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Trials & TRIBULATIONS

'Deflategate' may be pumped back to life

If you thought Deflategate was yesterday's news, you may be mistaken.

On March 4, 2016, oral argument was held before a three judge panel of the U.S. Court of Appeals for the Second Circuit, in the appeal of Judge Richard Berman's decision, vacating the ruling of NFL Commissioner Roger Goodell, which had imposed a four-game suspension on New England Patriots quarterback, Tom Brady. Based upon the oral argument and the questions posed by the judges, this case may not be over yet.

For those of us who may not recall all the salient facts surrounding Deflategate, let me briefly summarize those for you.

During the AFC Championship game on January 18, 2015, between the New England Patriots and the Indianapolis Colts, it was discovered by a Colts' staff member, who was handed an intercepted ball by Colts' linebacker D'Qwell Jackson, that the football was inflated to approximately 11 PSI, which was below the range of 12.5-13.5 PSI specified in Rule 2, Section 1, of the 2014 NFL Official Playing Rules. NFL officials collected and tested all 11 Patriots game balls and 4 Colts game balls at halftime and concluded that all 11 of the Patriots' game balls measured below 12.5 PSI. The balls were re-inflated to approximately 13 PSI and placed back in play.

As a result of that discovery, Commissioner Goodell retained Theodore V. Wells, Jr., of the firm Paul, Weiss, Rife, Wharton & Garrison, to conduct an investigation of the deflated balls and the responsibility for their condition. The so-called Wells Report, which was 139 pages, was completed on May 6, 2015.

In the investigation, it was discovered that two Patriot employees, Jim McNaly and John Jastremski, were seen on a videotape entering and remaining inside a



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restroom with the game balls for approximately two minutes on their way to the playing field prior to the start of the game.

The Wells Report concluded that "it is more probable than not that Brady was at least generally aware of the inappropriate activities of McNaly and Jastremski involving the release of air from Patriots' game balls." The Wells Report also found that it was "unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady's knowledge and approval."

The Wells Report resulted in NFL Executive Vice President, Troy Vincent, imposing a four game suspension on Brady, a \$1 million fine on the Patriots, forfeiture of the Patriots' first round pick in the 2016 NFL draft, and a fourth round pick in the 2017 NFL draft. McNaly and Jastremski were indefinitely suspended without pay by the Patriots.

Although the Patriots accepted the punishment imposed by Vincent, Brady, through the NFL Players Association, appealed the four-game suspension pursuant to the Collective Bargaining Agreement ("CBA"). In response, Commissioner Goodell designated himself the arbitrator to hear Brady's appeal, which was authorized pursuant to Article 46, Section 2(a) of the CBA.

On June 23, 2015, the arbitration appeal hearing was conducted before the Commissioner. On July 28, 2015, the Commissioner issued a twenty (20) page final decision on Brady's appeal, which upheld the four-game suspension.

“It is more probable than not that Brady was at least generally aware of the inappropriate activities of McNaly and Jastremski involving the release of air from Patriots' game balls.”

WELLS REPORT

In upholding the suspension, the Commissioner concluded that Brady had participated in a scheme to tamper with the game balls after they had been approved by game officials, and he furthermore willfully obstructed the investigation by, among other things, affirmatively arranging for the destruction of his cell phone, knowing that it contained potentially relevant information that had been requested by the investigators. The Commissioner concluded: "All of this indisputably constitutes conduct detrimental to the integrity of and public confidence in the game of professional football."

Immediately thereafter, the NFL commenced a proceeding in U.S. District Court for the Southern District of New York, seeking to confirm the arbitration award. The Players Association filed a cross-motion to vacate it.

After an unsuccessful attempt to settle the case, oral argument was held on two

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dates in August, and ultimately, District Court Judge Berman issued a 40-page Decision and Order on September 3, 2015, vacating the arbitration award, including Brady's four-game suspension. The NFL filed a Notice of Appeal, and oral argument of the appeal was held on March 4, 2016. A decision is expected within the next 30 to 60 days.

Although the District Court made reference to the deference normally afforded to arbitral decisions, it nevertheless concluded that the award should be vacated. The Court's decision was premised upon its conclusion that there were several significant legal deficiencies in the process, including the following:

Inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct;

Denial of the opportunity for Brady to examine one of two lead investigators, namely Executive Vice President and General Counsel Jeff Pash; and, denial of equal access to investigative files, including witness interview notes.

Based upon my review of Judge Berman's decision, the briefs filed with the Court of Appeals, and the oral argument, I expect the Court of Appeals will reverse Judge Berman's decision, and reinstate the four-game suspension of Tom Brady.

The basis of my opinion is the following:

Inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct.

The District Court concluded that Brady had no notice that he could receive a four-game suspension for being generally aware of the ball deflation by others, participating in any scheme to deflate footballs and non-cooperation with the ensuing investigation. The Court also took issue with the failure of the Commissioner to determine what portion of the four-game suspension was due to his non-cooperation as compared to his awareness of the tampering of the footballs.

