

# PROFESSIONAL SPORTS

August-September 2012

and the **LAW**

## PRACTICAL CONSIDERATIONS IN FINDING THE RIGHT ATHLETE TO ENDORSE YOUR PRODUCTS

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When I was a kid I used to love drinking Yoo-Hoo. The drink was heavily promoted for years by the great Hall of Famer Yogi Berra and I am sure now that Yogi's endorsement had something to do with my love for Yoo-Hoo. Fast forward to 1994.

In 1994, I organized players and coaches of the 1969 Mets into the *Miracle of 1969 Enterprises* to capitalize on appearances, licensing, merchandising and endorsement opportunities during the 25th anniversary of the Miracle Mets' World Championship. I was thrilled when the head of Farmland Dairies reached out regarding the possibility of having a group of the 1969 Mets promote their milk brand at a series of supermarkets in the metropolitan area. There was one catch; there would be no deal unless Yogi Berra, the lovable coach of the 1969 Mets, would be one of the athletes that made an appearance.

With full knowledge of Yogi's ties to Yoo-Hoo I called him to discuss this opportunity. I didn't get very far into the specifics of the deal when Yogi interrupted me and said: "I don't think that I can do a milk deal because I'm with Yoo-Hoo." Without skipping a beat he continued: "How much

will they pay?" Yogi must have liked the answer because on the first day of the series of appearances for the 1969 Mets on behalf of Farmland Dairies there was Yogi in the VIP area mingling with the guests.

For over a century companies have increased consumer recognition of their brand by utilizing athletes and celebrities to pitch their products and services. In 1921, basketball player Chuck Taylor became the first athlete to endorse a sneaker. In 1923 he made improvements to the shoe helping to re-brand it and allowing Converse to introduce "Chuck Taylor All-Stars" to the market. "Chuck Taylor All-Star" sneakers were not only around for the birth of the NBA in 1949 but are still arguably one of Converse's most widely known product today. The immortal Babe Ruth was hired by Red Rock Cola to endorse its soft drink brand in the 1930's. In the late 1940's, baseball legends such as Ted Williams, Stan Musial and Joe DiMaggio were all featured in a series of cigarette endorsements for Chesterfield. Boy have times changed! General Mills has run with this concept using the Wheaties box in one of the most well-known sports campaigns of present day. Wheaties has been able to make endorsing their product a prize amongst athletes, using multiple different sports

during varying seasons to secure the largest possible demographic. Of course, the great Yogi Berra is still a prime example of not only my own consumer recognition of Yoo-Hoo but his continued power to endorse as he has been in multiple commercials over the past 50 years examples of which are AFLAC, Entenmann's and StoveTop Stuffing, just to name a few.

It is estimated that companies spend almost one billion dollars on athlete endorsements annually. Our favorite athletes routinely endorse sports drinks, sneakers, apparel, fragrances, automobiles and virtually any other product that you can think of. SI.com recently released its annual list of the 50 highest-earning American athletes by salary, winnings, endorsements and appearance fees. The list was comprised of: 19 NBA basketball players; 17 MLB baseball players; 8 NFL players; 3 NASCAR drivers; and 3 golfers. Among the leaders- despite his well-publicized issues off the links- Tiger Woods still raked in a cool \$60,000,000 in endorsements primarily in connection with his Nike and EA video games deals. Phil Mickelson was a close second to Tiger with \$57,000,000 in endorsement deals with companies such as Callaway, KPMG, Rolex, Barclays Capital, ExxonMobil and Amgen/Pfizer. LeBron James was top amongst NBA

players pulling in \$30,000,000 in endorsements in 2011. Fresh off winning his first NBA Championship, industry experts expect that figure will increase significantly in 2012.

With so much at stake, the balance of this article will focus on several practical considerations in finding the right athlete to endorse a company's product from both the company's and the athlete's perspectives:

### **Choosing the Right Athlete to Meet a Company's Objectives from the Company's Perspective**

A professional sports team has a first round draft pick in its amateur draft. Prior to selecting a particular athlete with its number one pick, any prudent team will conduct extensive due diligence on the various candidates and deploy its scouts to the various Combines to watch potential candidates go through rigorous physical drills and psychological testing. Teams will also conduct detailed background checks on the candidates and speak with a candidate's coaches and friends before deciding to make a major financial investment in an athlete. A team will also consider their depth charts at various positions before making its choice.

