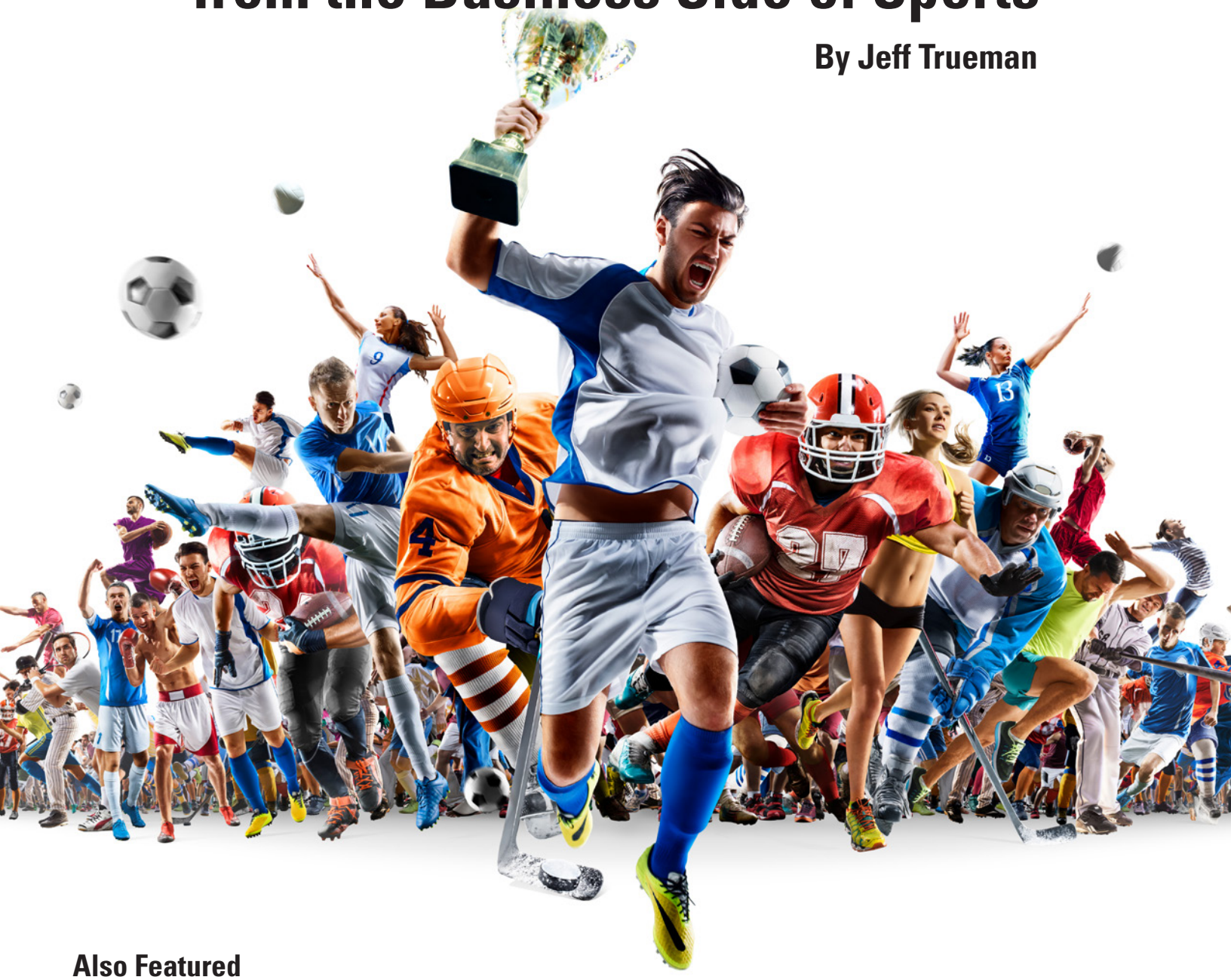
THE DEFENSE LINE

December 2022

A Publication From Maryland Defense Counsel, Inc.