In reading Judge Berman's Decision, it is evident that he was substituting his judgment for that of the Commissioner in concluding that the four-game suspension was inappropriate. For example, the Court emphasized the fact that

the Competitive Integrity Policy, which formed the basis for the Commissioner's Decision, is only incorporated into the "Game Operations Manual" which was provided to the Chief Executives, Club Presidents, and others, but it was not included in the "Players' Manual" which is provided to players such as Brady. However, the Court ignored the fact that every player's contract includes a statement that the Commissioner "has substantial discretion to discipline conduct detrimental to the game with a suspension up to and including indefinite suspension."

The Court also suggested that Brady was being punished for his awareness of misconduct by others, and that the NFL had never sought to punish players for such an alleged violation.

However, the Court's Decision ignored evidence from the Wells Report, which demonstrated that Brady refused to provide any of his own phone records, text messages, or emails, and more importantly, other phone records revealed that Brady had an inordinate number of communications with Jastremski immediately following the AFC Championship Game after it had been announced that an investigation into the deflated footballs would be conducted. The Court also ignored the fact that Brady and Jastremski had not communicated for at least six months before that day.

Additionally, the Court ignored the fact that there were messages dating back to May 2014, in which McNaly referred to himself as "the Deflator" and had discussed deflation using needles. Furthermore, McNaly had expressed frustration with Brady's request with respect to deflating.

The Wells Report demonstrates that Brady was more involved with the plot to deflate than what the Court was willing to accept, and to suggest that he was being punished for simply his knowledge of others' misconduct is misleading.

Denial of the opportunity for Brady to examine one or two lead investigators, namely Executive Vice President and General Counsel Jeff Pash

Brady's attorneys sought to compel the testimony of Jeff Pash, who was the Exec-

utive Vice President and General Counsel of the NFL, and who is identified as the co-lead investigator with Wells in connection with the investigation. Although Mr. Wells was presented at the arbitration hearing as a witness, the NFL objected to Pash's appearance since his role was limited in the investigation. He essentially reviewed the report and provided Wells' law firm with written comments or edits prior to the release of the report.

Commissioner Goodell upheld the objection to Pash being presented as a witness, and Judge Berman concluded that the Commissioner's ruling was "fundamentally unfair and in violation of 9 U.S.C. § 10(a)(3)." Although the Commissioner agreed to compel the testimony of two individuals with personal knowledge of the facts of the investigation, namely Wells and Clay Vincent, he declined to compel the testimony of two others, namely General Counsel Pash and himself.

However, the Commissioner did offer to revisit that ruling should testimony at the hearing reveal that he was mistaken in his understanding that Pash played no substantive role in the Wells investigation. After Wells' testimony, the Players' Association did not seek to have Pash testify.

In concluding that the refusal to compel the testimony of Pash was unfair, the Court ignored a number of cases which grant discretion to the arbitrator to determine whether testimony is cumulative and therefore unnecessary. See *United Paperworkers International Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29 (1987).

Denial of Equal Access to investigative files, including witness interview notes

The Court concluded that the Commissioner's denial of the Players' Associations' motion to produce the files involved in the investigation, including notes of witness interviews, for Brady's use at the hearing was unfair and a violation of 9 U.S.C. § 10(a)(3), and that Brady was prejudiced as a result of it.

The Commissioner ruled against producing all of the internal work product of Paul Weiss, based on the provision of the CBA Article 46 and Section 2(f)(ii), which specifies that the evidence that must be

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disclosed in an Article 48 Arbitration Hearing will consist of copies of any exhibits upon which the parties intend to rely. The District Court ignored this provision.

Furthermore, the Decision also ignored the fact that prior to the Paul Weiss firm becoming involved in the investigation, the League had produced “all of the NFL documents considered by the investigators in preparing their report, including notes of interviews conducted by in-house NFL investigators prior to the time that the Paul Weiss investigation began.”

I would not expect that the Court of

Appeals will agree that the failure to turn over Paul Weiss’ internal work product prejudiced Brady or deprived him of a fair hearing.

The District Court’s Decision in vacating the suspension of Tom Brady represented a departure from a number of Supreme Court and Second Circuit decisions which have upheld labor arbitration awards, even if the arbitrator’s decision “offers even a barely colorful justification for the outcome reached.” *Andros Compania Maritima v. Marc Rich and Co., A.G.*, 579 F.2d 691, 704 (2d Cir. 1978).

Unless the award was procured through dishonesty or wholly departs from the parties’ agreement, the Court must enforce

the award even if it views the arbitrator’s decision as incorrect. *Local 97, International Brotherhood of Electrical Workers, AFL-CIO v. Niagara Mohawk Power Corp.*, 196 F.3d 117 (2d Cir. 1999).

In view of the considerable precedent granting deference to the arbitrator, I expect the Court of Appeals will reverse Judge Berman’s Decision and reinstate Tom Brady’s suspension.

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