A company that is considering making a significant financial investment in an athlete and entrusting that athlete with being the face of its brand should conduct the same level of intensive investigation and due diligence in choosing the right spokesperson for its brand. When advising companies seeking an athlete to endorse its products I always impress upon the company that it is absolutely imperative to outline in writing its objectives and what it is intending to accomplish in selecting

one or more athletes to endorse its product. Critical considerations may include but are not limited to:

- Am I looking to launch and/or drive sales in a particular geographic market or nationally?
- What particular product or brands am I trying to promote?
- What is the demographic that I am trying to appeal to?
- What is my advertising budget (cash and/or stock) to secure one or more athlete endorsements and thereafter deploy an effective media and marketing campaign?
- How many athletes within a particular sport will I want to endorse my product?
- Does the athlete currently use my product or is he or she willing to try my product and stick with it?
- Does an athlete already endorse a competing product?

By asking and answering these basic questions a company will be able to focus on and be able to create a short "wish list" of athletes to choose from.

While some might think that the foregoing exercise is an unnecessary, one would be astonished how many times the athlete/company endorsement relationship fails even before it starts because a company does not do its homework. How many times do you hear about an athlete that has signed an endorsement deal to use a Louisville Slugger bat but in the middle of a mid-season slump switches to a Mazuno bat? How often do we read about an athlete endorsing a steak house but he/she is a vegetarian? How many times will a company reach out to a local athlete to endorse a local business and the athlete is traded to a team across the country? How often do we see an athlete

endorsing competing products?

Once a company outlines its objectives and creates a short list, oftentimes a basic internet search can provide a company with the additional information that it needs to further narrow down its quest. A client once asked me to reach out to Dan Marino to see if he was willing to endorse a pain relief product. As I started to do my homework, a pop-up ad appeared on my computer screen in which Mr. Marino was endorsing a competing product! Something as simple and routine as a Google search can save a company the time and effort of heading down a dead-end street with a particular athlete and may even prevent the company from the embarrassment of entering into an endorsement agreement with an athlete that already endorses a competing product.

Oftentimes, a short and candid conversation with an athlete's agent can also save a company an enormous amount of time in the process. A few years ago, a start-up beverage company developed a blend of seven anti-oxidants and was marketing the brand under the trademark "The Power of 7". They asked me to find athletes to endorse its product for a New York launch. Then New York Mets Shortstop Jose Reyes immediately came to mind since he wore the #7 on his uniform. I reached out to Mr. Reyes' agent and it quickly became apparent that Mr. Reyes wanted too much upfront cash and the company was only willing to offer a certain amount of cash up front with a significant equity kicker on the back end. In addition, Mr. Reyes did not have a no-trade clause in his contract so there was no assurance that he would definitely be in New York when the product was ready to be launched. As a result, my cli-

ent needed to go in a different direction.

The cash concept is especially important to note since a company must be realistic about what it can afford to pay an athlete. I have seen many companies that have a very small operating budget offer an athlete so much cash consideration that it has no money left over to implement its marketing plan and the world never knows that the athlete is endorsing its product. On the flip side, a company may have the financial ability to hire multiple current players from a particular sport to endorse their product. However, many companies do not realize that if they use the personal licensing rights of more than three active players within a sport to endorse a particular product they must deal with the sports' players association which has exclusive jurisdiction over group licensing deals.

Sometimes it is important for an advisor to get creative in finding the right athlete to endorse a company's product. When a vitamin company with a very small operating budget approached me to assist them in finding a current well-known athlete to launch its product in Ohio, I knew that there was no way they could afford LeBron James (or any current player for that matter). Instead, I suggested that they reach out to a very well-known local retired player in the Ohio area, Archie Griffin. Mr. Griffin was a retired athlete, who had played for the Cincinnati Bengals and who was a two-time winner of the prestigious Heisman Trophy in 1974 and 1975 at Ohio State. Often times a retired player that has been out of the spotlight is often a better candidate as an endorser rather than a current player who will undoubtedly demand more money. Another advantage of using a retired player for a vitamin company is that the retired

athlete was still within the demographic that the client was targeting. Even more importantly to the client, Mr. Griffin was serving as the Executive Director of the Ohio State Buckeyes Alumni Association and was considered to be a man of impeccable moral character and social standing.<sup>1</sup>

By clearly defining its objectives, developing a market plan and following a decisive operational budget for athlete endorsements a company has the stepping-stones to understanding their own needs, resources and limitations and are ready to commence their recruiting process. A company then must conduct due diligence, developing and then narrowing its "wish list" and engaging in candid communications with the agents for the athletes. By applying these basic concepts a company should have little difficulties finding the right current or former player to endorse its product.

### **Choosing the Right Product to Endorse from the Athlete's Perspective**

Much the same way that a prudent company will conduct its due diligence to select an ideal athlete, a prudent athlete should similarly conduct its own due diligence on the company and product which he or she is being asked to endorse.