Negotiating Lessons from the Business Side of Sports

By Jeff Trueman



Also Featured

Unlawful Use of a Trademark in Commerce and the Affirmative Defense to Infringement • Case Note: *SNC v. Certain Underwriters* • MDC's 2022 Past Presidents Reception • Spotlights

President's Message

Welcome to the winter 2022 edition of *The Defense Line*! Thank you to our editor, Nicholas Phillips, and graphics editor, Brian Greenlee, for their hard work in putting this issue together. We hope the articles and spotlights will be of interest.

Christopher C. Jeffries, Esquire
Kramon & Graham, P.A.

We enjoyed seeing so many members and sponsors at our Annual Meeting/Crab Feast at Nick's Fish House. At that meeting, MDC members voted to add Zachary Miller of Wilson Elser to the Executive Committee. In addition, members voted to approve Sheri Tirocchi of Godwin Tirochi as President-Elect, and Amy Askew of Kramon & Graham as Secretary. Katherine Lawler of Nelson Mullins will stay on as immediate past president. Thank you to the Executive Committee for their hard work on MDC's behalf.

You will notice that we have hired a new Executive Director, Aimee Hiers. Although she has only been with us for a short while, Aimee has become an invaluable addition to MDC. Thank you, Aimee, for your hard work.

We recently hosted a successful Past President's Reception at Blackwall Hitch Baltimore. In addition to excellent food and drinks, it was great to catch up with colleagues, including past presidents, as well as sponsors. Thank you to our Executive Director, Aimee Heirs, for organizing the event. We look forward to more in person events beginning in 2023.

MDC's goal is to continue to provide content that will be of value to our members and, in turn, to the clients they serve. As we look toward 2023, in addition to hosting more social gatherings, MDC plans to hold in person board meetings as well as seminar events, including MDC's deposition bootcamp, and trial academy. Two of our past presidents, John Sly of Waranch & Brown, and Mike Dailey of Schmidt, Dailey & O'Neill, serve as DRI's Maryland representative, and DRI's Mid-Atlantic Region Director, respectively. I am therefore really excited about the possibilities for continued MDC/DRI collaboration on membership, content, and resources. Stay tuned for more on that collaboration!

In addition to skills training and seminars, MDC is, and remains, active in many other areas. A few examples follow. Our Judicial Selections Committee, chaired by Tony Conti of Conti Fenn, continues its hard work of interviewing candidates for judgeships on our newly renamed appellate courts as well as our trial courts and submitting ratings to the judicial nominating commissions. Similarly, our Legislative Committee, co-chaired by Mike Dailey of Schmidt Dailey & O'Neill and Nikki Nesbitt of Goodell DeVries Leech & Dann, continues its hard work in Annapolis relating to the General Assembly session. John Stierhoff at Venable provides invaluable assistance to that committee. Our Appellate Practice Committee, chaired by Peter Sheehan of Nelson Mullins also continues its work. Most recently, that Committee submitted on behalf of the defendants/respondents an Amicus Curiae Brief to the Maryland Court of Appeals (now the Supreme Court) in the matter of Hancock v. Mayor & City Council of Baltimore. Thanks to Gardner Duvall of Whiteford, Taylor & Preston for drafting the brief. As a reminder, any MDC member is welcome to submit amicus opportunities for consideration to MDC via the Appellate Practice Committee. MDCs Workers' Compensation Committee, co-chaired by Julie D. Murray of Semmes, Bowen & Semmes and Meredith Wolack of The Hartford, discusses issues of importance to employers and insurers and communicates with the Workers' Compensation Commission and the legislature regarding those issues.

If you want to get involved in these, or any other committees, please feel free to reach out to me or the committee chairs. For more information about MDC, please visit our website: www.mddefensecounsel.org.

Enjoy the holiday season, and thank you for your continued support of MDC.

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Negotiating Lessons from the Business Side of Sports

Jeff Trueman

The business side of sports can be a rich source of instruction on what to do and not to do in negotiation. Contract terms for athletes, trades between teams, labor negotiations, broadcast licensing, etc., are in the news regularly. Dig into the details of a particular deal and you might find some interesting lessons that can inform your own negotiations.

