

DAN SNYDER & THE FOUNDATION OF A FORCED TEAM SALE IN SPORTS

*Dan Lust, Esq.**

Hunter Bedard: What role does the commissioner of a professional sports league play when owner misconduct occurs?

Dan Lust:

The biggest misconception concerning conduct enforcement in professional sports leagues is that the commissioner of the league has the authority to unilaterally remove an owner. **That is not the case.** However, the commissioner can and should use their role to influence others to take the matter to a formal vote among the other owners. For example, in the NFL, the league must put the removal of an owner to a vote, requiring a three-fourths affirmative vote by all owners who vote on it.¹ But even then, in most cases, that is not going to be the death vow. Specifically, in football, an owner in the National Football League (NFL) is going to have the ability to provide evidence and put it on a case to defend themselves.²

With respect to the calling of a vote concerning recent owner misconduct in the NFL, it could have happened at the recent owner's meeting in New York, where all the owners and representatives were present. But my understanding is that the actual voting process can happen over the phone, an impromptu meeting can be called, and votes can be taken at that time. It is not as if the owners are required to wait for next year's owner's meeting. Concerning time, the vote to terminate an owner's rights can happen relatively quick, after the charge and a timely response are filed.

People, I think incorrectly, point at Roger Goodell and say that he should kick Dan Snyder out of the NFL or that Adam Silver should have kicked Donald Sterling out of the National Basketball Association (NBA), but that's not within the commissioner's power. A commissioner has the power to influence other owners to put a termination to a vote, but that's never going to be unilaterally within his control.

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1. CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE § 3.8 (2006).
2. *Id.* § 6.5(G).

Hunter Bedard: At the center of owner misconduct in professional sports is Dan Snyder of the Washington Commanders. Can you give the readers a breakdown of that situation?

Dan Lust:

In July 2020, lawyer Beth Wilkinson started her investigation of Dan Snyder and the Washington Commanders. That investigation was brought on by a report published by the Washington Post. Then, the bulk of the investigation was focused on allegations made by former employees concerning a toxic workplace environment, workplace harassment, and lack of sufficient human resources. Generally, you can call this an allegation of a lack of institutional control. This first investigation went on for about fifteen months until October 2021.

The findings of the Beth Wilkinson investigation were kept under wraps for the most part. There was no comprehensive written report issued like one that might rival those commissioned for the NFL's "deflate-gate" investigation of Tom Brady and the New England Patriots or Major League Baseball's *Mitchell Report* on the prevalence of steroid use. It was lacking in substance, and nobody knew what Dan Snyder, or the Washington Commanders organization, was found to have done wrong. We have some indications of some of the allegations but not all of them. The lack of transparency provided to the public following the Beth Wilkinson investigation was generally criticized as the NFL trying to protect Dan Snyder and themselves by not releasing this report.

What we do know is that Dan Snyder and the organization were fined ten million dollars. Reportedly, again there's no writing on this, that Dan Snyder was told to stay away from the day-to-day handling and operations of the team for an undisclosed period. In the weeks and months that followed these punishments, Dan Snyder's wife, Tanya Snyder, became the face of the organization. The general sentiment was that people were unhappy with the overall lack of transparency provided by the NFL and the ten-million-dollar fine, which is a lot of money, but not a lot to someone worth billions upon billions of dollars.

What happened in the wake of that punishment was that these former employees, largely former female employees, started speaking up. They said that this punishment was not enough and that the world needed to know what was going on in Washington. Those comments eventually made their way to various politicians within the District of Columbia, Maryland, and Virginia (the DMV) area. Among those were national politicians working in Congress who were eventually able to call a meeting of the House Committee on Oversight and Reform (House Oversight Committee) to investigate the toxic workplace and workplace

harassment allegations regarding the organization, with hearings to follow.

