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ATHLETES VOICE

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“I am an athlete’s lawyer, not an agent.”



Though I am known particularly as an advocate for athletes with doping offenses, my law practice focuses on the representation of athletes in all types of disputes. I have been a sports lawyer for over 10 years (and a lawyer for 20), with a particular area of emphasis in the area of anti-doping. I also teach sports law as an Adjunct Professor at Southwestern Law School in Los Angeles, California.

I have defended over 70 athletes in doping cases around the world. I have handled these cases before the Court of Arbitration for Sport, American Arbitration Association, National Football League, Major League Baseball, Association of Tennis Professionals, Nevada State Athletic Commission, California State Athletic Commission, America’s Cup, and

others. I have also represented numerous athletes in civil lawsuits, including products liability lawsuits arising from contaminated supplements that lead to doping suspensions. I have had the opportunity to represent some of the greatest athletes in the world, and always take great pride in keeping them in the game.



JESSICA HARDY CHALLENGES NEW OLYMPIC RULE WHILE FIGHTING WADA'S APPEAL OF HER SANCTION LENGTH TO CAS

WHO'S WHO:

The World Anti-Doping Agency (WADA) has appealed to the Court of Arbitration for Sport (CAS) in the case of swimmer Jessica Hardy. The appeal follows a ruling by the American Arbitration Association (AAA) in the case initiated by the United States Anti-Doping Agency (USADA).

BASIC FACTS:

On July 4, 2008, Jessica Hardy tested positive for the banned substance clenbuterol, which the AAA found was the result of a contaminated supplement, and a month later, as a courtesy to her teammates, voluntarily withdrew from the Beijing Olympic Games. The AAA ruled that Jessica Hardy was subject to the strict liability rule even though it found that her positive test was caused by a contaminated supplement; but finding that her negligence was not significant, reduced her suspension to one year. The AAA also reserved the right to further reduce the suspension on the basis of the IOC Rule (discussed below). In response to the AAA ruling, WADA appealed to CAS, claiming that the ingestion of a contaminated supplement does not excuse Jessica Hardy from the normal 2-year sanction for a first time doping offense. The CAS arbitration was heard on March 12, 2010.

IOC RULE 45:

Just three days before Jessica Hardy's positive test, the International Olympic Committee (IOC) amended the Olympic Charter, which now would ban Jessica Hardy from the 2012 London Olympic Games if she is suspended for longer than six months. The AAA stated in its

decision that due to the facts of the case, it would be unfair to apply this rule to Jessica Hardy and cause her to miss two Olympic Games as a result of this positive drug test.

The IOC has stated that it believes that the validity of this new rule cannot be assessed in Jessica Hardy's case until the eve of the 2012 Olympic Games. Because the IOC's position not only impacts her but numerous other athletes, Jessica Hardy has requested that CAS address this issue within its decision of WADA's appeal of the sanction length.

BREAKING RECORDS:

In the meantime, Jessica returned to competition on August 5, 2009 and broke two world records in two days (the 50-meter and the 100-meter breaststroke).

THE LAWSUIT:

Jessica Hardy has filed a lawsuit against the nutritional supplement manufacturer AdvoCare for negligence, strict liability, intentional and negligent misrepresentation, and breach of contract, seeking damages resulting from her suspension and from the fact that she missed the 2008 Olympic Games, at which she would have been a heavy medal favorite.

Jessica Hardy is represented both in the doping case and in the civil lawsuit by Howard Jacobs.



MARATHON RUNNER GERT THYS COMPLETELY EXONERATED BY THE COURT OF ARBITRATION FOR SPORT

Since testing positive following his victory in the 2006 Seoul International Marathon, Gert Thys has emphatically and consistently denied taking any banned substances. After delaying his hearing process for nearly 2 ½ years, and in spite of clear laboratory errors, Athletics South Africa suspended Gert Thys for a period of 2 years and 7 ½ months (the exact amount of time that it took for them to conclude his hearing process), and ruled that Gert Thys was to forfeit his prize money from the 2006 Seoul International Marathon. Gert Thys then hired Howard Jacobs, who appealed the matter to the Court of Arbitration for Sport (CAS), the highest sports arbitral tribunal. A hearing was held before CAS in Lausanne, Switzerland on May 11, 2009. The CAS Arbitral Tribunal completely upheld the appeal of Gert Thys, ruling as follows:

- "1. It has jurisdiction to hear the appeal filed by Gert Thys on 7 January 2009.
2. The appeal of Gert Thys is upheld.
3. The decision of Athletics South Africa on 11 December 2009 is set aside.
4. Gert Thys is exonerated of any doping infraction and is eligible to compete without any prior reinstatement testing.
5. The prize money, income and benefits derived from the participation of Gert Thys in the 2006 Seoul International Marathon shall not be forfeited.
6. The award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Francs) paid by Gert Thys, which is retained by the CAS.
7. Athletics South Africa shall pay Gert Thys a contribution towards his legal fees in the amount of CHF 13,000 (thirteen thousand Swiss Francs) within 30 (thirty) days of notification of this Award."

AT A CROSSROADS

Do state drug-testing laws pre-empt a collectively bargained agreement? Maybe.

During the summer of 2008, seven NFL players tested positive for the diuretic bumetanide, determined to be the result of taking contaminated weight loss supplements. Based on allegations that the NFL knew of this dangerous contamination since as early as 2006 and failed to properly warn players, Minnesota Vikings Kevin and Pat Williams (not related) sued the NFL.

In December 2008, a state court in Minnesota issued a temporary restraining order, blocking the suspension of five NFL players. The next day, the NFLPA, on behalf of the Vikings, as well as three other players, brought suit in federal court, where Judge Paul

Magnuson granted a preliminary injunction and refused to overturn the temporary restraining order previously filed. The case is an unprecedented attempt to avoid suspension for an anti-doping violation based on state drug testing in the workplace laws.

The matter ultimately ended up at the federal appellate court, where the MLB, NBA, NHL and the United States Anti-Doping Agency submitted joint briefs supporting the NFL's position that allowing athletes to use state drug testing laws would hinder the league's ability to enforce



performance enhancing drugs policies. Additionally, they argued that since different teams would be governed by different drug testing policies (depending on the state in which they play), certain players would be left at a competitive disadvantage.

Kevin and Pat Williams were eventually cleared to play the entire 2009 season, and NFL Commissioner Roger Goodell stayed the suspension of three New Orleans Saints players, citing fairness, uniform application of policies and competitive integrity. This decision would eventually prove to be the most crucial for the Saints players, Charles Grant and Will Smith, who were key players in winning the Super Bowl.

At the request of the NFL, Congress briefly interceded. In a hearing overheard by Rep. Henry Waxman (D-CA), before the House Subcommittee on Commerce, Trade and Consumer Protection, Congress expressed some concern with the league's ability to properly administer the anti-doping policies, but declined the NFL's request for a "tailored and specific amendment to the Labor Management Relations Act."

In the court action, both parties moved for Summary Judgment. The Court ruled that the players are not excluded from the protections of the labor laws in Minnesota, and that these laws are not preempted by the collectively bargained agreement. The Court determined that several factual issues would have to be resolved at trial, including whether the NFL (or the Minnesota Vikings) is the employer of the players and whether or not the NFL was responsible for breach of confidentiality.

The trial began March 8th, and testimony was presented from Kevin and Pat Williams, as well as from Dr. John Lombardo, Administrator of the NFL drug policy (who conceded that in 2006, there were as many as six players who were not suspended for positive tests caused by StarCaps supplements contaminated with bumetanide). The Judge is expected to rule by May.

DOES YOUR CLIENT'S ATTORNEY UNDERSTAND THE SCIENCE OF DRUG TESTING?

In a recent case involving a substance that is not frequently the subject of positive tests, Howard Jacobs requested that specific additional testing be conducted to determine whether the positive test was caused by an exogenous (external) substance, as opposed to being caused by an endogenous substance (created by the body naturally). The request was made based upon a series of scientific studies which have not been significantly publicized. The testing organization initially refused to conduct the testing, but ultimately agreed to the additional testing after a series of negotiations. This additional testing revealed that the substance was in fact endogenous, and the case against the athlete was dropped. Had this additional testing not been conducted, the athlete would currently be facing the possibility of a 2-year suspension. This case perfectly illustrates why it is vital that your client's attorney, in the face of a positive drug test, understand the science of drug testing.