In advising athletes in endorsement agreements, I believe that it is also best practice to prepare a checklist of due diligence considerations from the athlete's perspective. Such questions may include

<sup>1</sup> While Mr. Griffin was gracious enough to hold several preliminary discussions with the company to explore possible synergies, the deal never went anywhere. It turns out that this company couldn't afford Mr. Griffin either! I use this, however, as an example of how an advisor may need to "think out of the box" to help its corporate clients find the right athlete to endorse its products.

but are not limited to:

- Has the athlete endorsed, or invested in, any competing product?
- Has the athlete tried and genuinely likes the product he or she is being asked to endorse?
- If the product to be endorsed is a nutritional supplement or food and beverage, what assurance is there that the product does not contain any banded substances?
- If the company is paying the athlete cash in installments or by issuing shares of restricted stock, is the company financially solvent?
- What is the company's marketing plan and does it have the economic ability to implement its plan?

First and foremost, an athlete and his or her adviser must keep careful track of all of the athlete's existing endorsements (and even investments in the athlete's portfolio) to ensure that the potential endorsement will not conflict with any of the athlete's existing endorsement deals or significant investments. Failure to do so could prove to be very embarrassing for the athlete and the company. In an article written by Ben Maller, which appeared in *The Post Game* on July 21, 2012, Michael Vick was criticized for entering into "exclusive" advertising agreements with competing nutrition companies. Similarly, New York Yankees third baseman Alex Rodriguez put himself in an embarrassing predicament when he signed an endorsement deal in June 2011 with Vita Coco when he was already a long-time major investor in another rival coconut water brand called Zico. The foregoing mistakes, are easily avoidable when companies and athletes ask the right questions and conduct basic due diligence before entering into an endorse-

ment relationship.<sup>2</sup>

It is equally important that an athlete tries the product and genuinely believes in the merchandise that he/she is being asked to endorse. If a professional athlete enters into a major sneaker contract with Nike, for example, but is photographed in public (or even worse on the basketball court) wearing a rival company's sneakers, this could have significant adverse financial consequences for the athlete under the endorsement agreement (not to mention the ensuing public humiliation). If an athlete is paid significant money to be the public face of a product, the athlete must really believe in it since the athlete will likely become synonymous with that product.

### Some words of extreme caution

If an athlete has been approached to endorse any beverage, food or nutritional product, the athlete should refrain from sampling that product until the athlete is completely comfortable that such product does not contain any banned substances under the rules and regulations of that athlete's league or athletic association. There are several independent organizations such as NSF or Informed-Choice that tests products and then certifies that such products do not contain any banned substances. I advise all my clients who are athletes to insist that products which they are being asked to endorse go through such independent testing and certification before the athlete tries the product for the first time.

<sup>2</sup> While most endorsement agreements will require an athlete to make a representation and warranty that entering into the agreement will not conflict with any other existing agreement, it is still best practice to raise this issue front and center as a threshold issue that must be addressed to everyone's satisfaction at the inception of the relationship before entering into, and potentially breaching, the endorsement agreement.

It is also imperative for an athlete or their representative to do financial due diligence on a company that approaches an athlete for an endorsement and to conduct a full background check on the principals of the company. If the company is a public company, the athlete's adviser should review the company's recent public filings on the U.S. Securities and Exchange Commission's website to access if the company has sufficient capital to honor its compensation arrangements with the athlete and also to implement its marketing plan. It can be a cause of humiliation to an athlete's reputation to lend his or her name to a company only to then have that company fail. Athletes or their representatives *MUST* carefully review a company's finances. If a company is financially unstable, a shrewd representative might be able to find alternative ways to structure and document the deal (perhaps with a personal guaranty of a stockholder or money being placed in escrow) so that sufficient funds are available to compensate the athlete and implement the company's marketing and media plan. Similarly, if an athlete is willing to take a chance to endorse a product for a struggling company, the athlete's representative should be sure to build into the endorsement agreement clear covenants and events of default that would excuse future performance(s) by the athlete under certain specified circumstances and allow the athlete to, thereafter, endorse competing products.

I have always advocated that athletes should conduct background checks on a company's executive management team to get a real sense of who the athlete is dealing with. Perhaps no athlete in all of my dealings took this suggestion more literally than New York Yankees superstar Mariano Rivera. Before agreeing to endorse

a beverage product for one of my clients, Mr. Rivera and his agent insisted that the company's CEO and his advisors fly to Tampa, Florida to meet with them face to face. Mr. Rivera was an absolute joy to be around and a gracious host, but I will never forget the look in Mr. Rivera's eyes when he suddenly peered at the CEO -as if he was an opposing batter in the 9<sup>th</sup> inning of a one-run game- and asked the CEO a simple question: "Tell me all about yourself and why I should endorse your company's product?"

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