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Sports Teams Are Selling The Jerseys Off Their Players' Backs But Are They Violating The Law In The Process?

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The first time that I saw it I knew that I had to have it! I had taken my young kids to a Mets game at Shea Stadium in 2005. After just 1 ½ innings of constant nagging, it was time to make the obligatory visit to the Mets Team Store behind home plate. While the kids were looking at Mr. Met bobble heads, my eyes were fixated on the newest object of my desire: a Game Used Road Gray Jersey of my favorite Mets player David Wright that was hanging on one of the stores walls. The dirt on the jersey was baked deep into the

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material and the stitched #5 across the front of the jersey, probably the result of a head first slide into second base. I could even see the sweat stains which, for reasons only a collector would understand, made me want this dirty jersey even more!

Trying to play it cool, I figured that, as any good lawyer would do, I would ask a few “due diligence questions” about the jersey:

Q: “*Can they trace the jersey to the date and game that Wright actually wore the jersey?*”

A: “Yes, the jersey was worn by Wright during the August 10th game against the San Diego Padres. Wright went 4 for 5 in the game with a Home Run and 6 RBIs.”

As an avid collector, I knew that game used items in which a player played well or achieved a significant accomplishment while wearing the jersey would command a higher value in the after- market.

Q: “*What kind of authentication would the jersey come with?*”

A: “The jersey was authenticated with a tamper proof Major League Baseball hologram that is affixed to the jersey and then

entered into MLB’s data base. The Mets would also throw in a signed LOA letter on team letter head.”

I was already sold. Since I represented Wright’s then exclusive memorabilia agent, Locker Room Memorabilia, I also knew that I could arrange for Wright to sign and inscribe the jersey for me.

Just as I was about to haggle over the price, the salesman added: “We also have the matching uniform pants from that game that was also authenticated by MLB which we can throw into the deal.” I’m pretty sure that I gave the salesman a hug as I handed him my credit card and closed the deal.

In an age where professional sports teams are always trying to figure out ways to increase their bottom line revenues, selling game used memorabilia worn by the teams’ players has become commonplace in the billion dollar sports memorabilia industry. Some leagues and teams enter into partnerships with third party agents such as The Meigray Group. Other teams, like the Mets, conduct their programs in-house. Making a game worn item available of a fan’s favorite

player or from a particular game (like a fan's birthday) makes for a unique collectible and gift.

As I was admiring my collection one day, the "passionate fan" side of my brain gave way for a moment and the following question popped into my "sports lawyer" head: *"Is a team violating a player's right to privacy under the law when they sell his game used equipment?"*

To fully understand this issue, a very brief overview on joint licensing and game used programs, who owns a player's uniforms and equipment and right to privacy laws follows. While the question posed affects players of all professional sports leagues in the United States, for the purpose of this article, I will focus solely on baseball.

What is a Joint Licensing Program?

A joint licensing program is where a licensee that produces a product secures the requisite intellectual property rights to create the product from more than one entity that owns particular IP rights. For example, when Topps produces baseball cards, it must obtain a license from Major League Baseball Properties for the use of the various team logos. Since a trading card also involves the name, likenesses and facsimile signatures of more than two active Major League Baseball players, Topps must also obtain a license from the Major League Baseball Players Association.¹ Topps then pays negotiated royalties to MLB and the MLBPA.

¹ In addition, Topps must obtain a copyright license for any photos used in the trading cards taken by non-Topps photographers.

Similarly, Majestic, the company that produces official MLB jerseys, must obtain a dual license when they create and sell to the jerseys that depict the names of multiple players embroidered on the back of the jerseys that they produce. How licensing revenue is divided among the players depends on the sport. While the NFL Players Association, for example, gives the league's star players a percentage of their individual jersey sales, the MLBPA pools all licensing revenue from jersey sales and doles out the licensing revenue pro rata to all of its union members.

What is a Game Used Memorabilia Program?

Generally, an MLB team will purchase and provide its players with "game issued" jerseys from its official supplier Majestic. These jerseys differ from jerseys that are generally sold to the public since they are customized to a player's specifications (such as extra length tags) and also contain special tagging, set numbers and embroidery. Once a player wears a game issued jersey in a professional game, the jersey is now a game worn or game used jersey and has more value to collectors. Game used jerseys and other game used equipment is periodically collected by a team representative in the presence of an MLB representative (usually current or former law enforcement officers that applied and were interviewed for the job), catalogued and a tamper proof hologram is affixed to the item. The item and hologram number is eventually entered into MLB's authentication program data

base. On a daily basis, MLB gathers and collects game used baseballs and bases (there are typically three sets of bases used during an MLB game specifically for this purpose). Baseballs are routinely catalogued with great specificity including who pitched the ball, who hit the ball, the inning and the result. Balls that were actually pitched by star pitchers or hit by star players (especially strikeout balls or base hit balls) command a large premium. The item is then offered to sale to the public through on-line auctions, team stores or partnership programs through third parties. *Prices vary largely based on the player that used or wore the item that is being sold.*

Who Owns a Player's Equipment?

The general rule in Major League Baseball is that the team owns the batting practice and actual game worn uniforms, helmets and hats worn by its players. There have been some notable exceptions to this rule. In 2001, when Barry Bonds broke baseball's all-time home run record with 73 HRs, he purchased, used and sold his own game used jerseys and equipment. Bonds often signed and inscribed the equipment with the home run number and date they were used and a special Barry Bonds sticker and certificate of authenticity were provided to customers. Game used player's hats are fascinating to collect since certain players will often inscribe the inside of the hat with a personal and inspirational inscription or bible verse. Scientists may one

day be able to clone a player from the DNA found in the sweat stains and hairs that are often found in a game used hat!