CONTAMINATED SUPPLEMENT STRIKES DOWN ANOTHER ATHLETE

In 2008, 33-year old JC Romero became the first Puerto Rican pitcher to win two games in one World Series. By winning the third and clinching games, Romero assisted the Phillies in their first major championship win in 25 years. When he tested positive for androstenedione, Romero became one of so many athletes whose careers have been affected, even ruined, by supplement contamination. Romero served a 50-game suspension at the beginning of the 2009 season and forfeited \$1.25 million of his salary for the year.

In January 2009, following Romero's positive

test, the supplement manufacturer ErgoPharm's lab was raided by the Drug Enforcement Agency. ErgoPharm manufactures the supplements 6-OXO and 6-OXO Extreme, which Romero purchased at a Vitamin Shoppe and a GNC. JC Romero, represented by Howard Jacobs, has sued ErgoPharm, Vitamin Shoppe and GNC for negligence, strict products liability, breach, misrepresentation and violation of the New Jersey Consumer Fraud Act.



OUSSAMA MELLOULI WINS TUNISIA'S FIRST EVER OLYMPIC GOLD MEDAL FOR SWIMMING



Ous Mellouli hired Howard Jacobs after the World Championships in 2006, when he tested positive for amphetamines, determined to be from a medication he took and not for the purpose of performance enhancement. Following a hearing in Lausanne, Switzerland, the Court of Arbitration for Sport (CAS) reduced his suspension to allow Mellouli to compete at the 2008 Olympics. Mellouli went on to win the gold medal in the 1500-meter freestyle, defeating defending champion Grant Hackett.

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AND THE WINNER IS: RIO DE JANEIRO

IN 2007, WHEN THE INTERNATIONAL OLYMPIC COMMITTEE (IOC) ASKED THE NATIONAL OLYMPIC COMMITTEES (NOCs) TO NOMINATE CITIES FOR THE PROCESS OF SELECTING A HOST CITY, BAKU (AZERBAIJAN), CHICAGO (USA), DOHA (QATAR), MADRID (SPAIN), PRAGUE (CZECH REPUBLIC), RIO DE JANEIRO (BRAZIL) AND TOKYO (JAPAN) BECAME THE SIX APPLICANT CITIES EAGER TO HOST THE 2016 SUMMER OLYMPIC GAMES. FROM THESE APPLICANT CITIES, THE IOC EXECUTIVE BOARD SELECTED CHICAGO, MADRID, RIO DE JANEIRO AND TOKYO TO BE THE FOUR CANDIDATE CITIES.

DESPITE A PASSIONATE DISPLAY OF DESIRE BY PRESIDENT OBAMA TO HOLD THE SUMMER GAMES IN HIS HOMETOWN, CHICAGO WAS THE FIRST CANDIDATE CITY TO BE ELIMINATED FROM THE SELECTION, FOLLOWED BY TOKYO IN THE SECOND ROUND. BRAZILIAN PRESIDENT LUIZ INACIO LULA DA SILVA URGED THE IOC TO CONSIDER A NATION THAT IS AMONG THE WORLD'S TOP ECONOMIES, TO INCLUDE A CONTINENT THAT HAS NEVER HOSTED THE OLYMPICS, AND TO EXTEND TO FARTHER CORNERS OF THE GLOBE TO UNITE THE WORLD THROUGH SPORT. IN THE FINAL ROUND OF SELECTION, BRAZIL RECEIVED TWICE AS MANY VOTES AS MADRID, AND ON OCTOBER 2, 2009, RIO DE JANEIRO WAS CHOSEN TO HOST THE 2016 SUMMER OLYMPIC GAMES.

A BOBSLEIGH RACE TO THE OLYMPICS

Serge Despres re-joined the Canadian Bobsleigh team last August, after serving a two-year suspension for an inadvertent doping violation. The positive test was barely over the allowable established threshold, and was determined to be caused by taking supplements contaminated with nandrolone.

In an effort to try and qualify for the 2010 Winter Olympics following his suspension, Despres dominated the America's Cup and the Europa Cup circuits. Unfortunately, he ran out of time and barely missed qualifying for Canada's 2010 Olympic team.

