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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Jordan Verdict A Warning For Advertisers On Image Use

By Zachary Zagger

Law360, New York (August 24, 2015, 3:28 PM ET) -- After billionaire former athlete Michael Jordan successfully defended his iconic brand in a publicity rights trial that concluded Friday, attorneys say the verdict should be a warning to companies no matter how big or small that they walk a fine line when using the image or likeness of a professional athlete without permission.

Jordan, who played most of his career with the Chicago Bulls and won six NBA titles, including two three-peats, was awarded \$8.9 million in damages by a jury late Friday evening in a trial over a full-page advertisement in Sports Illustrated taken out in 2009 by former Chicago-area grocery chain Dominick's Finer Foods LLC, now owned by Safeway Inc., without the superstar athlete's approval.

During the damages trial, Jordan and his attorneys told the jury that he does not take less than \$10 million for advertising deals using his image or likeness, pointing to major sponsorship deals with giants Nike Inc. and PepsiCo's Gatorade.

Dominick's, which had already been found liable for violating Jordan's publicity rights, had argued the fair market value for the single-page ad that featured Jordan's No. 23 in Bulls red and black congratulating him for making the Basketball Hall of Fame was closer to \$100,000.

But the verdict, though slightly less than Jordan's \$10 million figure, shows that even with a congratulatory message, juries will not let companies get away unscathed for using a player's image without permission.

"This verdict is a stark reminder to advertisers, big and small, that unauthorized commercial use of a person's name or likeness, even if it does not involve what we traditionally think of as an endorsement, is potentially dangerous territory," intellectual property litigator Jedediah Wakefield with Fenwick & West LLP told Law360 Monday.

The ad in question ran in a 2009 edition of Sports Illustrated commemorating Jordan's entrance into the NBA Hall of Fame. In it, the now-shuttered grocery chain appears to congratulate the athlete on the achievement by pasting the words "Michael Jordan ... you're a cut above the rest" above a \$2 coupon for a steak.

Jordan took the stand himself last week and told the jury that he would not have approved the ad at all, not even for \$10 million, saying it "didn't fit the strategy that [he] operated on" and that he is very selective in order to drive up the values of the endorsements he does make.

The case forced the jury to decide what the true fair market value of the ad was back in 2009, and intellectual property litigator Jordan Sigale of Dunlap Coddling said the verdict says a lot about how a "jury of our peers" views the way in which we compensate people for their right of publicity.

The advertisement in question was a mere congratulatory message from a local Chicago grocery chain, but the jury agreed to an extent that despite the content, Jordan's publicity is valuable.

"While this jury was clearly comfortable with the notion that some people's right of publicity can be extremely valuable, it wasn't willing to completely side with Mr. Jordan," Sigale said, noting that the jury didn't give Jordan the full \$10 million but also didn't go as low as Dominick's sought. He said that could create an avenue to challenge the verdict.

"We have a circumstance where Dominick's by having violated his right of publicity, now finds itself in the position of having to pay for the value of the identity that they misappropriated," intellectual property and entertainment attorney Roger Behle of Foley Bezek Behle & Curtis LLP said. "It is not a defense to say that they never would have made a deal with him if the value is so much. The counter is that you chose to use Michal Jordan and what he is worth so you inherit that brand value ... so you now have to be prepared to step up and make good on that."

Jordan, who has not played in an NBA game since 2003, still brings in at least \$100 million a year from his endorsement deals. He is worth \$1 billion, according to Forbes.

And Dominick's is not the only company Jordan went after over his publicity rights. He is also fighting another Chicago-area grocery chain, Jewel Food Stores Inc., which was also found liable for violating the Illinois RPA for a similar ad in the same issue of Sports Illustrated. That case goes to trial for damages in December.

"The reason that this case is so interesting is that I do think that Michael Jordan worries about his brand and takes steps to cultivate that brand more than most athletes," Ropes & Gray LLP litigator Rick McCaulley said.

But despite Jordan's larger-than-life persona, experts say that publicity rights deals like this are not an exception and some expect other pro athletes to follow Jordan's lead, especially with the growth of sports and the proliferation of media for athletes to gain exposure, and thereby add value for advertisers.

Evan Gourvitz, an intellectual property attorney with Ropes & Gray, said this is especially true as social media creates even more opportunities for companies to use a player's or other celebrity's name or likeness and makes it extremely easy to do so, even unintentionally, without authorization.

"If you have a Twitter account for your company and you say happy birthday to Michael Jordan, that could potentially be seen as leveraging his name," Gourvitz said. "I think we are just going to see more and more of this as time goes on."

With the Jordan case, Gourvitz said the verdict "serves as a useful reminder to be very cautious before trying to associate one's company or one's brands with a celebrity without permission."

--Additional reporting by Jessica Corso. Editing by Rebecca Flanagan.

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