Between October 2021 and June 2022, when the hearings would ultimately take place, these improprieties came on the radar of the House Oversight Committee, and they started to conduct discovery concerning these former Commanders' employees. Interviews were conducted behind the scenes, though some of the former employees were scared to speak to investigators for fear of violating various non-disclosure agreements they had signed. Around this same time, and stemming from the interviewing process by Congress, it was publicized that Dan Snyder had his own separate sexual assault allegation directly between him and a former employee. The allegation was that Dan Snyder had an inappropriate incident with a former employee and that he paid her a certain amount of money to remain silent.

Through reporting by the Washington Post and the efforts of Congress, an additional allegation was made public claiming that Dan Snyder was hiring attorneys to run interference on both Congress' efforts and the Beth Wilkinson report that had since come out. So, it was apparent that Dan Snyder was not going down quietly and that he was allegedly using intimidation tactics to steer the story and certain witnesses. Those allegations have since been denied by Dan Snyder, but not before they were brought to the attention of Roger Goodell and placed on the record during the June 2022 hearings. Roger Goodell would go on to confirm his commissioner power under the NFL Constitution and Bylaws, testifying that he does not have the unilateral authority to remove Dan Snyder as the owner of the team.

Following that testimony, Congress then shifted its efforts to get Dan Snyder to appear and testify. He ultimately did testify for upwards of ten hours via remote software. The transcript has never been released. There is no video as to what happened, but we do know he provided some sort of testimony. Congress has not issued any type of written report or finding concerning the Snyder testimony, so it is still unclear as to what was said. Whether he pled the Fifth Amendment and exercised his right against self-incrimination or answered the questions asked is uncertain.

In June 2022, and throughout the House Oversight Committee's investigation, Roger Goodell essentially had Dan Snyder's back. He did not condemn Snyder like Adam Silver did Donald Sterling, he did not say that Snyder was banned for life. Goodell essentially defended Snyder at every turn and refused to throw Snyder under the bus. Fast forward to October 13, 2022, when ESPN released its investigative findings. Seemingly going one step further concerning Snyder's intimidation tactics, ESPN's report found that Snyder was trying to dig up "dirt" on other owners and commissioner Roger Goodell. In theory, to leverage

owners and prevent them from voting against him concerning any type of vote to oust him.

Following the ESPN report, owners' meetings were held on October 18, 2022. During the meetings, Jim Irsay, the owner of the Indianapolis Colts, was very candid and essentially said that the owners are waiting for the second investigation into Snyder and the Commanders' organization to be completed. Adding that they likely do have the required three-fourths vote to oust Snyder from the league.

The second investigative report that Irsay was referencing is a report that is currently being conducted by Mary Jo White, which is now nine months into its onset and that seems to be the tipping point. If and when that report is released to the public, we will see Snyder's alleged wrongdoings. You can likely assume that report would include allegations pertaining to consumer fraud, issues with ticket availability, and allegations of underreporting team revenue, in addition to the sexual assault charges. Additionally, Snyder was directly implicated in other allegations within the organization of voyeurism with the team cheerleaders. This second report seems to be the final domino that all other owners are watching fall.

Hunter Bedard: There was another big domino that recently fell in the Dan Snyder situation. Could you break that down for the audience?

Dan Lust:

It has been reported that the United States Attorney General's office in the Eastern District of Virginia has opened a criminal investigation into the Washington Commanders for allegations of financial improprieties. Specifically, the team misreported revenue to the league and engaged in consumer fraud by holding back millions of dollars in season ticket deposits that were otherwise meant for customers.

There may be additional allegations that Congress has advised the United States Attorney General's office about, but we just know for the time being that these are financial-based improprieties. Why that's relevant to a potential sale is obvious if someone's going to be buying into the team, you buy into the profits, but you also buy into debts and liabilities. So, from a financial standpoint, this might impact the dollars it can be sold for, number one. But in another sense, these investigations could outlast a potential sale—these investigations and criminal prosecutions take a year and a half, two years, two and a half years, or maybe longer—and if a team is sold sometimes, you can do that in six months.

So, whoever is buying into the team now and doing their due diligence, they're going to see these aren't just state-based investigations

that the State Attorney Generals and the DMV are conducting. They now also reach the federal level. We're not sure if it's an SEC issue or an IRS issue, but it's very problematic if four different governmental entities are actively investigating your organization at the same time.

