20.

37. *See generally* Mary Hutchings Reed, *Sponsorship Contracts: Drafting Challenges*, submitted by Marsha S. Shaines for Nuts and Bolts of Sponsorship and Advertising Arrangements with NonProfits, ALI-ABA COURSE OF STUDY MATERIALS: LEGAL ISSUES IN MUSEUM ADMINISTRATION (Mar. 2006).

38. *Id.*

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