CENTER FOR JUSTICE & DEMOCRACY
CJ&D
at NEW YORK LAW SCHOOL

IMPACT

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...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friends,

We are excited to tell you that Center for Justice & Democracy has just started a brand-new multi-year project aimed at broadening support to end forced arbitration and class action bans.

As you may know, in the last couple years, litigation as a tool to enforce any kind of rights, whether civil rights, consumer rights, health care, environmental rights, and so on, has been put in very serious jeopardy thanks to recent U.S. Supreme Court decisions. The Court has allowed companies and employers to place biased, forced arbitration clauses with class action bans into contracts. Another Supreme Court decision on this topic has already been argued and it doesn't look good.

Hundreds of class actions have already been dismissed over the last year in the consumer protection area. Employers are starting to force employees to sign them. They are in fracking agreements. Health care contracts. It is only a matter of time before this practice starts to spread even more widely.

In March, I testified in Congress on this topic and a number of other corporate "litigation abuses." We are eager to do more. If you would like to learn more, or to support CJ&D's work in this area, please get in touch! I would love to hear from you.

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: SPORTS

VANISHING RIGHTS FOR SPORTS FANS

On February 23, 2013, more than 30 NASCAR race fans were injured when a horrific 12-car crash propelled huge chunks of debris through and over a fence into the stands at the Daytona International Speedway track. Fourteen victims were treated at an on-site medical facility, 14 others were transported to local hospitals. Among those injured was 53-year-old Eddie Huckaby, who suffered such a severe leg gash from hip to knee from a long piece of flying metal that his brother had to turn his belt into a makeshift tourniquet to control the bleeding. "Stuff was flying everywhere," Terry Huckaby told *ESPN*. "It was like you was in a war zone or something. Tires were flying by and smoke and everything else. …I know there's a lot of people hurt out there, and I'm just rooting for them," he added. "I know my brother is going to be fine. The other people I don't know. I'm praying for them and hoping they'll be OK, too."

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TITLE IX'S FADING PROMISE

Enacted over 40 years ago, Title IX of the Educational Amendments Act prohibits sex discrimination in academic institutions that receive federal funds. High school, college and university athletic programs are subject to this law, and while such institutions have made great progress since Title IX's passage, gender equality in sports remains a significant problem. According to the latest figures from the U.S. Department of Education's Office for Civil Rights (OCR) June 2012 report, "Women make up 57 percent of college students but receive only 43 percent of positions on varsity sports teams. And girls make up roughly half of all high school students but receive only 41 percent of positions on varsity sports teams."

Though OCR is responsible for enforcing Title IX, its enforcement efforts have been incredibly weak. The agency admits as much on its own website, stating that "the large number of institutions under its jurisdiction, OCR is unable to investigate and review the policies and practices of all institutions receiving [Department of Education] financial assistance. Therefore, OCR provides information and guidance to schools, universities and other agencies to assist them in voluntarily complying with the law." From FY2009 to FY2011, OCR initiated only 17 compliance investigations involving athletic programs.

The agency's complaint resolution process has also been ineffectual in holding schools accountable when they violate the law. In the small number of cases that involve voluntarily-mediated resolutions, OCR doesn't monitor or enforce compliance with the agreement, a failure that both increases the likelihood of violators breaching the agreement and unfairly burdens victims who then have to start the complaint process all over again.

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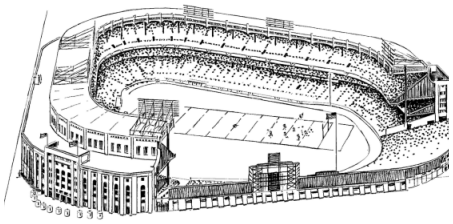
VANISHING RIGHTS FOR SPORTS FANS continued…

One thing is certain: If either Daytona International Speedway or NASCAR were negligent for not properly protecting these spectators, there would be little the injured could do about it in court. Or at least, they would face a tremendous legal hurdle, simply because of fine print on the back of their tickets. As a February 25th *Reuters* article explains, "The disclaimer on a Daytona ticket says: 'The holder of this ticket expressly assumes all risk incident to the event, whether occurring prior to, during or subsequent to the actual event, and agrees that all participants, sanctioning bodies, and all employees, agents, officers, and directors of Daytona International Speedway, its affiliates and subsidiaries, are hereby released from any and all claims arising from the event, including claims of negligence.'" In other words, by using their ticket for entry, all spectators may be stripped of their legal rights, essentially immunizing NASCAR and others from liability, even for injuries that could have been avoided.

Unfortunately, such liability waivers on sports tickets are the norm. These provisions are usually written in tiny print and legalese, which is incomprehensible to millions of NASCAR and other sports fans who unknowingly cede their rights just by watching sports events. They are not unlike liability waivers to which anyone who has ever gone skiing, played golf, rented a bicycle or spent time in a recreational sports facility has agreed. This practice, which has generally been upheld by courts, removes a crucial incentive for sports operators to take steps to prevent future harm.