Consider Franco Harris, the famous running back for the Pittsburgh Steelers. For those of us old enough to remember, Harris was very close to breaking the all-time pro football rushing record when his contract was up for renewal. Thinking the Steelers would want Harris to be in a Steeler uniform when he broke that record, Harris's agent starting negotiating with Art Rooney, owner of the Steelers. Rooney reminded Harris's agent that Harris's knees were not good. Nonetheless, Rooney recognized Harris's value to the team and the city of Pittsburgh. Even though Harris was not as strong and capable as in previous years, Rooney proposed a one-year deal with no change in the terms. Harris's agent countered, asking for a big increase that was guaranteed. Remarkably, Rooney agreed to the increase and the guarantee, even though he believed Harris would not make it through the entire season. But Harris's agent pressed on, asking for a second year with an increase and a guarantee. Moreover, he threatened to go to the media if the Steelers rejected the demand. Rooney refused and talks broke down.

Instead of wearing a Steeler's uniform at the end of his career, Harris landed a modest deal with the newly-established Seattle Seahawks. Unfortunately, the story does not end well for Harris. According to one report, Harris was cut from the Seahawks midway through the season. According to another, Harris's knees gave out and he could not perform. Regardless, he did not finish the season and did not break the league's rushing record. Although Harris got more money, the Seahawks did not get the running back they sought.

What happened between Harris and the Steelers? In my opinion, the negotiation failed because Harris's agent threatened to go public. Any strategy based on blaming and shaming the other side through the media usually intensifies, polarizes, and complicates the dynamic. Behind the scenes, numerous stakeholders and influencers are often connected to the situation. Once public, additional parties get involved and their interests have to be satisfied, creating more complications that will interfere with and delay the prospects of a deal.

Harris's agent could have saved the negotiation by recognizing Rooney's status as owner of the team. In an effort to assuage any offense or resentment on Rooney's part, Harris's agent could have asked for an opportunity to resubmit a counter offer. Rooney could have offered more money in the form of a bonus if Harris broke the rushing record.

Good negotiators do not drive hard bargains in every case. Rather, they read the situation accurately and adapt in order to obtain the prize. In Harris's case, after numerous Super Bowl victories with a legendary team, "the prize" was not a two-year deal, even with guaranteed money. The prize was Harris's place in the history books as a Steeler, where all of the players, coaching staff, front office, and the fans would come together to help him break that record. And he was offered a guaranteed raise for one year to boot.

Sometimes disappointing outcomes result from the decisions athletes make regarding their personal assets. Boxer Mike Tyson bought a house in Connecticut for $2.7 million dollars. He invested another million for upgrades and listed the home for sale one year later for $22 million. Not surprisingly, he received no offers. Tyson dropped the asking price to $12.9 million. Still no offers. He dropped it again to $5 million. Again, no offers. Tyson then took the house off the market. Eventually rapper 50 Cent bought the house for $4.1 million. Astonishingly, 50 Cent did the same thing. He invested $6 million and listed the house for $18.5 million. Seventeen years later it sold for $2.9 million.

The lesson here is whether you can support your numbers. You need not make your best argument, but a plausible one will suffice. Credibility and respect come from acknowledging what is speculative or questionable. Keeping it real can generate a better deal. And keep the media out of it.

Jeff Trueman, Esq., is an independent mediator and arbitrator. He can be reached at jt@jefftrueman.com

Case Note: *SNC v. Certain Underwriters*

Richard J. Medoff and Robert L. Hebb

"The citizenship analysis is complicated in the foreign context" — Maryland Federal Court Agrees with Defendants that a European Public Limited-Liability Company (*Societas Europaea* or SE) Established Under the Laws of the European Union Should be Treated Like a U.S. Corporation for Purposes of Diversity Jurisdiction in First U.S. Case to Address the Issue.

In *SNC-Lavalin Constructors Inc. v. Tokio Marine Kiln Insurance Limited*, *Certain Underwriters at Lloyd's*, Civ. Nos. GJH-19-873 and GJH-19-1510, 2021 WL 2550505 (D. Md. June 21, 2021), United States District Judge George J. Hazel, writing for the U.S. District Court for the District of Maryland, addressed the citizenship of a European Public Limited-Liability Company (*Societas Europaea*, abbreviated "SE") — a relatively-new type of entity established under the corporate law of the European Union, with the core legal framework in EU Council Regulation No. 2157/2001 (adopted by Member States in 2001) — for purposes of federal diversity jurisdiction under 28 U.S.C. § 1332.

