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Litigators of the Week: US Soccer and MLS Fend Off Claims They Conspired to Scuttle Rival League's Prospect

By Ross Todd
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Our litigators of the week are **Christopher Yates** and **Larry Buterman** of **Latham & Watkins** and Bradley Ruskin and Kevin Perra of Proskauer Rose.

With the **Latham** team representing the U.S. Soccer Federation and the Proskauer team representing Major League Soccer, they squared off during a three-week trial in Brooklyn federal court against lawyers for the North American Soccer League, a league that sued USSF and MLS when it folded in 2017. NASL claimed that USSF and MLS conspired to exclude it from being a sanctioned Division I or Division II professional soccer league.

Federal jurors in Brooklyn last week found NASL hadn't proven the existence of a relevant market in Division I or Division II pro soccer, handing a win to the defendants after just about 90 minutes of deliberations.

Litigation Daily: Who were your clients and what was at stake here?

Chris Yates: Our client is the United States Soccer Federation, commonly known as U.S. Soccer. U.S. Soccer is the national governing body for the sport of soccer in the United States and oversees all aspects of the sport at all levels, including youth soccer, amateur soccer, professional soccer and our women's and men's national teams. The plaintiff, the North American Soccer League or NASL, originally sought damages that would have exceeded $1 billion after trebling, and also sought relief that would have drastically altered U.S. Soccer's ability to govern the sport and compromised its ability to fulfill its mission to grow the sport in the United States.

Courtesy photos

L-R: Lawrence E. Buterman & Chris Yates of Latham & Watkins, and Bradley Ruskin & Kevin Perra of Proskauer Rose.

Brad Ruskin: Proskauer's client was Major League Soccer or MLS, the major men's professional soccer league in the U.S. and Canada. Plaintiff's conspiracy and monopolization claims against MLS alleged that MLS conspired with U.S. Soccer to exclude the NASL from being able to operate a professional soccer league and sought damages of about a billion dollars. The evidence we presented at trial showed the jury the exact opposite: that MLS has gotten to where it is in the highly challenging sports world through hard work, extraordinary investment and the commitment of its investor-operators and leaders, not through any anticompetitive conduct.

How did this matter come to you and your firms?

Ruskin: MLS has been one of Proskauer's most highly valued clients for more than 25 years. We have been extremely fortunate to represent the league across all aspects of its business (including transactions, litigation, financing, tax, employment and more).

Larry Buterman: U.S. Soccer has been a great client of the firm for over 30 years. We have represented them in numerous matters, including litigations and arbitrations, and have a long track record of working closely with U.S. Soccer, assisting them as they have grown the sport at all levels. We began working on issues related to the NASL in 2015 when the NASL first complained about U.S. Soccer's sanctioning process and threatened litigation if U.S. Soccer did not cave to their demands to be classified as a "Division 1" league, even though they admittedly did not meet U.S. Soccer's professional league standards.

Who was on your trial teams, and how did you divide the work?

Kevin Perra: We had an amazing group of lawyers and professionals on our trial team, many of whom have been with us for this seven-year journey. Along with the two of us, the trial team included partners Keisha-Ann Gray and Colin Kass, senior counsel Scott Eggers, and associates Adam Farbiarz, Tara Brailey, Jake Butwin, Genesis Sanchez Tavarez and Perry Kumagai. A terrific team of legal assistants, trial specialists, graphic artists and secretaries were there to support us every step of the way. To a person, all of us would say that the closeness of this team and the collective commitment to excellence made this a fun and fulfilling experience throughout. Also, the "trial team" very much included our wonderful colleagues at **Latham**. The level of collaboration between the two firms was extraordinary.

Yates: Larry and I have tried three cases together in the last two and a half years, so we've been in the trenches together a lot. In this case, I opened and closed and also cross-examined the NASL's liability expert. Larry crossed-examined the NASL's primary fact witness, conducted the direct of U.S. Soccer's former president and also conducted a large part of the cross-examination of NASL's damages expert. We were joined by two superstar partners **Anna Rathbun** and **Aaron Chiu**, each of whom played key roles at trial. Anna examined a key witness called adversely by the NASL and Aaron argued all the complex issues related to the jury instructions, as well as the verdict form. We were fortunate to have an amazing group of dedicated attorneys, led by our counsel **Joe Axelrad**, who supervised a large part of the economic work, as well as our senior associate **David Johnson**, who oversaw the associate team and did critical work on the opening and closing presentations. The larger cast includes associates **Ehson Kashfipour**, **Christine Greeley**, **Robert Medina**, **Alex Siemers**, **Emily Viola**, **Lei Samanta Brutus**, **Hanna Nunez Tse**, **Krissy McKenna**, **Evan Omi** and **Molly Barron**, as well as our incredible staff.