Spectators are probably also unaware that the federal SAFETY Act of 2002 gives sports venues the opportunity to immunize themselves from any liability for failing properly to protect spectators if there's a terrorist attack. Specifically, this law provides unprecedented tort protections to venues that use Department of Homeland (DHS)-approved anti-terrorism technologies, products or services that are later involved in a terrorist attack that causes physical and/or financial harm. Among the law's anti-victim provisions are a menu of "tort reforms" including liability caps. And if a sports facility receives additional certification from DHS, it is also entitled to the "government contractor defense" in product liability and other cases. In other words, extra DHS certification means that negligent sports venues using DHS-certified products or services will be fully immunized from liability for harm unless clear and convincing evidence shows fraud or willful misconduct when applying for Safety Act protection.



In June 2012, Yankee Stadium became the first sports facility to be designated and certified by DHS under the SAFETY Act and have been joined by the NFL and Super Bowl venues. "It's the mother of all liability waivers," George Washington University Law Professor Ellen Zavian told NBCNews.com's August 21, 2012 Red Tape Chronicles Blog. "How did this get under the radar? Are people really supportive of that? I think attendees should know what they are waiving when they enter a facility, and I don't think they do." Hopefully, they will now.

TORT DE LANCE

In January 2013, seven-time Tour de France winner Lance Armstrong admitted that he used performance-enhancing drugs and blood transfusions throughout his cycling career. Tried in the court of public opinion, he now faces accountability in the civil courts.

Defrauding the Government
In February, the Justice Department announced that it would join a civil whistleblower lawsuit filed by Armstrong's former teammate, Floyd Landis, who alleged that Armstrong, among others, cheated the government when cyclists engaged in a systematic, covert doping scheme to enhance their performance in violation of their sponsorship agreement with the U.S. Postal Service.

False Advertising
FRS product endorser and spokesman Armstrong faces a federal class action lawsuit for allegedly misleading customers into believing that his successes were the result of using FRS products rather than "his systemic and illegal use of banned performance-enhancing drugs and human growth hormones," according to the suit.

Insurance Fraud
On February 7th, insurance company SCA Promotions sued Armstrong, among others, after paying him $12.1 million in bonuses for three Tour victories. Three weeks later, Acceptance Insurance Company filed a similar lawsuit, seeking $3 million in bonuses paid to Armstrong for winning several Tour titles.

Libel Recoupment
The *Sunday Times of London* is seeking repayment of $1.5 million in settlement money from Armstrong who sued the paper over stories linking him to doping.

The resolution process is more unjust when OCR tries to settle the complaint. As reported in the ABA's 2010 *Human Rights Magazine*, "[I]f the complaint is not clear or does not cover all the areas of discrimination, the resolution that OCR negotiates will not include them, because OCR only investigates the issues expressly identified in the complaint. This practice places a tremendous burden on complainants to know their rights enough to list all the ways in which a school discriminates and to use the magic words necessary to state a claim. In real life, this rarely happens." In addition, "Complainants do not have the right to participate in the complaint investigation or resolution process. Unlike court proceedings, they have no right to present evidence or argue their case. They also have no right to reject or appeal any resolution. Thus, in practice, the process ends up being a negotiation between OCR and the school over the enforcement of the complainant's civil rights – often without the participation, input, or approval of the injured party."

OCR has the authority to terminate federal funding but has never done it; the agency can also refer cases to the Justice Department, which, according to the ABA, has only happened once in over 30 years. Instead, if schools refuse to negotiate a voluntary resolution with OCR, the agency simply sends a letter of findings that detail the extent of the discrimination and what's needed to fix the situation.

Clearly schools, colleges and universities need a stronger advocate to provide equal athletic opportunities and resources. That's where the civil justice system comes in. Civil lawsuits have been instrumental in holding discriminatory sports programs and practices accountable and expanding opportunities for women and girls to have equal access to participate. Below are some noteworthy examples.

***Cohen v. Brown University* (1996)**
When Brown eliminated funding for its women's varsity gymnastics and volleyball teams, team members sued the school for reinstatement and won. The 1st Circuit explained, "To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities."

***Mercer v. Duke University* (1999)**
Heather Sue Mercer, an all-state placekicker in high school, sued Duke for discrimination after she was cut from the football team. Mercer ultimately prevailed, with the court agreeing that Duke could not discriminate against Mercer because of her gender once the school had decided to allow her to join the team.

***Pederson v. Louisiana State University* (2000)**
In this class action lawsuit, female students alleged that the school's failure to add varsity women's soccer and softball programs violated Title IX. A settlement was ultimately reached, requiring that LSU add the two women's teams, provide gender equity in facilities, equipment, coaching and other athletic support areas and pay damages to four of the victims.

