

SPORTS LAW TEAM

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A L E R T

SAVING FANS FROM THEMSELVES (AND FOUL BALLS): CLASS ACTION SUIT AIMS TO RAISE NETS AND TAKE DOWN THE BASEBALL RULE

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“The slaughter pen” is the early 1900s term to describe the seating area behind baseball’s home plate before the age of nets or fencing shielded them from wild pitches and foul balls.

While the game has come a long way since then, a team of class action lawyers drew inspiration from the term in a civil class action filed against Major League Baseball in the Northern District of California.¹ The attorneys argue that in today’s game of faster and stronger players, compounded with more distractions at the park and in the palms of fans’ hands, the “slaughter pen” now stretches far beyond just behind home plate and now encompasses everything between the foul poles. The complaint refers to all season ticket holders in this area as the “Danger Zone” class of plaintiffs.

Momentum is arguably in plaintiffs’ favor, given the enthusiasm in the 24-hour news cycle for showing fans acting outrageously to injuries

related to foul balls, or worse yet, the image of an ambulance stretcher in the stands. More than a few incidents have garnered significant press in the first half of the 2015 baseball season.

There is no question that the part of the experience where fan and game collide can be a dangerous one. It’s the touch and feel of the game that draws people to the park, whether the nostalgia of filling out a scorecard in the fresh air or the high-tech interactions now available at the ballpark, such as between inning games played on smartphones. Many kids (and adults) are still clutching baseball gloves at games in the hope a foul ball or home run comes their way. But as the class action complaint argues with respect to today’s faster paced play featuring increasingly powerful players in a significantly distracted environment, might more safety be necessary?

This lawsuit, while brought as an injunctive measure to force MLB to install more nets and fences, directly attacks the foundation of the Baseball Rule. The Baseball Rule holds that stadium and venue owners and operators, including teams, owe only a limited duty to fans to protect them from baseballs and pieces of bats flying into the stands. The stadium owner must provide adequately screened seats for all those who wish

¹ *Gail Payne v. Office of the Commissioner of Baseball (d/b/a Major League Baseball); and Robert D. Manfred, Jr.*, Class Action Complaint 4:15-CV-03229-KAW, filed July 13, 2015.

to sit behind a screen, and provide screening in the most dangerous parts of the field, which up until now has been designated as the area behind home plate. It is a derivative of the assumption of risk doctrine, which in its simplest form means that if you knowingly enter into a dangerous area or activity, you assume the risk of any related injury. At the ballpark, courts almost uniformly hold that even the novice fan knows there are inherent dangers with attending a live game. “Even someone of limited personal experience with the sport of baseball reasonably may be assumed to know that a central feature of the game is that batters will forcefully hit balls that may go astray from their intended direction.”²

Within this framework, courts and some state legislatures have held it is not proper to impose liability on ball clubs and venues when fans are injured.³ You buy a ticket, you’re buying the experience, with all the dangers that could come with it. The class action complaint makes multiple arguments against the Baseball Rule. Interestingly, or perhaps more practically, the real push appears to entice MLB to act on its own. From a realistic litigation standpoint, getting the courts to overturn the Baseball Rule whole hog would be extremely difficult. However, creating a public relations dilemma could be the best approach to effect change in major league parks.

On this front, the observer should focus on at least three of the myriad points made in the complaint. First, players have been more vocal in calling for additional netting to make the fan experience safer. Second, other sports have increased safety

in their own way, arguably without detracting from the fan experience. And third, in the hyper-connected age of ubiquitous smartphones and offline distractions, fans’ attentions are pulled in various directions besides the field of play making a potentially dangerous collision between fan and game arguably more likely than in the past.

Player Comments Cut Against the Status Quo

After a recent incident at Fenway Park, information leaked to news outlets that extending the nets in the Major Leagues has been discussed in the last two rounds of collective bargaining.⁴ Recently, as the complaint points out, a number of players have been quoted regarding the dangers in some of the closer seats between the foul poles. Some expressly recognized the danger, as Los Angeles Angels of Anaheim catcher Chris Iannetta did after a game in which he hit a foul ball that unfortunately struck a young fan: “I wouldn’t put my kids there. I wouldn’t even sit there. It’s different when you’re a player, you’re in every pitch, but as a fan, you’re distracted... They’re not paying attention. It’s a bad scenario.”⁵

The complaint uses this quote to make the point that the players recognize and are concerned about the risk. But looking deeper at Iannetta’s comments reveals they could have just as likely been directed at the parents – and thus could be taken as supporting the underpinning of the Baseball Rule. Those attending games, specifically

² *Costa v. The Boston Red Sox Baseball Club*, 61 Mass. App. Ct. 299, 303 (App. Ct. Norfolk 2004)

³ And even where courts have attempted to impose liability, state legislatures have pushed back to give more deference to leagues and venue operators. *See, e.g.*, New Jersey Baseball Spectator Safety Act of 2006, N.J.S.A. 2A:53A-43 to -48; Illinois’ Baseball Facility Liability Act of 1993, 745 ILCS 38/1, et seq.