What were your trial themes and how did you drive them home with the jury?

Perra: Our key trial themes centered around providing the jury with the reality of what has happened over the past decades in the soccer world in the U.S. and unraveling the far-fetched story that the NASL tried to present at trial. Those themes included that: (1) it is really hard to succeed as a sports league, and MLS has gotten where it is because of leadership, vision, committed and experienced owners and huge investments—not from unfair or special treatment; (2) MLS never did, or sought to do, anything to harm the NASL; and (3) the NASL failed as a league because of its own choices and actions, and was seeking to blame everybody but itself.

Yates: Primarily, we wanted this trial to be about accountability. The NASL was a league that was wholly mismanaged and, despite receiving numerous chances and assistance from U.S. Soccer, was never successful. The NASL had deep ties to a criminal enterprise called Traffic Sports, which pled guilty to racketeering and wire fraud conspiracy charges. But rather than accept that those connections harmed the league, the NASL tried to claim that U.S. Soccer and MLS had conspired to run it out of business. There was literally no support for that claimed conspiracy theory, and we knew the hard-working women and men of our jury would not be inclined to reward the NASL with hundreds of millions of dollars that it did not earn. A big theme that we presented throughout was that NASL's fact and expert witnesses could not be trusted, that they were being paid significant amounts by a billionaire who was funding the litigation. We asked the jury in opening and closing to trust their own common sense and the prelitigation emails and business records of the NASL, which flatly contradicted what their witnesses were saying now at trial.

Brad, for those unfamiliar with this case, explain a bit about who Rocco Commisso is, how he fits in and how your cross-examination of him went.

Ruskin: Mr. Commisso, who is the founder and CEO of Mediacom, purchased the NY Cosmos shortly

before the NASL's 2017 season. When he bought the club, both the Cosmos team and the NASL as a league were on the verge of collapse. A significant piece of the NASL's story was that whatever problems the league had previously faced were now in the past because Mr. Commisso brought money and a passion for soccer to the league. The focus of the cross was to establish a number of points, including that: (1) Mr. Commisso had no basis to allege conspiracy or any wrongdoing by MLS or U.S. Soccer; (2) he was highly biased, including that he was the primary funder and beneficiary of the suit; (3) he had created a burner Twitter account from which he secretly tweeted extremely hateful attacks "from the shadows" at MLS and U.S. Soccer leadership; (4) he bought the Cosmos club with no due diligence on it or the NASL, and without any experience in sports business; and (5) his investment history supported and reinforced our view of the relevant market. I think the cross achieved all of our goals and more.

I gather that you had a more extensive defense case prepared to put on, but you decided to cut that short, put on no live testimony and move rather quickly to closings. What went into that decision?

Buterman: It was not an easy decision to make. Defendants in antitrust cases almost always present liability experts to challenge the plaintiff's proposed market definition and competitive effects analysis and damages experts to undermine the plaintiff's proffered damages calculations. Here we had esteemed experts who had done significant work and were prepared to persuasively attack the plaintiff's experts' work. We also had numerous fact witnesses ready to testify and undermine NASL's claims of conspiracy. But as the trial progressed, we came to realize that the jury was simply not buying the plaintiff's conspiracy theory. The NASL called multiple key defense witnesses in its case-in-chief, all of whom came off as extremely credible, while its own witnesses did not hold up well to cross-examination—repeatedly refusing to answer basic questions. NASL's expert witnesses also performed poorly in their testimony, and were subject to very intense cross-examinations. NASL's liability expert presented no record evidence to support his proposed market definitions, and NASL's damages expert admitted under cross that he could not say whether his key damages calculation was accurate. So when NASL rested its case after two weeks of trial, we decided that NASL simply had not come close to meeting its burden. After a lot of debate and discussion, both among the outside counsel and in-house teams at MLS and U.S. Soccer, we decided that the jury had what it needed to rule in our favor, and that we would not call any live witnesses. We instead played a few short deposition designations that allowed us to get some additional key facts and documents showing the truth about the NASL into evidence, and then rested.

Ruskin: There were several unique aspects of the case that led to that decision. First, eight of our witnesses testified in the NASL's case, and it was our collective judgment that they had done very well. Second, we felt that our cross-examinations of the NASL experts had been very effective in undermining their ability to meet their burden on key issues like relevant market, harm to competition and damages. And, third, the factual record at the close of the NASL's case revealed that it had no evidence of a conspiracy, as the directors who voted against the NASL's application to be certified as a league all testified that they voted consistent with U.S. Soccer's mission to grow soccer in the U.S. and without any influence from MLS. So, with credit to Larry for first raising the idea, and after long discussion and debate, we became confident that the best way forward was to shorten our case, not try the patience of the jury and get quickly to closing arguments.