On the same day that this federal criminal investigation was announced, Dan Snyder announced that he's hired Bank of America to consider the potential sale of the Washington Commanders. In that reporting, it's unclear if Snyder is going to sell one hundred percent of the team, or some amount representing a majority interest but not the whole team, or even a minority interest. Snyder purchased one hundred percent of the team and bought out his minority partners within the last year.

He could just be selling those minority shares back as someone that's cash-strapped because he wants to start financing the new stadium. He might be selling as much of the team as necessary to finance the stadium, so not necessarily one hundred percent of the team. But certainly, the timing of these state and federal investigations and this announcement are conspicuous. If you wanted to say these two things were causally related, that wouldn't be so far-fetched.

Hunter Bedard: What is the advantage for Dan Snyder if he voluntarily decides to sell?

Dan Lust:

If Snyder doesn't agree to voluntarily sell and he goes through the NFL mechanism of a forced sale, he will have to sell one hundred percent of the team, he can't maintain any share of it. If he voluntarily sells, there's the option where he might be able to maintain five percent, ten percent, forty percent, maybe seventy percent of the team where he's only selling thirty percent. So, those questions and the ability to maintain some percentage are probably why he would voluntarily sell. Ultimately, if Dan Snyder is going to sell, he will want to dictate the terms of it. He may not want someone with a high profile like Jeff Bezos or Jay-Z to buy the team. He may want someone with a lower profile that doesn't want a controlling interest in the team.

Hunter Bedard: Can you expand on why Dan Snyder would consider selling less than one hundred percent of the Washington Commanders?

Dan Lust:

Part of the reason that the team is not as profitable as it should be is that the stadium is not a state-of-the-art facility. Owners would like

Snyder to upgrade the stadium in terms of seating capacity and amenities because at the end of the day the NFL is a system of revenue sharing. The NFL owners will only make as much as the least profitable team will make. Snyder has been trying to get public financing to help his efforts to build a stadium. Because of all these state and federal investigations and congressional inquiries, the local politicians at the state level have been getting letters from their constituents telling them that they don't want any public money to fund the stadium. They don't want the Washington Commanders, while they're owned by Dan Snyder, to be in their state.

Snyder is in a position where he needs to privately fund the stadium. In theory, say you sell forty percent of the team, and the team is worth five billion, or six billion, or eight billion, that's a lot of money. That's another reason why Snyder might not be so inclined to sell all of it, he might just sell a portion to help privately fund the stadium.

The interesting issue is whether somebody would want to buy forty percent of the team. You would still be attached to Snyder, so you would probably only attract the Jeff Bezos' and Jay-Z's of the world if they are buying a controlling interest. If you buy a minority interest in the team, yes you can tell people you're a minority owner, but in the history of sports, the minority owners of the team don't have that much control or say over what is going on in the day-to-day handling of the team. You're holding an asset that is going to appreciate 3, 4, 5 times, but in terms of controlling share, you're not doing much. If someone like Jeff Bezos comes in who is worth over 100 billion dollars, you'd hope that that individual was in control of the team so that they could put their money into the team.

Hunter Bedard: You mentioned due diligence by potential purchasers, would that include their investigation? Are they going to be saddled with whatever damages are assessed civilly if there are federal indictments after the sale, or would the sale not happen until all this ends?

Dan Lust:

I think a lot of the money would be held in escrow and they should try to wait as long as they possibly could for the resolution of these investigations. Some of these investigations could take, potentially, years. I think the best possible route is to somehow carve out indemnification and carve out potential liabilities so that it doesn't fall on the new owners' hands and potentially affect the value of the franchise.

Similar to when the Rams moved from St. Louis to Los Angeles, you have litigation related to the move but had this indemnification clause that was in theory designed to protect the other owners. Kroenke was

going to step up and protect them. In our recent NFL sports history, you can have a scenario where Dan Snyder agrees to sell the team and in theory, he could protect the new owners from any type of liability that the team would face. Again, if Snyder is controlling the sale, and there's no shortage of big-name suitors that have been linked to a potential sale, maybe someone's going to want to cave. They'll say, "you know what, I just like the team, we'll deal with the indemnification difficulties later."

