

THE WORK

Boies Not Only Veteran of NFL Labor Litigation to Stand Up for NBA Players

Posted by **Brian Baxter**

Apparently, David Boies can't be everywhere at once.

Berens & Miller, a five-lawyer Minneapolis firm that served as local counsel to National Football League players in their antitrust suit against the league earlier this year, is now advising a group of pro basketball players in one of two antitrust suits against the National Basketball Association.

The 27-page antitrust complaint filed by Berens & Miller in U.S. district court in Minneapolis is separate from a similar 25-page complaint filed in federal court in Oakland by Dewey & LeBoeuf and Boies, Schiller & Flexner.

The two putative class actions—both of which target the NBA and its 30 member teams as defendants and name as plaintiffs a range of players that include stars, midlevel veterans, and rookies—came a day after the NBA players union rejected management's latest contract offer, announced a so-called disclaimer of interest, and converted itself to a trade association.

With the collective bargaining talks dead and the NBA's 2011–12 season in serious jeopardy—games have already been canceled through December 15—players and owners are now looking to the courts to potentially resolve the standoff. The players made waves Monday by adding David Boies to their legal team, prompting questions about whether the antitrust litigation veteran's representation of NFL management in a similar dispute earlier this year might create a potential conflict.

Almost as intriguing as Boies's entry into the case is the role being played by Berens & Miller name partners Barbara Berens and Justi Rae Miller, whose named clients in the Minnesota litigation are free agent Caron Butler, Ben Gordon of the Detroit Pistons, and Anthony Tolliver and Derrick Williams of the Minnesota Timberwolves.

The current litigation is something of a rerun for Berens and Miller, who represented NFL players in March when their union decertified and pursued antitrust litigation in order to win labor concessions from ownership in their collective bargaining talks.

Berens, who was once a special master for NFL antitrust litigation that has a long history in Minnesota, declined to comment when reached by phone late Tuesday. Her cocounsel, Miller, is a former All-Big Ten athlete and college golf coach who has had an active practice representing current and former athletes, according to a bio on her firm's Web site.

In the Oakland action—which names New York Knicks players Carmelo Anthony and Chauncey Billups, free agent Leon Powe, and San Antonio Spurs rookie Kawhi Leonard as plaintiffs—the players are being represented by Dewey global litigation chair and sports litigation cochair Jeffrey Kessler, sports litigation cochair David Feher, and litigation partner David Greenspan. The Dewey lawyers are joined as cocounsel by a Boies, Schiller team that includes firm chair Boies, cofounder and managing partner Jonathan Schiller, and partner John Cove, Jr. (Schiller is a member of Columbia's athletic hall of fame, having played on the school's 1967–68 men's basketball team that won the Ivy League championship; but even he's not the best basketball player with a legal degree.)

Lawyers from Dewey and Boies Schiller either declined or did not respond to

requests for comment on whether Berens and Miller are working in concert with them in antitrust litigation against the NBA. But a source familiar with the suits filed by players in Minneapolis and Oakland tells The Am Law Daily that the attorneys hope to work collectively in litigation against the league. The full details of any agreement to cooperate have not yet been fully fleshed out, the source says.

The NBA's outside lawyers from Proskauer Rose, Skadden, Arps, Slate, Meagher & Flom, and Washington, D.C.'s Bancroft are not talking publicly about the suits filed by players and their counsel. But the league's commissioner, former Proskauer partner David Stern, lashed out this week at player agents, accusing them of greed in pushing their clients into a "losing strategy" of decertification.

Several high-profile agents are representing players in both suits. Leon Rose, Andy Miller, and Aaron Goodwin are representing Anthony, Billups, and Powe, respectively. All three are among the top agents in the basketball business, according to data by HoopsHype.com. Rose is a former partner at Moorestown, New Jersey–based Sherman, Silverstein, Kohl, Rose & Podolsky, where his father, M. Zev Rose, serves as a senior partner and president of the firm. (Leonard, the rookie in the Oakland suit, is represented by Brian Elfus.)

In the Minnesota action, former Mayer Brown associate and onetime NCAA scholar athlete of the year Rob Pelinka, Jr., is the agent for Williams, a rookie. Raymond Brothers, a former lawyer from New Orleans, represents Butler and Gordon, while Larry Fox represents Tolliver.

At a press conference at the union's headquarters in Harlem, Boies, conveying a sense of calm while raising the stakes against an adversary, claimed that it was the NBA and team owners that had acted greedily in pushing the players to accept a wide array of concessions while threatening them with ultimatums.

"If you're in a poker game, and you run a bluff, and the bluff works, you're a hero," said Boies, who's betting instincts we have chronicled previously. "If someone calls your bluff, you lose. I think the owners overplayed their hand."

The NBA is likely to try and get the two antitrust suits removed to a federal court in Manhattan, where the league filed a complaint against the players union in August. In that suit, the NBA accused the union of negotiating in bad faith. A copy of the union's disclaimer letter, signed by executive director G. William "Billy" Hunter, is attached to a November 14 letter to U.S. district court judge Paul Gardephe by Skadden litigation partner Jeffrey Mishkin, a former chief legal officer for the NBA. Steptoe & Johnson is serving as labor counsel to the players in the litigation.

As for the players, their lawyers have made it clear that they hope not to resolve their dispute with ownership and league management through litigation. Boies said at the union's press conference that although more suits could be filed by players against the NBA, which he hopes to consolidate in Oakland, it was still in everyone's best interest to resolve the litigation quickly, perhaps opening the way for settlement talks.

"The longer it goes on, the greater the damages that the teams will face, the greater the damages the players will suffer," Boies said. "And perhaps most important of all, the longer basketball fans will be deprived of basketball."