***Delhotal v. Elgin Area School District U-46* (2001)**
Five students filed a class action lawsuit against their high school seeking to remedy the pervasive disparate treatment of boys and girls in sports. Nearly seven months after it was filed, the case settled, with the Elgin Area School District U-46 and the Upstate Eight Conference (an organization of fourteen high schools in northeastern Illinois) making significant changes in athletic opportunities and support for girls.

***Communities for Equity v. Michigan High School Athletic Association* (2006)**
A group of parents and high school athletes filed a class action lawsuit alleging that MHSAA violated Title IX by scheduling six girls' sports teams to compete during more disadvantageous times of the academic year than boys' teams. The 6th Circuit Court of Appeals upheld the lower court's precedential ruling that a state athletic association can be liable under Title IX. The U.S. Supreme Court let the case stand.

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THIS IS YOUR BRAIN ON FOOTBALL

Shane Dronett: defensive lineman for 11 NFL seasons, victim of chronic traumatic encephalopathy (CTE, a degenerative brain disease linked to concussions), dead from suicide at 38. **Dave Duerson**: safety for 11 NFL seasons, CTE victim, dead from suicide at 50. **Ray Easterling**: safety for 8 NFL seasons, CTE victim, dead from suicide at 62. **Junior Seau**: linebacker for 20 NFL seasons, CTE victim, dead from suicide at 43. **Andre Waters**: defensive back for 12 NFL seasons, CTE victim, dead from suicide at 44.

This is a team roster of which no athlete wants to be part, yet over 4,000 former professional football players are listed with these five plaintiffs in a consolidated lawsuit against the NFL over injuries suffered during their time on the field. Players accuse the League of deliberately ignoring and hiding evidence that linked football-related concussions with permanent brain damage. The victims seek damages for injuries and wrongful death.

According to the master complaint, "For decades, the NFL has been aware that multiple blows to the head can lead to long-term brain injury, including but not limited to memory loss, dementia, depression, and CTE and its related symptoms" yet has "engaged in a long-running course of fraudulent and negligent conduct, which included a campaign of disinformation designed to (a) dispute accepted and valid neuroscience regarding the connection between repetitive traumatic brain injuries and concussions and degenerative brain disease such as CTE; and (b) to create a falsified body of research which the NFL could cite as proof that truthful and accepted neuroscience on the subject was inconclusive and subject to doubt."

For example, the complaint alleges, "from 1994 until 2010, the NFL publicly inserted itself into the business of head injury research and openly disputed that any short-term or long-term harmful effects arose from football-related subconcussive and concussive injuries. The NFL propagated its own industry funded and falsified research to support its position…." Moreover, "It took decades for the NFL to admit that there was a problem and sixteen years to admit that its information was false and inaccurate. The NFL's conduct in this regard is willful and wanton and exhibits a reckless disregard for the safety of its players and the public at large."

The players have also filed a separate class action suit to obtain medical monitoring for potential brain disorders or disease for all former players, at least 20,000 retirees.

On April 9th, U.S. District Judge Anita Brody will hear arguments about whether the athletes' claims can be heard in court or must be resolved through forced arbitration as specified in the players' collective bargaining agreements. As Junior Seau's family said in a January 2013 statement, "We know this lawsuit will not bring back Junior. But it will send a message that the NFL needs to care for its former players, acknowledge its decades of deception on the issue of head injuries and player safety, and make the game safer for future generations."

IS NFL MEDICINE FOR SALE?

If you thought NFL players received the best medical care possible, you would be wrong. That's the firm belief of the players' union, the National Football League Players Association, which says that 78 percent of players do not trust team doctors and medical staff. In fact, earlier this year, Executive Director of the union, DeMaurice Smith, said the diagnosis and treatment of players by some teams was "reckless." One example cited by Smith was the decision by San Diego Chargers to stand by team physician David Chao, who, reports the *Washington Post*, has "an extensive history of complaints and malpractice suits" and against whom the California State Medical Board has initiated proceedings citing "gross negligence" and "repeated acts of negligence."

Conflicts of interest may be at the root of the problem. Writes *USA Today*, "Many team doctors belong to groups or hospitals that pay NFL teams or offer reduced medical rates for the right to be called the team's official medical provider or sponsor." Some providers pay teams in the seven figures just for this title. Rob Huizenga, a former Los Angeles Raiders team doctor, told *USA TODAY Sports*, "Most jobs try to hire the best person, but the NFL teams don't do that necessarily. They're going to hire the person (from a medical group that) is going to pay them the most amount of money.'" And once there, they want to keep that job. That means keeping the teams happy above all else – even if, it seems, the players aren't properly protected.