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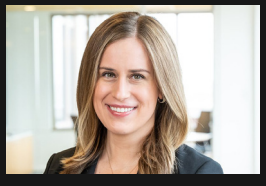

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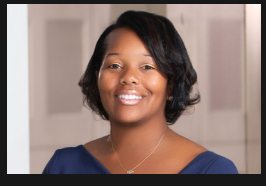

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BOTTOM OF THE NINTH: FOREVER CHEMICAL BANS TAKE EFFECT IN 2025. WHAT'S IN YOUR TEAM APPAREL?

MEGAN MCCURDY AND ASHLEY CRISAFULLI

There has been a significant uptick in class action litigation related to sustainability claims, which will only increase after bans in California and New York on forever chemicals in apparel go into effect January 1, 2025.

Per- and poly-fluoroalkyl substances (PFAS) are a broad group of thousands of man-made compounds often referred to as "forever chemicals" because they contain a strong carbon-fluorine bond and do not degrade easily in the environment. PFAS are most commonly recognized for their resistance to water, heat and oil. PFAS have been found in everything from your favorite team's apparel to your food packaging from the concession stand. Although only certain chains of PFAS have confirmed health risks, some studies now suggest that all PFAS could be harmful to human health and the environment.

Beginning January 1, 2025, California will prohibit the manufacture, distribution and sale of new athletic wear, sports uniforms, footwear, bags and other clothing or textile items that either contain intentionally added PFAS or contain 100 parts per million (ppm) or more of PFAS. Until 2028, intentionally added PFAS will be allowed in outdoor apparel designed for sports experts to use in severe wet or snowy conditions, such as offshore fishing and sailing, whitewater kayaking and mountaineering. However, beginning January 1, 2025, "Made with PFAS chemicals" disclosures will be required for any such outdoor apparel with intentionally added PFAS or 100 ppm or more of PFAS.

Also beginning January 1, 2025, New York will prohibit the sale of new apparel with PFAS intentionally added for a functional purpose or technical effect in the product. By 2027, New York will establish a limit on the amount of PFAS allowed in apparel regardless of whether it was intentionally added. Other states are considering or have already passed similar PFAS bans that will go into effect at a later date. For example, Maine is also restricting the use of PFAS in apparel, but the ban doesn't go into effect until 2026.

Already, plaintiffs are blowing the whistle on violations of a similar California ban on PFAS in food packaging that went into effect last year. The total organic fluorine test identified in California's statutes is relatively inexpensive to run, prompting plaintiffs to test products en masse. Based on the results, plaintiffs are using a variety of false advertising laws to threaten and file putative class actions against companies manufacturing, distributing and selling products that violate California's ban on PFAS. Similar litigation related to apparel items is expected.

Compliance with applicable state laws may not be sufficient. Your favorite team's apparel could still risk litigation even if PFAS are not intentionally added and even if it contains less than 100 ppm of PFAS. Plaintiffs have already started to target major apparel and athletic wear manufacturers, alleging that a product representation is false or misleading because the product contains PFAS, even in the absence of statutes regulatory PFAS.

Affirmative sustainability claims are particularly susceptible to litigation. Plaintiffs' attorneys often target products that tout they are "certified" with various third-party certifications as well as products that make claims like "green," "sustainable," "environmentally friendly," "reduce waste," "reduce your carbon footprint," "recyclable," "compostable" and "biodegradable."

For example, in Washington state, a consumer brought a putative class action against a manufacturer of outdoor gear and clothing, alleging that affirmative sustainability claims were false because the apparel contained PFAS. The case was dismissed – after a year and a half of costly litigation.

In Missouri, a consumer brought a putative class action against a manufacturer of athletic footwear, apparel and equipment, alleging the manufacturer's sustainability line of products were not made from sustainable and environmentally-friendly materials. Although the claims were dismissed by the district court as conclusory and unreasonable, the case litigates on before the Eighth Circuit.

In Illinois, consumers brought a putative class action against a manufacturer of children's apparel because they did not disclose the presence of PFAS in the apparel. In that case, the court reasoned that a consumer purchaser would not be misled because the manufacturer did not make any affirmative representations that would conflict with the presence of PFAS.

