

High-Profile Athlete Doping Cases Provide Insight for Sports Law Attorneys

BY TONY R. BERTOLINO

We recently witnessed the public fall from grace of champion cyclist Lance Armstrong, one of Texas' favorite sons and a seven-time Tour de France winner. While allegations about the use of performance-enhancing drugs had followed Armstrong for much of his professional career, his defenders have always asserted that the charges were unfounded and nothing more than slanderous attacks on a naturally-gifted athlete. That is, until Armstrong announced that he would not fight charges brought against him by the U.S. Anti-Doping Agency. He quickly was stripped of his titles and banned from the sport of cycling for life. Was the fight no longer in Armstrong, with the legal muscle of the USADA just too strong? Or, through his silence, did he admit the wrongdoing of which he has been accused for years? And, in a broader question, what message does Armstrong's case send to athletes in other sports? Despite tougher sanctions instituted by Major League Baseball several years ago in the wake of a wide-reaching federal investigation and congressional hearings, we continue to see instances of high-profile players suspended for their use of banned substances. In the recent Summer Olympics in London, we saw stories of alleged doping in sports ranging from track and field to swimming to weightlifting.

With this cloud of suspicion continuing to hang over professional sports, and with new ways in which athletes and their trainers maneuver around the barriers to access performance-enhancing drugs, the problem is not going away. There are important issues at play here regarding both serious constitutional questions of privacy and case jurisdiction and the more practical matter of the changing language that must be included in sports contracts. Attorneys operating in the world of sports law need to prepare themselves to face challenges that can arise in the courtroom and to their clients' reputations when questions of doping surface. What can those in the field of sports law learn from headline events such as the Armstrong sanctions and the earlier Bay Area Laboratory Cooperative investigation, and what questions are still to be answered?





A quick review of the legal facts surrounding Armstrong's ban from the sport is enough to give most attorneys some pause as they consider their own defense in such a case. The USADA is the primary player here as it oversees the drug-enforcement efforts for cycling and other sports that comprise the Olympic and Paralympic Games.¹ This organization lists the tenets of its mission being, at least in part, to "preserve the integrity of competition, inspire true sport, and protect the rights of athletes."² To meet this end, the USADA has enacted strict drug testing policies and broad investigative efforts when it believes doping has occurred. Armstrong and others who have fallen victim to the USADA's work would argue that these aggressive measures have compromised the "rights of athletes" that are purported to be of importance as well.

As those who have been following the legal component of Armstrong's story, he raised the white flag following a series of disappointing decisions for his cause made by a judge in Texas. Armstrong first issued a complaint — a lengthy one of 80 pages — against the USADA in July, which was thrown out by Austin-based U.S. Federal District Judge Sam Sparks the same day. In doing so, Judge Sparks chastised Armstrong's legal team for their wordy argument, filled largely with what he believed to be irrelevant accusations. Armstrong wasted no time in filing a new, trimmed-down lawsuit. But, in August, Judge Sparks issued the decision that federal courts have no place interfering in matters that have been deemed to be within the jurisdiction of international arbitration.³ Sparks also took the opportunity to be rather blunt about the fact that, if he did have the opportunity to rule on the case, he had real questions concerning the motives of USADA in going after the decorated cyclist.⁴

Armstrong was left with the reality that he had signed an earlier arbitration agreement with the USADA, giving them authority to rule over the matter,⁵ and facing a pretty strong indication from the USADA concerning how they intended to come down. Efforts by the International Cycling Union to claim authority to issue sanctions also had been fought by the USADA.⁶ The path ahead was clear for Armstrong and his attorneys. Continue to fight issues of jurisdiction and a questionable argument regarding statute of limitations on the charges,⁷ or accept the authority of this ruling body and move on to a new stage in life. The decision to choose the latter has only left more questions for Armstrong's fans, and for those

who work in sports law who wonder what such a conclusion may mean for their athlete clients.

Why was an American enforcement agency, whose chief executive officer, Travis Tygart, received death threats following the decision,⁸ allowed to strip an athlete of titles earned in a European competition? How was the testimony from several of Armstrong's associates able to override the fact that Armstrong had never once tested positive for performance-enhancing substances? The strength of the USADA in furthering its mission, even under the suspicion that punishing a high-profile athlete may have been a deliberate flexing of its own figurative muscles. This leads to the conclusion that, for accused athletes to

get a decent shot at clearing their name, the best legal tactic may be to argue for the matter to be settled without the USADA's involvement.