Howard Jacobs represented Serge Despres at his hearing before the Canadian Center for Ethics in Sports and before the CAS in Lausanne, Switzerland. Jacobs also represents Serge Despres in a civil suit related to the contaminated supplements.



SEE ZACH LUND'S
INTERVIEW ON THE
COLBERT REPORT

<http://www.colbertnation.com/the-colbert-report-videos/257741/december-03-2009/skate-expectations---skeleton-team-tryouts---zach-lund>



Understanding the Pitfalls of Behavioral Finance

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Understanding the Pitfalls of Behavioral Finance Making the Difficult Choices

By Morgan Stanley Smith Barney LLC.

The severe downturn of the financial markets that began in 2007 has led many investors to question their investment strategies and the choices they made in the past. Investment decisions are among the most important life choices a person can make. They may determine where your children will be able to go to college, when you'll be able to retire and the type of lifestyle you'll enjoy after you retire. For these reasons, many investors are now reevaluating their strategies, reassessing their personal tolerance for risk, revisiting their asset allocation strategy and rethinking their long-term financial plans. In order to make sound decisions in this environment, investors should be aware of their own psychological blind spots. These can lead all of us to make persistently poor financial choices—errors that over time can do significant damage to our portfolios.

Chains of Thought

Traditional financial theory assumes all investment decisions are made rationally, based on the best available information. In theory, the result is an efficient market—one in which prices accurately reflect fundamentals, such as earnings and interest rates. However, it's not always easy to reconcile financial theory with financial reality. Investors often appear determined to ignore the fundamentals, both in bidding stock prices up and creating “bubbles” only to watch them fall—and often fall dramatically as we have recently witnessed.

“In many important ways, real financial markets do not resemble the ones we would imagine if we only read finance textbooks,” notes Richard Thaler, a professor at the University of Chicago and a leading behavioral finance researcher. It's not that investors are totally irrational, Thaler and other researchers argue, but rather that their thinking can be influenced by mental biases. These quirks can lead them to make choices that appear intuitively correct, but produce poor performance. This field is known as behavioral finance and it tries to find explanations for these apparent contradictions. It's not that investors are irrational, but that their thinking maybe often guided—or in some cases misguided—by subtle biases and mental blind spots.

Some examples include:

- **Overconfidence.** Investors generally assume they know more than they actually do. They also tend to remember previous investment decisions in ways that exaggerate their own foresight. This can lead to overly aggressive trading and a reluctance to admit—and correct—mistakes.

- **Mental Accounting.** Financial experts often advise investors to take their entire portfolio into account when making investment decisions. Yet, many investors unconsciously divide their wealth into separate pots. If they have a big gain, for example, they may think of it as essentially “free” money and take greater risks with it than they would with their “own” money.

- **Anchoring.** Logically, investors should always base their decisions on current prices and expectations. Instead, they often become fixed on past events, such as the price they paid for a particular stock. Investors will often refuse to sell at a price lower than that—even when it makes more

sense to accept their loss and invest their remaining money elsewhere.

- **Framing.** How people view a decision often depends on how their choices are presented. For example, in one study researchers asked participants how much they would be willing to pay to avoid a one-in-a-thousand chance of being killed. The average answer was \$1,000. Participants were then asked how much they would demand to accept the same risk. This time, the answers ranged as high as \$200,000. From an economic point of view, the two questions were identical, but subjects saw them very differently.

- **Loss Aversion.** In a completely rational market, the risk of loss and the possibility of gain should carry equal weight. However, on average investors place twice as much importance on avoiding a loss as they do on making a gain. In other words, to accept a 50% chance of losing \$100, most people will demand at least a 50% chance of earning \$200.

The Value of Advice

Are investors doomed to repeat these mistakes? Maybe not. Some studies have shown that the more investors know about the investment process, the less likely they are to be misled by behavioral biases. This is one reason we encourage investors to develop prudent, long-term investment strategies that take into account their goals and tolerance for risk. While this doesn't guarantee investment success, it can at least reduce the risk of being led astray by behavioral blind spots. That's something even the smartest investor may benefit from in today's volatile market environment.

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