While several of these early cases have been dismissed, the new PFAS bans and increased focus on PFAS nationally may impact outcomes of future cases.

So while we are in the ninth inning as PFAS bans are about to take effect, litigation risk and scrutiny on marketing will persist into next year's season.

WHAT SHOULD YOUR GAME PLAN BE IF YOU MANUFACTURE, DISTRIBUTE OR SELL APPAREL?

- Ensure compliance with the upcoming PFAS bans and monitor for additional state specific requirements.
- Understand the vulnerabilities in your supply chain.
- Eliminate the intentional use of PFAS in your apparel, if applicable, and conduct a review of your affirmative claims.
- Contact counsel if you receive a pre-litigation demand or service of a lawsuit. Seasoned counsel will be familiar with the plaintiffs litigating in this space.

FLAG AFTER THE PLAY, RULING ON THE FIELD UNDER REVIEW: $4.8 BILLION NFL SUNDAY TICKET ANTITRUST LITIGATION

NICCI WARR, JEETANDER DULANI AND SOPHIE HILL

In June 2024, a California jury awarded plaintiffs nearly $4.8 billion in an antitrust class action against the National Football League (NFL) and DirecTV. In the case, *In re National Football League's "Sunday Ticket" Antitrust Litigation*, plaintiffs – individual and corporate subscribers to the NFL's "Sunday Ticket" streaming package – alleged that all 32 NFL teams, along with DirecTV, violated federal antitrust law by pooling their broadcast rights and offering the "Sunday Ticket" only as a complete package. Plaintiffs argued that there should have been a single-team option available, in addition to the complete package. The jury agreed.

But a little over a month later, U.S. District Judge Philip S. Gutierrez overruled the jury's verdict, finding that plaintiffs' experts presented "flawed" and unsound methodologies. "[B]because there was no other support for the class-wide injury and damages elements of plaintiffs' [antitrust] claims," Judge Gutierrez entered judgment as a matter of law for the defendants. Plaintiffs, as expected, filed an appeal to the Ninth Circuit. That appeal – which could determine the fate of the NFL Sunday Ticket – will likely be decided next year.

WHAT IS THE CASE ABOUT?

At base, the litigation addresses whether the NFL can offer only an "all team" Sunday Ticket product or whether it must also allow teams to offer a single-team product, which plaintiffs assert would be cheaper. In a 2010 opinion in *American Needle, Inc. v. NFL*, the U.S. Supreme Court held that, for purposes of analyzing whether the NFL teams could pool their apparel licensing rights consistent with antitrust law, each team had to be treated as a separate market participant. The consequence was that the NFL as an umbrella entity does not immunize the league's teams from antitrust law. As a result, plaintiffs can bring a claim alleging that the pooling of intellectual property rights by the teams violates federal law.

Based on a similar theory to *American Needle*, the *Sunday Ticket* plaintiffs sued the 32 NFL teams and DirecTV, which sells the Sunday Ticket. Each NFL team formed an agreement with

the NFL to allow the NFL to exercise their rights collectively. The NFL then entered an agreement with CBS and Fox to broadcast the NFL games, allowing some local games in each geography to be broadcast free over-the-air. The NFL and DirecTV entered into an agreement allowing DirecTV to create "NFL Sunday Ticket," a package combining live broadcasts from CBS and Fox. Plaintiffs alleged that the NFL's interlocking broadcast agreements unreasonably restrain trade in violation of federal antitrust law and amount to monopolization.

In July 2024, the case was presented to a jury in a two-week trial. After the jury returned a multibillion dollar judgment for plaintiffs, the court entertained post-trial motions. On Aug. 1, 2024, the judge determined that the testimony of plaintiffs' two expert witnesses – who provided opinions that plaintiffs had been injured by the pooling arrangement and by how much – did not meet the requirements of the federal rules.

Federal Rule of Evidence Rule 702, which governs expert testimony, had been amended in 2023 to become more stringent. Judge Gutierrez held that the testimony of plaintiffs' economic experts did not meet the new requirements because it did not result from reliable and sound methodologies.