To this end, however, it does not appear that athletes have much of a track record on their side once arbitration is removed from the hands of the USADA and taken before an international body. The World Anti-Doping Agency is an organization that receives funding from American taxpayers and works to integrate the doping regulations of various nations into the World Anti-Doping Code.⁹ It is a Swiss private law foundation that comprises representatives from the Olympic movement and from govern-

ments. Like its USDA counterpart, the jurisdiction of WADA seems a bit murky. Even the organization's own website does not lay out a clear standard for governance. But when either USADA or WADA reaches a decision with which an athlete takes issue, he or she then may appeal to the Court of Arbitration for Sport. If you are an American, though, do not expect that your argument is likely to fall on understanding ears. Of the 60 cases that have been brought before the CAS from our athletes, 58 of the appeals have been lost.¹⁰ While many sports law attorneys enjoy a challenge in the courtroom, those are odds that not too many would want to face.

For most attorneys who practice sports law in Texas, their dealings with USADA are likely limited. If you represent an athlete whose sport is not among those that offer competition in the Olympic Games, your concern will not be with USADA compliance. Instead, the federal courts often will claim jurisdiction when football or baseball players, as two prominent examples, are found to be involved in doping. While still not desirable to find your client facing federal charges, or at the least be the subject of an inquiry, it can be argued that attor-

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neys are operating here on ground that is more familiar and tested in terms of its case history.

The integration of sports, illegal doping, and the federal legal system was seen perhaps most notoriously with the BALCO scandal that extended for years and most famously led to the conviction of slugger Barry Bonds on counts of perjury and obstruction of justice.¹¹ The Bay Area Laboratory Cooperative was a business that started as a California-based vitamin shop and became a million-dollar operation that catered to athletes who were drawn to the cycle of performance-enhancing drugs that would stay under the radar of random drug testing. In a sweeping investigation that also caught Super Bowl champion Bill Romanowski and American League MVP Jason Giambi in its web, BALCO's illegal product was exposed and the careers of athletes, coaches, and trainers were ended.¹²

In March 2005, concerned that efforts in court would not be enough to curb a systemic problem, Congress held hearings on live television in which star athletes, both past and present, were brought in to share their testimony regarding drug use in their sport.¹³ Despite the increased scrutiny of legislators and judges and the league, players continue in 2012 to use performance-enhancing drugs and face the consequences. Just this season, San Francisco Giants left fielder Melky Cabrera, MVP of this year's All-Star game, received a 50-game suspension after testing positive for fast-acting testosterone. Co-founder of BALCO, Victor Conte, contends that Cabrera is hardly alone in his actions, and likely is joined by half of professional players in their use of this hormone supplement.¹⁴ With the financial incentive to get that performance edge always present, and no shortage of entrepreneurs with questionable ethics ready to sell the latest product, the challenge facing attorneys to keep their clients' reputations clean is ongoing.

As some players continue to violate doping policies and federal investigators seek out those who supply these drugs and bring them to light, do not overlook the role that state courts can play. Sports law attorneys need only to look to Minnesota and the case involving the weight-loss supplement StarCaps for evidence that states may want their say as well. In the StarCaps case, several Minnesota Vikings players fought their suspen-

sions for taking the diuretic on the grounds that they did not know bumetanide, a banned substance, was an ingredient and because the NFL's anti-doping policy violated Minnesota's state law regarding workplace drug testing.¹⁵ The players' legal fight ended when the Minnesota Supreme Court declined to consider an appeal made by a lower state court, and the NFL seemed to demonstrate successfully that its collective bargaining results were subject to federal law and could not be held captive to widely varying standards afforded by the laws of individual states.¹⁶ For instance, in Texas, there are not strict guidelines in place concerning which drugs can be tested by employers and where, with much discretion being left to the individual companies as part of their hiring and retention procedures.¹⁷ A player for the Houston Texans likely would not have as much standing when challenging a drug test in Texas courts as his peer in Minnesota might. Even with a victory for federal supremacy in this instance,¹⁸ the point should be noted that jurisdiction once again is a point of contention. Positioning the legal struggle in a courtroom or in front of an arbitrating body that has leanings favorable toward players' rights and privacy is always a legal play to keep in the book.

