

PUBLICATION

Just Play the Game: Sixth Circuit Says Student-Athletes Have No Right of Publicity in Game Broadcasts

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In a short, sharp opinion filed August 17, 2016, a three-judge panel on the Sixth Circuit Court of Appeals affirmed dismissal of a class action lawsuit brought by ten former college athletes asserting they were entitled to compensation for use of their images and names in televised games based on their "right of publicity." The defendants in *Marshall v. ESPN* included major broadcasters, NCAA athletic conferences and various licensing agencies; the NCAA itself was not a party. Baker Donelson's, Bill Jones and Samuel Gregory (Jackson), as well as John Hicks (Nashville), represented two of the prevailing defendants.

Though plaintiffs' complaint alleged several causes of action, including antitrust violations, Lanham Act violations, conspiracy and unjust enrichment, the lower court and Sixth Circuit focused primarily on plaintiffs' assertion that their rights of publicity had been violated. Plaintiffs claimed that both Tennessee and federal law granted them property interests in their names, images and likenesses, as they appeared on television broadcasts of games in which they participated.

The Sixth Circuit dismissed plaintiffs' theory as meritless "legal fantasy." Citing approvingly to the lower court's dismissal, the Sixth Circuit noted that the Tennessee statute on which plaintiffs relied explicitly allowed the use of players' images and likenesses during sports broadcasts and noted that no Tennessee common law authority exists for the proposition that participants in sporting events have a right of publicity.

Plaintiffs' other claims were disposed of in similar summary fashion. Because plaintiffs' antitrust claim was predicated on a right of publicity, the antitrust claim failed by necessity. As aptly noted by the lower court: plaintiffs "cannot have been injured by a purported conspiracy to deny them the ability to sell non-existent [publicity] rights." Plaintiffs' Lanham Act claim, based on a theory that a player's images on television, when juxtaposed with general advertising, created consumer confusion as to whether that player endorsed that advertising, was deemed similarly meritless. The Sixth Circuit quipped that "ordinary consumers have more sense than the theory itself does."

Although *Marshall* has received significantly less media attention than *O'Bannon v. NCAA* and other recent antitrust cases, *Marshall* may serve as a significant bellwether for future cases. Underlying the antitrust legalese of those cases is a core presumption that there may be a future payday when student-athletes can be compensated, and those antitrust plaintiffs have looked towards the billion-dollar broadcast television market as a source for potential compensation. The Sixth Circuit's wholesale rejection of plaintiffs' publicity claims provides persuasive authority to other courts that college athletes possess no protectable publicity interest in their names, images or likenesses, at least for purposes of game broadcasts.

Baker Donelson will continue to monitor developments in *Marshall*, *O'Bannon*, *Jenkins* and other related cases. If you have any questions regarding these cases or related issues, please contact any of the attorneys in the Firm's Higher Education Group or Intellectual Property Group.