By way of background, this set of consolidated cases involved a civil action filed by a power plant construction contractor against a group of mostly foreign-entity insurers — including an SE — in the Circuit Court of Maryland for Prince George's County, which defendants subsequently removed to the U.S. District Court for the District of Maryland on the basis of federal diversity jurisdiction. The federal diversity statute, in relevant part, gives the federal district courts original jurisdiction over "all civil actions" between "citizens of different States," as well as between "citizens of a State and citizens or subjects of a foreign state," where "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." *See* 28 U.S.C. § 1332(a). The plaintiff filed a motion to remand arguing, *inter alia*, that the requisite complete diversity for the SE defendant had not been adequately demonstrated.

In the first U.S. case to address the issue, Judge Hazel adopted the arguments raised by Semmes, Bowen & Semmes attorneys, in corroboration with Mound Cotton Wollan & Greengrass LLP, holding that a SE would be treated like a U.S. corporation, with its citizenship determined based on its place of incorporation and principal place of business. As Judge Hazel noted regarding this issue: "The parties have not cited, and the Court is not aware of, any case law [addressing] a societas europaea… However, Defendants argue a societas europaea should be treated like a U.S. corporation for the purposes of diversity jurisdiction. The Court agrees."[1] However, the test to apply to even reach that conclusion is not entirely settled in the Fourth Circuit.

As Judge Hazel reviewed, regarding American companies, the analysis is relatively straightforward — a "corporation is a citizen of both its state of incorporation and its principal place of business for purposes of diversity jurisdiction," whereas "[f]or business entities other than corporations (LLCs, partnerships, etc.), however, diversity depends on the citizenship of all its members."[2] In contrast, when it comes to foreign entities, Judge Hazel acknowledged that the "citizenship analysis is complicated," noting that "it is hard to determine whether a business entity from a foreign country is equivalent to a corporation: 'not even the United Kingdom has a business form that is exactly equal to that of a corporation.'"[3]

In addition, as Judge Hazel explained, there is Circuit split with courts having "followed two divergent approaches" regarding the test to be applied for foreign companies in light of the lack of clear precedent from the Supreme Court.[4] And although the Fourth Circuit had not necessarily definitively ruled on the issue, Judge Hazel noted that the Fourth Circuit had indicated that it "favors a two-step comparison approach," like that in the Seventh and Eighth Circuits, in which, if a foreign corporation lacks a "*clear* domestic analogue," courts should look to the "structure of an entity" to determine if its "features resemble a corporation"[5] — thus, Judge Hazel held: "The Court will apply that approach here" — noting relevant characteristics under that analysis included whether the entity: "[has] perpetual existence, [is] governed by a Board of Directors, [is] able to issue tradable shares ..., and [is] treated as independent of its equity investors—who are neither taxable on its profits nor liable for its debts."[6]

Continued on page 8

[1] *SNC-Lavalin Constructors Inc. v. Tokio Marine Kiln Insurance Limited*, *Certain Underwriters at Lloyd's*, Civ. Nos. GJH-19-873 and GJH-19-1510, 2021 WL 2550505, at *8 (D. Md. June 21, 2021).

[2] *Id.* at *4 (*citing*, *inter alia*, 28 U.S.C. § 1332(c)(1); *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010); *Hawkins v. i-TV Digitalis Tavkozlesi zrt.*, 935 F.3d 211, 223 (4th Cir. 2019) (noting that the dual citizenship rule has been limited to "true-blue" corporations); *James G. Davis Constr. Corp. v. Erie Ins. Exch.*, 953 F. Supp. 2d 607, 610 (D. Md. 2013) (stating that an unincorporated association is a citizen of any state in which its members are citizens)).

[3] *Id.* at *4 (citing, *inter alia*, *White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc.*, 647 F.3d 684, 686 (7th Cir. 2011)).

[4] *Id.* at *5.