While the team generally will own the players' uniforms, hat and helmet, the player typically owns his glove, batting glove, cleats, sweat bands and sun glasses. There are several players that have entered into marketing arrangements with agents to sell these game used items to their fans. MLB typically purchases and retains ownership of their players' bats while the opposite is generally the rule in the minor Leagues. Teams will routinely collect, authenticate and subsequently sell a player's broken bats.

Right to Privacy Laws

At the very foundation of the group licensing programs that are run by the players associations of every major sporting league on behalf of its active players are the "Right to Privacy" laws that are promulgated in most states (including New York Civil Rights Law Section 50). Generally these laws prohibit the use of an individual's likeness for commercial purposes without consent. Courts have held that even retired players that played together long ago on a professional team enjoy these rights to privacy. For example, in 1995 under my direction, twenty members of the 1969 Mets, including Art Shamsky, Bud Harrelson, Tommie Agee and Tug McGraw, sued Garan Industries. For years Garan had produced a very popular t-shirt with a picture of the 1969 Mets on the front of the shirt and the names of the players on the



sleeves. Garan had claimed that the picture celebrated "team identity" thereby not entitling individual players to any compensation. However, Justice Martin Schoenfeld ruled in *Shamsky v. Garan Inc.* that "these players have the right to commercial exploitation of their individual identities, even if collectively these identities may be somewhat less valuable than the identity of a greater, more memorable, whole." The case was eventually settled for a six figure cash settlement. *Shamsky v. Garan* remains an often quoted right of publicity case.

Do Game Used Programs Violate a Players Right to Privacy?

While players share in the licensing revenues generated from the sale of jerseys that depict their name to the public, professional players generally do not to share in the revenue generated when a team sells the player's

game used memorabilia. Some players are completely unaware that their team was selling their memorabilia to the public until they are approached by a fan to autograph the item.

It is indisputable that what primarily drives the value of game used memorabilia is the name of the player that used the item and the player's dirt, sweat and sometimes blood of the player left on the item. While a game used jersey that was worn by a Coach or the 25th man on a roster may only command \$250 on the market, a game worn jersey worn by a team's All-Star player or top prospect may command several thousand dollars. ***Therefore, most professional teams are routinely generating additional revenues through the commercial exploitation of their players' names in their game used memorabilia programs without sharing the incremental value of the item with such players even though it is the players' names that determine the added value of the item!***

In reviewing the Comprehensive Bargaining Agreements of the major sports leagues, it does not appear that the players have granted the various leagues and/or teams the legal right to commercially exploit their names in this capacity. While certain teams have figured out ways to benefit the players in their game used memorabilia programs by paying the players to autograph and inscribe their game used equipment or work together with players to support various charities, it is a fact that the sale of most game used memorabilia only economically benefits the team and not the player

which is a clear violation of a player's right to privacy under the laws of most states!

If this is an Issue Why Haven't we heard about it?

In researching this article, I reached out to several player agents to get their thoughts on this topic and why the players have been seemingly passive about enforcing their privacy rights in connection with these game used programs. While most agents that I spoke with agree with my legal analysis, the general consensus seems to be that it's not worth "rocking the boat" for their clients over potentially a few thousand dollars and potentially jeopardizing a multi-million dollar contract negotiation by raising this issue. In addition, given the significant issues that are routinely addressed during the collective bargaining process, the amount of money generated by these programs are not significant enough to rise to the level of a material player grievance.

However, not every agent shares this view. One player agent that spoke to me on the condition of anonymity had a very strong opinion on this topic. "The issue that you raise has been on my agency's radar screen for several years now. We have given

serious consideration of making a big stink about this in the past." said the agent. "While this may not be a big money issue for players that sign multi-million dollar contracts, take a team's rookie sensation that makes the league minimum. As the "hot prospect" the team commercially exploits his name and sells his game used jersey for several thousand dollars. What happens if this player suffers a career-ending injury and never touches the big money? Why shouldn't this guy share in the revenue that he generated through the commercial exploitation of his name in the sale of his game used memorabilia? Why should it all go to the team and not that player?"

As perfect illustration of this agent's point about the popularity of the game's premier prospects is that in an auction that ended on MLB's website on September 20, 2012, a "rookie" game worn jersey of Washington Nationals phenom Bryce Harper sold for a whopping \$6,275!² One only needs to recall the story of former Mets' ace Dwight Gooden, whose tremendous Hall of Fame potential early in his

² It should be noted that the MLB listing stated that a portion of the proceeds of the auction benefited the Washington Nationals Dream Foundation and that the winner was personally presented with this jersey by Mr. Harper.

career crashed like a fiery meteor when he succumbed to his demons, to know that long-term success in sports is never guaranteed.

Conclusion

As an avid collector of game used memorabilia, I love the fact that I can purchase authentic game used items of my favorite player or as a gift for someone else. However, as an experienced licensing attorney who has fought to protect the intellectual property rights of players for a significant part of my career, I would hope that the teams, leagues, player associations and agents can figure out a way to equitably share the revenue generated by these programs and perhaps in the process enhance the scope of the products being offered by adding signatures, inscriptions and inter-active experiences with the players who create and drive the value of these items. Absent such a negotiated spirit of revenue sharing, it would be prudent for team General Counsels, in the process of negotiating a player's contract, to secure the legal right to commercially exploit a player's name in connection with the team's game used memorabilia program. ●