The season ticket money that is alleged to have been wrongfully held by the Washington Commanders is in the seven figures. Potentially, you have tax issues and could have issues for not paying your taxes for a certain amount of years. How much is that going to be? Is it going to be a billion dollars, a hundred million dollars? You might have some owner that waives everything and opens the books to look at the true debts and liabilities. If they're really trying to put up an aggressive bid to try and win the team because they don't go up for sale very often in the NFL, maybe someone is going to excuse Dan from those liabilities and not attempt any carve-outs. There are creative options here, but I think that's one of the reasons why Snyder elected to try to sell on his own, to try and control the terms of the sale as best as possible.

Hunter Bedard: Can you describe the NFL's procedure, whether formal or informal, for removing an owner?

Dan Lust:

In terms of the NFL, there are absolute formalities to the system regarding ownership termination. Maybe to the surprise of some, there is a written charge that either Roger Goodell or the League Executive Committee would have to file. Dan Snyder would have fifteen days to file a written answer or otherwise respond to those formal charges. After that, there is a proceeding held that resembles a mini-trial, replete with Dan Snyder hiring counsel and submitting evidence, which again emphasizes the formality of the system in place.

This will come as a surprise to a lot of people because no league has ever gotten that far into the ownership termination process. There was a lot of attention paid to the congressional hearings with Roger Goodell and, specifically, questions pertaining to the sale of an NFL franchise. That line of questioning may have been a precursor to an upcoming mini-trial where the fate of a franchise is up for debate. It's unlike anything we have ever seen in sports.

Hunter Bedard: In the NFL, a 75% vote is required by NFL owners to force a particular owner to sell that owner's team. Keeping the Dan Snyder situation in mind, what are your thoughts on this requirement?

Dan Lust:

The NFL's code of conduct holds players, executives, and owners to the same standards—that you can't commit conduct detrimental to the interests of the League. In previous comments by owners and commissioner Goodell, they aim to hold owners to that standard and it is not, in theory, different from what the players have to follow. Interestingly, there's no voting process for teams when a player receives a suspension. There seems to be one person making that decision somewhere in NFL Headquarters.

I don't know if there is anything wrong with the 75% requirement and I guess we will see since that number has never been tested. For example, if twenty-four owners want Snyder to sell the team but the formal vote does not pass, I think there would be a lot of people calling for that percentage to be reduced. Twenty-four sounds like a lot, that's three-fourths of the league. In the event that three-fourths of the League owners wants an owner out and the entire fanbase in a particular jurisdiction (here in the DMV area, wants the owner out), twenty-four seems like a lot of votes to have secured. Maybe the requirement should be a majority vote. Maybe it should be a lower threshold. I could see that number changing but I'm not sure how many owners (other than Dan Snyder) are hoping that that number is higher.

Hunter Bedard: The NFL personal conduct policy states: "Ownership and club or league management have traditionally been held to a higher standard and will be subject to more significant discipline when violations of the personal conduct policy occur."

The policy goes on to say that the commissioner has the power to discipline players for various violations of that policy. A few short months ago when Roger Goodell was testifying before congress, he claimed that "I do not have the authority to remove him" when referring to Dan Snyder. What do you make of this policy and what Goodell had to say in front of Congress?

Dan Lust:

The application of the phrase "higher standard" is somewhat tricky when applied to NFL owners. Certain owners had troublesome allegations that have not been punished at all and others have allegations we will never know about because the NFL likely does not want us to

know about them. Meanwhile, for players, there seems to be a very wide range of instances where players are fined or suspended for something that may be an owner would not be punished for. It seems to call into question whether the NFL would truly hold that “higher standard” language in practice.