⁴ <http://www.foxsports.com/mlb/story/boston-red-sox-fenway-park-mlb-broken-bat-injured-fan-safety-netting-060715>. In June, Derek Holland, player representative for the Texas Rangers, stated “we’re the ones who are down there, so we know how dangerous it can be, and that’s probably why the players have been pushing for so long to get a change.” <http://www.dallasnews.com/sports/texas-rangers/headlines/20150627-after-recent-dangerous-incident-should-rangers-hang-more-netting-at-globe-life-park.ece>.

⁵ <http://www.latimes.com/sports/sportsnow/la-sp-sn-angels-giants-young-fan-hit-by-foul-ball-20150503-story.html>

parents, are held to know that with the joy of taking their youngsters to games comes some risk that the minors will be in harm's way, especially if allowed to bring in outside distractions to the park. So while players may be encouraging greater safety for the fans' sake, personal (and familial) responsibility still counts for something.

Trends in Other Sports towards a Safer Fan Experience

The complaint also points out that two other professional sports leagues – the NHL and NASCAR – have taken a more proactive approach. After a fatal incident in 2002, the NHL has raised the boards and encased more of the ice in netting to protect against errant pucks. The complaint cited an NHL statistic revealing that the extra netting had stopped more than 23,700 pucks from getting into the seats from 2005 to 2010.⁶

In NASCAR, where machines race around the track at over 200mph, the sport, sometimes at the strong urging of the drivers, has constantly improved fan safety. While many improvements are put in place to protect drivers – for example installing impact absorbing walls, advanced car chassis design and roof flaps – the sport has developed and installed new and improved fencing and catch nets to protect the fans. Following a particularly violent accident in February of 2013 at Daytona International Speedway where 28 fans were injured by flying debris, the track reinforced and reconfigured the crossover gate and grandstand fencing. Similar improvements have been made at other tracks with designs being updated continuously.⁷ Though improvements

have yielded results, wrecks can still lead to debris making their way into the stands.

This was the case at the July 4 weekend race at Daytona where Austin Dillon's car was catapulted into the catch fence just as Dale Earnhardt Jr. was about to win the race. Luckily, only one fan was injured badly enough to require immediate hospitalization. As he crossed the finish line, Dale Earnhardt Jr. quickly inquired about the safety of Austin Dillon and the fans before acknowledging his win. After the race, Dillon credited NASCAR for making racing safer for him and the fans. The area of the track where the crash occurred was in fact a renovated area where the stands were moved farther back from the fence – allowing most of the debris to fall harmlessly in front of the stands.⁸

The complaint did not go into the same level of detail regarding NASCAR, but the analysis is an important one for the MLB to consider. What's good for one sport may not necessarily be good for another. For example, moving the stands back further from the action makes sense for NASCAR fans who generally prefer to view races from higher vantage points, but would likely put off baseball fans who like to be on top of the field. Regardless, the MLB needs to be prepared for cross-sports comparisons to improve their own negotiating position.

Not Just a Dancing Mascot

Finally, the complaint points to a more distracting environment at today's ballparks. Chief among its allegations is that the MLB has encouraged fans to use smartphones during games, thereby calling for fans to avert their eyes from the field of play. Encouraging smartphone use is different, the

⁶ <http://reportingtexas.com/into-the-stands-how-safe-is-professional-baseball/>

⁷ Jerry Bonkowski, *Crossover gate, fencing significantly strengthened at Daytona after February's near-tragedy*, MOTOR SPORTS TALK (July 4, 2013).

⁸ http://sports.yahoo.com/blogs/nascar-from-the-marbles/dale-earnhardt-jr--wins-at-daytona-in-front-of-vicious-crash-065946402.html?utm_medium=referral&utm_source=pulse_news

theory goes, than simply having T-shirt cannons and dancing mascots at breaks in the play because the mascot stops dancing with the pitch is thrown; Wi-Fi stays on throughout the game. There needs to be a balance between providing additional sources of entertainment that help draw in a younger fan base and unintentionally subjecting that fan base to a more dangerous environment because of that additional entertainment. Legally, the argument may not be enough to overcome the Baseball Rule; but looking again to the court of public opinion, MLB will need to show they have considered fan safety.

The End Game

Given the voluminous nature of the class action complaint, the Court of Public Opinion may well be the preferred audience, and a quick settlement may be the targeted end game for plaintiffs' counsel (as it so often is in class action cases). Due to the strength of the Baseball Rule, plaintiffs' counsel may be wise to go this route. However, will a class action case really prove the motivating factor for the MLB to mandate huge new nets and fences at all its major and minor league ballparks? We shall see. ◆

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