Each of the plaintiffs' experts had engaged in creating economic models to determine what would have happened in the "but for" world – *i.e.*, a world where the NFL teams did not enter into the challenged contracts. One of the plaintiffs' experts based his economic model on college football, concluding that, absent the challenged agreements, out-of-market NFL games would become available for free. Judge Gutierrez held in his post-trial order that this expert's testimony was both contrary to the fact testimony during trial, and unreliable because it had unsupported assumptions about how the NFL teams and their broadcasting partners would have arrived at a spot where every out-of-market football game was available for free. Instead, according to the judge, the expert simply opined that the NFL teams and broadcasting partners would have "figured it out," which was not sufficient.

The judge also excluded the testimony of another plaintiff expert, who opined about an alternative distributor of out-of-market games that could have existed in the "but for" world. The judge determined that, logically, the expert's opinions were limited to a "but for" world where there was a direct-to-customer streaming option, but there was no factual testimony to demonstrate that any streaming service was available or seeking to distribute out-of-market NFL games during the relevant time. Consequently, the economist's testimony did not meet the requirements of the federal rules.

Along with eliminating the expert testimony, the court held that "[t]he jury did not follow the Court's instructions [on damages] and instead relied on inputs not tied to the record to create its own 'overcharge.'" Rather than calculating the average overcharge, the jury "calculated the average 'discount' a residential consumer received," which the court determined was not only contrary to the court's instructions, but "nonsensical" as well.

WHY DOES THIS MATTER?

The case is before the Ninth Circuit, so any final analysis of the consequences of this case will need to await the outcome of the appeal. That said, the district court opinion presents issues that warrant more immediate consideration.

Parties in litigation – particularly in cases, such as antitrust cases, that almost always involve "but for" analysis – should ensure that expert testimony is based on a thorough explanation of the "but for" world and use sound "but for" assumptions that have factual support. Judge Gutierrez explained that "[w]hile FRE 702 certainly does not require a but-for world to perfectly reflect what the real world would have been," plaintiffs' expert needed to do more than just opine "market participants would have figured it out." Parties also need to ensure that their expert's testimony is well supported not just before trial, when challenges to expert testimony often take place, but all the way through trial. In other words, parties must present the appropriate factual record at trial to support their expert's assumptions.

Even when an expert opinion is well-grounded and has a sound methodology, parties should remember that juries are often motivated to make their own determinations. This is particularly true in complex cases, such as antitrust cases, where the jury is asked to decide complicated issues.

FROM FIELD TO FIRM: LESSONS FOR LAWYERS FROM ATHLETES' MENTAL HEALTH PLAYBOOK

KRISTA LARSON, NAIMA STARKS AND AUSTIN TAPURO

Both athletes and lawyers operate in intense environments where performance is paramount. Athletes are trained to cope with stress through mental conditioning and performance strategies. In contrast, the legal field has traditionally prioritized individual achievement, often neglecting mental wellness. Proactively creating an environment where lawyers can thrive mentally and emotionally is essential, and adopting strategies from the sports industry could help.

There is mounting evidence of mental health challenges within the legal profession. A landmark 2016 study published in the *Journal of Addiction Medicine* found that attorneys experience problematic drinking, depression, anxiety and stress at higher rates than the general population. As mental health awareness grows, law firms have an opportunity to implement healthier practices that enhance attorney well-being.

Integrating sports psychology can help legal professionals handle these pressures more effectively – particularly principles that focus on emotional literacy, resilience and individualized optimization.

EMOTIONAL LITERACY

Emotional literacy – understanding and managing one's emotions – can improve client interactions, decision-making and the overall work environment. Programs that teach emotional intelligence skills can help lawyers regulate emotions, enhancing resilience and mental health. Fostering open conversations about emotions within law firms can help destigmatize mental health issues and create a supportive culture.

Athletes frequently encounter setbacks, whether losing a championship or recovering from injury. Their ability to navigate adversity is crucial to their success. Lawyers also face setbacks: Losing a case is especially demoralizing. But by learning to recover and grow from challenges, lawyers can improve their emotional resilience, similar to how athletes bounce back from losses or injuries.