[5] *Id.* at *5 (citing *Navy Fed. Credit Union v. LTD Fin. Servs.*, LP, 972 F.3d 344, 354 n.5 (4th Cir. 2020) (referencing a Seventh Circuit comparison approach case — B*ouMatic*, *LLC v. Idento Operations*, *BV*, 759 F.3d 790, 791 (7th Cir. 2014); and *Hawkins v. i-TV Digitalis Tavkozlesi zrt.*, 935 F.3d 211, 224 (4th Cir. 2019) ("To be sure, we might well be inclined to adopt the Seventh Circuit's approach if we were reviewing the issue de novo.")).

[6] *Id.* at *5 (citing, *inter alia*, *Lear Corp. v. Johnson Electric Holdings Ltd.*, 353 F.3d 580, 582–83 (7th Cir. 2003); *Jet Midwest Int'l Co., Ltd v. Jet Midwest Grp., LLC*, 932 F.3d 1102, 1105 (8th Cir. 2019)) (internal quotations omitted). In contrast, the Fifth and Ninth Circuits have adopted a "juridical-person approach," which considers a foreign business entity to be a citizen for diversity purposes "so long as the entity is considered a juridical person under the law that created it." Id. at *5 (citing, *inter alia*, *Cohn v. Rosenfeld*, 733 F.2d 625, 629 (9th Cir. 1984); *Stiftung v. Plains Mktg., L.P.*, 603 F.3d 295, 298 (5th Cir. 2010)).

(SNC V. CERTAIN UNDERWRITERS) *Continued from page 7*

Regarding the treatment of the SE defendant, Judge Hazel first agreed with defendants that "a U.S. corporation is a plausible analogue to a societas europaea," citing various provisions in the SE statute providing that a SE has transferable shares, limited liability, and a legal personality independent from its shareholders, as well as provisions imposing "other requirements that are characteristic of U.S. corporations," including requirements related to registration, reporting, management and oversight, shareholder meetings, and shareholder voting.[7] Judge Hazel went on to note, however, "to the extent a U.S. corporation is not a '*clear* domestic analogue[,]' *Navy Fed. Credit Union*, 972 F.3d at 345 n.5 (emphasis added), the Court will apply the Seventh and Eighth Circuits' comparison test" to confirm that the SE defendant was "equivalent to a U.S. corporation for the purposes of diversity jurisdiction."[8]

Looking to the relevant company characteristics identified by the Seventh Circuit, and the defendants' briefing and supporting exhibits, Judge Hazel concluded that the SE defendant had "all the features of a U.S. corporation and should be treated as such for the purposes of diversity jurisdiction," specifically noting that, *inter alia*, it had perpetual existence without regard to death, dissolution, or withdrawal of its individual shareholders; it was governed by a Board of Directors; it was able to issue shares that are transferable, subject to certain restrictions; it had a corporate existence separate from that of its shareholders; it had the power to enter into contracts, own property, transact business, and sue and be sued in its own name and right; it was taxed at a corporate level; its shareholders were not liable for the company's debts, and its shareholders' potential liability was limited to a shareholder's capital stake in the company.[9] Treating the SE defendant as a U.S. corporation to determine its citizenship, Judge Hazel looked to its place of incorporation and principal place of business — both of which were abroad — and thus, complete diversity existed with the U.S.-based plaintiff, and plaintiff's motion to remand was ultimately denied.

Author Note:

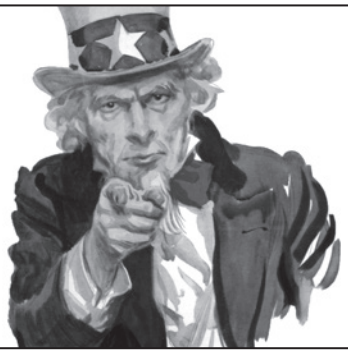
SE's have been growing in popularity as they provide advantages including allowing companies operating in different European countries to operate throughout the European Union with one set of rules, rather than utilizing a network of subsidiary entities.[10] And a number of SE's have appeared on the EURO STOXX 50® Index, a stock index of 50 of the largest Eurozone companies, apparently including some recognizable names such as Airbus SE and LVMH Moët Hennessy Louis Vuitton SE.[11] Despite the growing popularity of SE's, a search by the author indicates that no federal Circuit Courts have yet addressed the citizenship of a SE for purposes of diversity, although operating as a SE could provide a more reliable possible avenue to obtaining federal jurisdiction than other types of foreign entities.