If a player, for example, was accused of sexually assaulting somebody, that player might not be a member of the NFL anymore. They might get kicked out. You can take the example of Matt Araiza, the punter for the Buffalo Bills; he had one very serious allegation against him and immediately he is out of the League. Or you take a guy like Ray Rice who had an allegation of domestic violence and, despite being a very talented player, suddenly he was no longer in the NFL. Concerning the allegations about Dan Snyder—and by and large, these are still allegations until a court of law or maybe the NFL’s court finds that these occurred with some level of credibility—it is established that the offenses Snyder is accused of would be nearly criminal acts that would likely result in a player no longer playing in the NFL. Because the NFL does not seem to be practicing what they preach regarding the “higher standard” language, the NFL is in a tough place from a public relations standpoint.

Applying that language to the Robert Kraft scenario, you had an NFL team owner that was accused of committing a charge resembling prostitution which, if that happened to an NFL player would probably result in some form of discipline. Robert Kraft was not given any type of discipline as far as the public knows about that incident. We do not hear about owner punishments that frequently. Ultimately, the NFL team owners somewhat control the narrative of news that comes out concerning the League. One would hope that if a “higher standard” was really the goal, then team owners would be pushing for a higher degree of transparency, but that does not seem to be the case.

Hunter Bedard: What influence, if any, do fans have when it comes to owner misconduct?

Dan Lust:

In one sense, fans really have no power. The NFL is not a public institution where they can demand some type of Freedom of Information Act request to get some information from the League about closed-door meetings. That’s not something they have. With respect to the Washington situation, it became very clear that fans were influencing the politician’s efforts regarding the congressional investigation. That influence is ineffective unless there is a groundswell in the public that the NFL was not doing enough. That is the power of the fans. The fans were not okay with the inadequacy of the NFL’s response to the first report by

Beth Wilkinson and demanded more action. Some of that was from former employees, and some of that was from fans of the organization. Certainly, members of the public made their voices heard and Congress thought it was important enough to act on it.

The second part, that I find to be fascinating, is the recent allegation concerning Dan Snyder about consumer fraud and the availability of certain tickets. If true, that could represent a state-based consumer fraud charge in any state that was impacted. Certainly, the fans voicing their displeasure with these alleged illegal acts is going to raise the concern of the attorney general.

As a third tier, Dan Snyder has been trying to get a new stadium deal done for some time. In the local DMV area, states were competing for the right to bid and use public money to help finance the rebuilding of a stadium for the Washington Commanders. As a result of all these allegations, constituents were writing letters to their local politicians objecting to any use of public funds for the Commanders. Combined, these three factors have had a very significant impact on Snyder and his controlling hold on the organization. According to one anonymous NFL team owner, Snyder's inability to get a stadium is certainly impacting his standing within the League. Fans certainly can have an impact and they have on Dan Snyder.

Hunter Bedard: What influence, if any, do players have when it comes to owner misconduct?

Dan Lust:

They say that winning cures everything and, unfortunately, that is true with certain situations in sports history regardless of what's going on behind the scenes. If there are championships, then people tend to look the other way. With respect to players, as we've seen with Washington, they seemingly could not land marquee-free agents for some time. Is that because of the Dan Snyder allegations? It remains unclear, but Washington has remained without a premiere quarterback for nearly thirty years.

Historically, the motive for players not flocking to Washington is unclear, but players can make a significant difference by choosing not to sign with a particular organization. If ugly allegations about a team's owner are compounded by that team not performing well from a revenue standpoint, that lends itself to a perfect storm where it is understandable that an owner may be put on the chopping block. That is kind of what is happening here. The Washington team is performing poorly because of internal mismanagement, to be sure, but these issues are magnified by their ability to patch on-field performance holes with quality-free agents.

These two major driving forces seem to have gotten us where we are today.

Hunter Bedard: Based on the different potential outcomes of the Snyder situation, what different ways do you think the NFL will adapt its owner misconduct policy and oversight?

Dan Lust:

For many years, the NFL has not provided a level of transparency to certain investigations pertaining to owners. What has changed in even the last year or so is that the public's outcry for transparency has changed the protocol for various professional sports leagues. Robert Sarver, the owner of the Phoenix Suns, faced allegations of misogynistic and racist comments. The NBA, in trying to figure out how to deal with Sarver, issued a nearly fifty-page comprehensive report that showed the extent of the work done by the NBA to find out what truly happened. The issued punishment was a one-year suspension from the League.