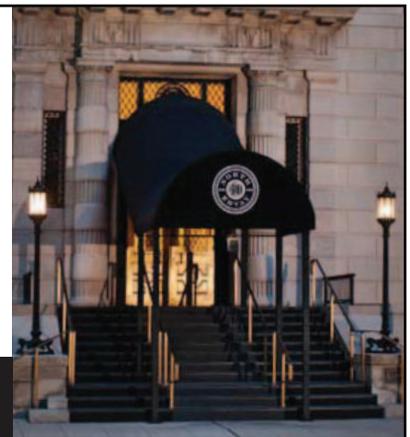
Sports law attorneys know, though, that for the overwhelming number of their clients, most of the work is done in the drafting of contracts, not in defending charges in an open courtroom. When it comes to negotiating contracts for professional athletes in light of the legal consequences of doping, attorneys generally are not working with a lot of flexibility in the way in which drug testing and the subsequent penalties are handled by a particular league. An attorney won't be able to dictate special exceptions for his star quarterback coming into training camp with Heisman in hand. As already mentioned, most major sports have players' unions through which the process of collective bargaining is used to establish drug-testing policies. Both the NFL and MLB, as examples, have well-negotiated language in place regarding the specific substances that can be tested and manner in which this can occur. As anyone who follows the off-season activity knows, there is ongoing conversation about the newest drugs available to athletes, how much in a person's system is too much, and when the random



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request for bodily fluids may constitute invasion of privacy. These debates have threatened seasons as much as pension plans and salary caps. Diligent sports law attorneys may not be involved in these annual discussions, but they better be informed of their outcome.

Also, each team will require “morality clause” language in their athletes’ contracts.¹⁹ If an attorney is working for an athlete who has engaged in some questionable behavior in the past, he may find the contract language must be stronger and more specific in this area to calm a nervous owner. It is understandable that you do not want a player representing your team on the field, smiling for the posters that hang on a young boy’s wall, and bringing fans and their money to the stadium to then destroy that image with public intoxication or incidents of violence or the use of performance-enhancing drugs. While this current moral clause is expected and understood, sports law attorneys should expect, in light of recent controversies, that language concerning doping activity that is discovered after retirement has occurred and the lucrative endorsements already have paid out is increasingly important.²⁰ Will companies like Nike, Gatorade, or Wheaties be able to demand money back from an athlete if it is later revealed that he was injecting hormones while promoting their products on television, even if for a commercial that aired a decade ago? Be prepared to defend your clients’ earning against such efforts, as Armstrong lost many endorsements and was taken to court for the return of commercial compensation when just the hint of wrongdoing was emerging.

When it comes to doping controversies and protecting a client’s career and reputation, sports law attorneys face a set of circumstances that are not set in their favor. And, to an extent, maybe this is understandable. The use of performance-enhancing drugs tarnishes the integrity of the game, bringing the home runs, touchdowns, and record-setting sprints of every athlete into question. We want our clients to operate in a system that is above board and clean so that their performances will be rewarded appropriately and without doubt. The abuse of chemicals that alter one’s mind and body should be taken seriously and with great sensitivity. Because the odds are tough, attorneys should learn from those who have already tested the waters when a legal challenge is presented. My advice is:

1. Fight to have your client’s case heard in a forum that is most understanding of your client’s perspective and, even before that, be careful when agreeing to the arbitrating body that will hear any hypothetical case that may arise in the future.
2. Know in advance that organizations like the USADA and WADA will come down hard and use athletes as examples. Be prepared.
3. Stay current on negotiations between players’ unions and leagues on doping matters.
4. Be mindful of contract language that acknowledges your client’s responsibility for upstanding conduct while also protecting him from the financial fallout of simple allegations.

With these steps taken, attorneys who practice in sports law will be in the best position to handle doping among athletes — an issue that will continue to evolve and be challenged as long as any of us are practicing law.

NOTES

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