Additionally, as the Fourth Circuit has cautioned: "Despite the apparent simplicity of diversity jurisdiction, in practice it can become complicated, ensnaring the parties (and judges, too) in jurisdictional disputes."[12] And that is especially true when foreign entities are involved, and as other countries continue to establish new types of business entities that will likely not have clear-cut American-law analogues, Judge Hazel's decision in this case may have additional value in providing an overview of pertinent considerations that may impact how new entities will be treated for purposes of federal diversity jurisdiction in U.S. courts.

Richard J. Medoff is an Associate in the General Litigation practice group at Semmes, Bowen & Semmes, P.C. and has worked on a broad range of civil litigation defense cases and regulatory matters on behalf of a range of individuals, insurers, and companies in areas including insurance defense, premises liability, products liability, toxic torts, intentional torts, personal injury, business litigation and commercial disputes. He can be reached at RMedoff@semmes.com.

Robert L. Hebb is a Principal in the General Litigation practice group at Semmes, Bowen & Semmes, P.C. and a Martindale-Hubbell AV-rated attorney. His practice is concentrated in a variety of litigation areas, including products liability, premises liability, construction defect, property, insurance, and personal injury. He can be reached at RHebb@semmes.com.

7 *Id.* at *8 (citing EU Council Regulation No. 2157/2001 at Preamble ¶ 13, art. 1 ¶ 2-3, art. 12–16, art. 38–45, and art. 52–62).
8 *Id.* at *8.
9 *Id.* at *9 (citing, *inter alia*, defendants' affidavit and exhibits).
10 *See, e.g.*, Albert H. Kritzer, 2 International Contract Manual § 56:38 (Dec. 2020 Update); https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index_en.htm.
11 *See* https://www.stoxx.com/index-details?symbol=SX5E.
12 *Hawkins v. i-TV Digitalis Tavkozlesi zrt.*, 935 F.3d 211, 222 (4th Cir. 2019) (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 84–88, 130 S.Ct. 1181 (2010)).



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Unlawful Use of a Trademark in Commerce and the Affirmative Defense to Infringement

Jim Astrachan

The Lanham Act imposes on a trademark's owner the requirement that the mark be used lawfully in commerce. If it is not, the USPTO should refuse to register it, and if registered the registration should be canceled. As well, unlawful use of a trademark in commerce has been applied as an affirmative defense to infringement in the case of registered marks, and there is no basis to distinguish, for this purpose, registered and unregistered marks. It's just that the tested cases have been with registered marks.

To obtain trademark rights, the mark must be used in commerce; a mere intention to use a mark fails to create rights. The TTAB has adopted and applied a "lawful use in commerce" doctrine, the effect of which is that goods bearing a mark shipped in violation of a federal statute leaves the mark unregistrable or if already registered, unenforceable.

One purpose behind this lawful use doctrine is to regulate honest trade among merchants, and not reward merchants who deceive the buying public; and certainly an aim of the courts and the USPTO is not to help merchants achieve their aims by enforcing their marks when their marks are used unlawfully. As one court ruled, "In all cases of unfair competition, it is principles of old fashioned honesty which are controlling." *Radio Shack Corp. v. Radio Shack, Inc.*, 180 F.2d 200, 206 (7th Cir. 1950).

While a number of these cases result from the violation by a mark's owner of the Food, Drug & Cosmetic Act, this law is by no means the only federal act for which the affirmative defense has been raised when the allegation has been a violation. For example, the defense has been revised for alleged violations of the Federal Meat Inspection Act, the Federal Clean Air Act, the Amateur Sports Act of 1978 and the Federal Insecticide, Fungicide and Rodenticide Act.

It is the clear rule that a trademark's owner must use its mark lawfully in order to enforce its rights against would-be infringers.

Unlawful activity that will result in problems for the owner can be found in false statements made to the USPTO for purposes of registration, or in ad copy, or other claims, made to induce consumers to buy the goods associated with the mark. Even failure to comply with labeling requirements can be considered unlawful use in commerce and result in loss of enforcement rights. Of course, there must be a nexus between the use of the mark and the allegedly unlawful activity, and generally, the unlawful use must be material. Merely collateral unlawful use likely won't result in loss of rights.