Shortly thereafter, the NFL had their first issuance of owner punishment following allegations leveled against Miami Dolphins owner, Stephen Ross. Ross was accused of bribing a coach to lose games and trade tampering in an attempt to land Tom Brady and Sean Payton who at the time were employed by other organizations. Even that report—which was issued after the first Beth Wilkinson report—was a written report and spoke openly about what was being investigated, what information was and was not verified by investigators, and provided a level of transparency we had not seen regarding owner allegations in the past.

Moving forward, the trend line strongly predicts we are going to get another level of transparency when it comes to Snyder in this do-over report. The public was just not happy with the NFL's handling the first time around and the NFL does not seem inclined to want to blindly protect Snyder without letting the public weigh in on the allegations and the findings. I think that's the next level. You're going to continue to see leagues move closer to that "higher standard" of accountability.

Hunter Bedard: What impact, if any, will these allegations have on the Human Resource (HR) departments across different organizations in sports?

Dan Lust:

Part of the allegations with respect to the Washington Commanders investigation and the Phoenix Suns investigation is that HR was not doing

their job and that people were being protected within the organization despite claims being made against them. That was also the case in the recent report released which discussed similar issues within the National Women's Soccer League (NWSL). The coaches were being protected despite allegations being made against them. At least concerning the NWSL, some teams indicated players did not have a clear way to report HR-type allegations. I think we are going to start seeing more examples in the sports sphere where people are punished for normal HR violations.

On one end of the spectrum, you can punch a teammate in the face without being suspended or cut from the team. If that were to happen in any other workplace environment, there would be an unquestionable HR violation and HR-type discussion. On the other end, you could have allegations of an inappropriate relationship between a player and a coach or between different staffers in a particular department and for many, many years the power dynamic in sports led to those being underreported or not dealt with. Now, with the public paying very close attention to these issues, especially in the social media era—making it much easier for both fans' and players' voices to be heard—teams are getting smart about addressing these issues head-on. For example, the recent news of the Detroit Pistons placing their assistant GM, Rob Murphy, on leave pending the results of an investigation may not have happened even ten years ago. Certainly, we are moving in the right direction.

Hunter Bedard: How does the impact of increasing franchise valuations impact someone like Dan Snyder or another owner who might find themselves in a similar situation?

Dan Lust:

That is the question I think no one knows the answer to. The Denver Broncos were just sold for 4.65 billion dollars. Compare that sale to the potential of a team like Washington which sits in a major media market. You can expect the Commanders to fetch at least that amount, as I mentioned earlier that recent reports point to an 8 billion dollar evaluation.

To put it another way, there is a literal pot of gold waiting on the other side of this for Dan Snyder. If Dan Snyder did not own a professional sports team and he was an executive of any other type of company, there would be much less attention paid to his personal issues. There would certainly not be a congressional hearing concerned with what he is doing in his private life or how he runs his organization if it was not a sports team. The question is what incentive Dan Snyder has to fight and beat this thing. Because if he wins and successfully defends the allegations, he

keeps his team but will continue to get more backlash from fans and the public. It seems to be a scenario of scorched earth.

If Dan Snyder decides not to sell and continues to defend himself, then he is only making the team more of a distressed asset. There is no shortage of suitors for any one of only thirty-two NFL teams. There are certainly more than thirty-two billionaires in the world. Arguably the most enticing benefit of being an NFL team owner is not that the asset is exclusive, it is that the team keeps doubling in value every couple of years. Again, there is undoubtedly a long line of people willing to buy Snyder out, the question is whether he wants to hold on to his asset indefinitely. It is unclear why Snyder would want to hold on and be a punching bag unless he just does not care what the public says and is okay dragging the NFL through the mud. That may be the NFL's greatest fear here, that Snyder decides not to sell and remains content riding this out for as long as it needs to go, past the point of no return.