



NCBJ

National Conference
of Bankruptcy Judges

San Francisco

Tell it to the Judge Roundtable Discussions

Hon. Scott C. Clarkson (Central District of California)

Hon. Dennis R. Dow (Western District of Missouri)

Hon. Erithe A. Smith (Central District of California)

Factual and Procedural Background

- NCAA Athletes Exploitations, L.L.C. (NAE) acquires images of college athletes and places them on coffee mugs, t-shirts and other items, selling them to colleges, individuals and collectors
- Pays no money to student athletes for these images
- Recently, NAE has had financial difficulty

Factual and Procedural Background

- Also recently, former student athlete, Bin Bebow, initiated a class action against NAE alleging the appropriation of right to publicity
- Shortly after filing of the complaint, NAE filed a petition for relief under Chapter 11
- NAE removed litigation and both parties consented to jurisdiction of the bankruptcy court

Discovery Issues

- During his deposition, Bebow refused to answer certain questions claiming a violation of the attorney-client privilege
- NAE claims Bebow provided incomplete responses to interrogatories and requests for production asserting work product protection
- Bebow alleges NAE has threatened class members with notices to their institutions of their seeking money related to their images and activities
- Bebow has begun “scorched earth” discovery campaign as reflected by scope of discovery requests and number of deposition notices

Scenario 1 – Discovery Conference

- The players
 - Den S. Dour, counsel for NAE
 - Sketch E. Snarkson, counsel for Bebow
 - Judge Zuma Rockne
- The setting: discovery conference set at 7:00 a.m. on the Friday before Memorial Day weekend

Potential Discussion Issues

- Judicial reluctance to entertain discovery disputes (indicated by scheduling/rulings)
- Not commencing hearings on time
- Not being adequately prepared
- Failure to enforce local rules

Potential Discussion Issues

- Consistency of rulings (as compared to both judge's prior rulings and those of other judges in district)
- Availability of rulings
- Failure to appreciate time sensitivity or logistical issues in ruling on discovery disputes
- Reluctance to actively manage discovery

Scenario 2 – The Trial

- Preliminary issues discussed
 - Amendments to complaint
 - Addition to lists of witnesses and exhibits
 - Motion in limine
- Argument set on motion for partial summary judgment, which has been fully briefed

Potential Discussion Issues

- Deviation from local rules regarding pretrial filings
- Rulings on scope of claims and evidence; sufficiency of notice and prejudice to opposing party
- Favoritism to one counsel

Potential Discussion Issues

- Unwillingness to consider motions in limine and perform gatekeeper function as to certain kinds of evidence
- Raising issues sua sponte
- Propriety and impact of judicial questioning of witnesses