In a case like this, where your clients are being accused of conspiring, how do you strike the right balance when putting on a joint defense? How do codefendants avoid coming off as co-conspirators?

Ruskin: We were highly sensitive to this issue from the outset of the trial and took it on directly in the opening statements. I explained that the two defendants were distinct entities, but that we planned on having only one lawyer from the defense side questioning most witnesses because we wanted to be as efficient as possible and not waste the jury's time. I concluded by telling the jury that "[of] course, this trial isn't about who asks the question but what you hear from the witnesses and what you see in the exhibits." Also, during the course of trial, we leaned into the notion that it was good for fans of soccer in the U.S. for MLS and U.S. Soccer to have a productive and healthy working relationship, not something sinister as the NASL tried to portray it.

Yates: It's definitely a concern, especially given that the teams representing U.S. Soccer and MLS are sitting at the same table and were being lumped together by NASL's counsel throughout as "defendants." In his opening, [Brad] explained to the jury that we would largely be having one lawyer examine each

witness for efficiency reasons. But, most importantly, all our witnesses emphasized that the decisions made by U.S. Soccer were made by U.S. Soccer Board Members with no connection whatsoever to professional leagues and that MLS was not involved at all.

Jeffrey Kessler, who represents the plaintiffs, said after the verdict came in that there were some "fundamental legal errors" that prevented jurors from receiving important evidence or being instructed correctly. He said he expects the NASL to appeal. How do you feel about the prospect of this decision holding up on appeal?

Buterman: While we respect NASL's right to appeal if it chooses to do so, we are confident that the jury's unanimous 10-0 verdict will be upheld. The court was extremely thoughtful and reasoned in all of its decisions in the lead-in to and at trial. The jury ultimately found that the NASL didn't meet its burden of establishing any of its claimed relevant antitrust markets. That is a fact-bound issue, and one that the court did not make any rulings related to—let alone ones that could be claimed to constitute legal error.

Perra: Judge Gonzalez dug deeply into this case and worked extremely hard to "get it right." We strongly believe there is nothing in this record that would provide grounds for a meritorious appeal, and therefore are highly confident that the jury verdict in our favor will be upheld should the NASL move forward with an appeal.

What can other antitrust defendants take from your experience here?

Yates: It is not always easy for defendants in antitrust cases to see cases all the way through. The risk of treble damages, joint and several liability and attorney's fees often drive defendants to settlement, even when the allegations have no merit. Here, we were fortunate that U.S. Soccer and MLS were willing to fight all the way through and defend their innocence against baseless claims. The jury's swift decision not only vindicated our clients, but is a reminder that our jury system works. The jurors in this case were extremely attentive and were able to grasp difficult antitrust concepts related to relevant markets, damages and causation.

Perra: Two key things. First, as everyone who practices in this area knows, antitrust principles and concepts can be very complex and difficult for jurors to understand. We focused on keeping our presentation on issues like relevant market, harm to competition and damages as simple as possible, using examples and information from the "real world" that the jury could understand and relate to. We were very pleased that they got our market definition arguments and applied them in reaching their verdict. Second, and perhaps an obvious point, but it is critical to maximize your chances of success to push as hard as you can on every element of an antitrust case—whether it is market definition, harm to competition, injury causation, damages, etc. When you get to the end of trial, you want the jury to have as much optionality as it can to find in your favor on one or more of those points.

What will you remember most about this matter?

Perra: Well, winning a high-stakes case—that never gets old, especially when your client deserves to win. But more seriously, I will never forget the camaraderie among our Proskauer team, our trusting client MLS, and the **Latham** team during this long journey—the mutual trust and friendship among talented people who spent a lot of time together with the shared goal of excellence in client service.

Buterman: What I will remember most will be how incredibly our entire team operated. For almost a month, we worked 18-hour days in a hotel in Brooklyn, and our team, which included some younger attorneys who were at their first trial, never lost focus for a second. We grew so close, and had so much fun and camaraderie in our war room. It is so gratifying to see how well everyone performed. I'll also remember the excitement we had when our team members discovered key documents that contradicted what NASL witnesses had said on direct examinations and set us up for dramatic cross-examinations and closing arguments. And, of course, the long hours debating strategic calls, including whether to not call live witnesses in our case and move quickly to verdict.

Ruskin: I echo Kevin's comments. For seven years we fought this fight as a team and managed to have fun at every stage. Most importantly, we had a terrific client who deserved to be vindicated and had the fortitude to take this to the end. It is incredibly satisfying to achieve this result for them.

Yates: Trials are truly a team sport. We were fortunate to have a true "dream team" not just within **Latham** but in our co-counsel at Proskauer and in our clients and friends at U.S. Soccer, who have been such amazing partners throughout the decades. I'll carry the memory of this group and the incredible collaboration with me for the rest of my career.