For a more detailed treatment of this topic, see Astrachan, James B. *Unlawful Use in Commerce and the Affirmative Defense to Infringement: When Trademark Rights are Not What They Appear to Be*, Syracuse Law Review, Vol. 69, No. 2 (2019).

Jim (Astrachan) is a partner at Goodell DeVries and represents clients in intellectual property law and litigation, mediation, and business, regulatory, and transactional matters. He is a frequent author and speaker and has taught IP at Maryland's two law schools for more than two decades.

Editors' Corner

The editorial staff wish to express our thanks to the contributions made by MDC members to this publication of *The Defense Line*. We wish to thank **Jim Astrachan** from Goodell, DeVries, Leech & Dann, LLP, **Jeff Trueman**, and **Richard Medoff** and **Robert Hebb** from Semmes, Bowen & Semmes for their outstanding contributions to this issue. The articles in this edition address a nuanced diversity jurisdiction question stemming from developments in European Union business law, negotiation strategy, and affirmative defenses to claims of trademark infringement. We are also looking for articles and case updates for publication and will accept those submissions at any time.

We continue to look forward to opportunities to support the MDC and be a resource to its members. We hope that you enjoy this edition of *The Defense Line*. If you have any comments, suggestions, or submissions for future editions, please contact the Publications Committee.

Nicholas J. Phillips
Chair, Publications Committee

Thomas, Thomas & Hafer, LLP
(571) 464-0436

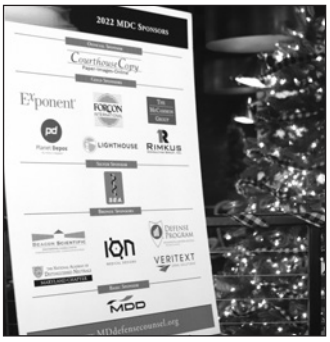
Co-chair, Publications Committee

We have a vacancy on the Publications Committee. If you or one of your colleagues are looking to get involved with the MDC and are interested in joining the Publications Committee, please reach out to Nick Phillips or Chris Jeffries.

MDC's 2022 Past Presidents Reception

Maryland Defense Counsel ("MDC") hosted its annual **Past President's Reception** at Blackwall Hitch in Baltimore on Wednesday, December 7. Attendees enjoyed drinks, hors d'oeuvres and camaraderie in the upstairs Crow's Nest in support of our past presidents.

MDC wishes to thank all attendees, including our sponsors and members for their participation and contributions to a fun evening. It was a great warm-up for the upcoming holidays!



Spotlight

Goodell DeVries Secures Important Precedent in Maryland's Court of Appeals

Goodell DeVries has secured an important precedent in Maryland's Court of Appeals for oncologists and other health care providers against novel Wrongful Death claims for "failure to prolong life" of terminally ill cancer patients. *Wadsworth v. Sharma* (Case No. 40, July 15, 2022). **Derek Stikeleather** briefed and **argued the case in the Court of Appeals**. For decades, Maryland courts have held the line against "loss of chance" claims brought by Wrongful Death beneficiaries who seek recovery for medical negligence that occurred after the underlying illness was already likely to — and ultimately did — cause the decedent's death. In such cases, it is impossible that any purported negligence ***likely*** caused the death, as required to support civil liability under the Wrongful Death Act.

With support from the Plaintiffs' Bar, the ***Wadsworth*** wrongful-death beneficiaries conceded that the patient with Stage IV breast cancer had no chance of surviving her illness, but they proffered expert testimony that earlier treatment could have extended the patient's life by up to 2.5 years. The trial court and Court of Special Appeals held that such wrongful-death claims were barred by the loss-of-chance rule. Plaintiffs argued in the Court of Appeals that the loss-of-chance rule and cases applying it simply did not apply to their novel claims for failure to prolong life. Recognizing that the statutory rights created by the Wrongful Death Act are in derogation of the common law and narrowly construed, the Act limits recovery to cases where the negligence caused the death, ***stare decisis*** bars loss-of-chance claims in Maryland, and any changes to the Act must come from the Legislature, the Court of Appeals affirmed the judgment for the oncologists on the wrongful-death beneficiaries' claims.

See photos from past events at mddefensecounsel.org/gallery

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