For decades, sports psychologists have studied the relationship between an athlete's emotional state and performance. Lawyers must understand their emotional and mental states, identifying when they are most productive. Legal education traditionally emphasizes logical reasoning, often neglecting the role emotions play in performance. Embracing emotional literacy allows attorneys to become self-aware, manage their emotions effectively and tap into their emotions for peak performance in high-stress situations.

For example, if an attorney feels like they've missed an obvious argument, they may beat themselves up, returning to their mistake over and over. Instead, attorneys should practice sitting with that uncomfortable emotion. Acknowledging disappointment can be grounding. It gives you a moment to reflect on your potential for growth, allowing you to ultimately push forward.

RESILIENCE

Specifically, athletes engage in "eustress," a positive, adrenaline-pumping form of stress that helps them grow and develop resilience. This concept applies directly to law, where stress is a daily reality. Instead of allowing stress to turn into distress, lawyers can learn to engage with it constructively. Developing coping mechanisms and stress management techniques can help lawyers stay within a eustress zone, fostering resilience and avoiding burnout.

When stress is viewed as an opportunity for growth, it becomes a powerful tool for personal and professional development. A "stress is enhancing" mindset can improve work performance and reduce negative health outcomes. Lawyers often face isolation and criticism, making them more vulnerable to adversity. Instead of avoiding stress, attorneys should embrace it, recognizing it as an opportunity for growth. By reframing their stress responses, lawyers can unlock motivational potential, channeling it into high-stakes challenges.

Managing stress responses can also lead to physiological benefits. When stress is properly channeled, it aids in cellular repair, protein synthesis and immunity – what researchers call "physiological thriving." Athletes use stress to build mental toughness, and similarly, lawyers can grow from their challenges by viewing stress as an integral part of professional growth. Lawyers learning

to embrace stressful situations and the opportunities they present can lead to stronger connections, increased self-awareness and clearer priorities.

Athletes often refer to being "in the zone" during peak performance, a state known as "flow." Psychologist Mihaly Csikszentmihalyi defines flow as complete engagement in an activity where nothing else matters. Some attorneys find flow when drafting legal documents, such as summary judgment briefs. Organizing the facts and law into a compelling argument begins to feel like assembling a puzzle. After entering this zone, an attorney may look up to find several hours have passed.

Lawyers can cultivate similar flow states in their work, though the conditions that enable flow vary. What works for one lawyer may not work for another. Identifying activities and environments that foster this state is essential for bringing meaning and purpose to a lawyer's career.

INDIVIDUALIZED OPTIMIZATION

Well-being is a team sport, with employers playing a crucial role in supporting lawyers' mental health. Improving mental health and well-being in the legal profession requires a shift from individual resilience strategies to systemic cultural changes. Research shows law firms that value employees for their skills rather than just billable hours tend to have healthier and more productive lawyers. When lawyers feel valued, they report better mental and physical health and are less likely to leave the profession. Conversely, those who feel undervalued may struggle with mental health issues and higher attrition.

Successful well-being programs recognize that a one-size-fits-all approach is inadequate. Tailoring resources to accommodate different learning styles can enhance engagement. Offering various mental health resources – such as Employee Assistance Programs, online platforms, and on-demand content – ensures attorneys receive the support they need. In addition to employer-provided resources, every state has a lawyer assistance program that can provide confidential counseling and other well-being support services. Prioritizing mental health initiatives creates a culture of well-being, benefiting both employees and clients.

The legal profession often views stress as an unavoidable downside of the job, but it doesn't have to be. By learning from the sports world, where stress is harnessed for growth, attorneys can cultivate resilience, emotional fitness and physiological thriving. Stress can serve as a force for improvement, mastery, and meaning in both personal and professional realms. By embracing stress, acknowledging its challenges and using it to fuel growth, attorneys can thrive under pressure and enjoy fulfilling careers. Creating supportive environments is a crucial step toward overcoming the stigma surrounding mental health in the legal profession.

With these strategies, the legal field can begin to foster environments which permit lawyers to perform their best in their respective "game sevens," ultimately leading to figurative "championships" for everyone involved.

THE LINE UP

AALOK SHARMA

01 **11.** Over the last year, 11 separate actions have been commenced against online sweepstakes casino operator Virtual Game Worlds (VGW), its affiliates and others. Generally, online casino sweepstakes are free to pay and include an alternate means of entry, making them at first blush permissible under state law. But these online casino sweepstakes permit participants to obtain "sweeps coins," which can be converted into real currency or used to play real-money contests. The crux of plaintiffs' claims is that by offering online casino contests disguised as sweepstakes, VGW is violating state laws, which provide for injured parties to recover damages for gambling losses. Industry stakeholders, including the American Gaming Association, are calling on state legislatures and regulators to do more to rein in online sweepstakes operators. Earlier this year, the Michigan Gaming Control Board served a cease and desist letter to several operators demanding that they comply with Michigan gaming laws, or otherwise face significant penalties. However, it is unlikely that the sweepstakes casino marketplace will change significantly until after the U.S. presidential election.

02 **$560,000.** In April 2024, former Toronto Raptors player Jontay Porter tipped off a select group of sports bettors about his health and presumed performance in upcoming games. The bettors profited off of Porter's insider information. Porter, who was making $560,000 a year on a two-way contract, was later banned from the National Basketball Association (NBA) and charged by federal prosecutors in the Southern District of New York for conspiracy to commit wire fraud. Porter pleaded guilty to those charges and is expected to be sentenced December 18, 2024. The NBA's investigation revealed Porter suffered from a gambling addition, and his misconduct was tied to large gambling debts that he had accrued. Unlike their superstar teammates who earn millions of dollars, low-salary players on two-way or 10-day contracts have more incentive to engage in nefarious conduct to bolster their earnings. Now, the NBA and several of its gaming partners have agreed to ban prop wagers on low-salary players like Porter, which should address integrity concerns around NBA contests.

03 **$375 MILLION.** Ten years ago, several Ultimate Fighting Championship (UFC) fighters alleged that the UFC was suppressing fighters' wages. Specifically, the fighters alleged that the UFC used several tactics to harm competition, including keeping fighters locked into long-term contracts, preventing free agency options, and coercing fighters into re-upping their contracts. Plaintiffs and the UFC initially agreed to a settlement valued at $335 million, though the district court expressed skepticism that the settlement value was too low. Accordingly, a revised settlement of $375 million was agreed to and approved by a Nevada district court judge. The settlement will provide recovery to over 1,000 UFC fighters who engaged in bouts between 2010 and 2017, with payouts ranging from $15,000 to $1 million.

04 **$20 MILLION.** Now that most states have legalized sports wagering, operators have turned to increasingly novel products to acquire and retain customers in a hypercompetitive marketplace. One area of continued growth is live golf wagering and content. In a recent deal rumored to be worth $20 million, DraftKings acquired Dijon Systems, a subsidiary of Mustard Systems. Mustard is a business-to-business supplier of golf betting models, pricing and strategy. According to DraftKings, the deal will allow them to "innovate in the golf space, and provides ... an opportunity to deliver fresh and exciting options for golf fans." It is expected that DraftKings will incorporate Mustard's technologies into the DraftKings platform with new bet types and content.

05 **$3 BILLION.** In analyzing whether a free-to-play online casino was illegal under Washington gaming law, the Ninth Circuit held in *Kater v. Churchill Downs Incorporated*, that virtual chips in an online casino constituted things of value because they are a "form of credit . . . involving extension of . . . entertainment or a privilege of playing [the app] without charge." In *Kater*, the online casino app was free to download, and users were provided a set of free chips. Subsequently, users would earn more chips through gameplay, or could purchase more chips using real money. In ruling for plaintiffs in *Kater*, the court stated that that online operators could not skirt Washington law by claiming that its contests were free to play. Now a new lawsuit is targeting a similar in-game mechanic in Royal Match, a free-to-play tile-matching game in which users can purchase virtual coins to extend gameplay. Royal Match was developed by Dream Games' Teknoloji Anonim Şirketi, a company headquartered in Turkey. The newly filed complaint alleges Dream Games earned over $3 billion in revenue since its inception through May 2024, with almost all of the revenue attributable to Royal Match. Like the *Kater* plaintiffs, the complaint alleges violations of the state of Washington loss recovery statute, negligent misrepresentation and fraud.

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