

LANCE V USADA – THE LEGAL ARGUMENTS

In June 2012, USADA sent charging to Lance Armstrong (and others). Those letters were the first formal step in the anti-doping prosecution by USADA. This process raises big legal issues, partly, due to the athlete involved, but equally, this will be the most important case yet of the "non-analytical positives" (prosecution of an anti-doping violation in the absence of a failed test).

Background to the “Non-Analytical Positive” Cases:

Since the BALCO cases commencing in September 2004, the WADA Code, and all sports codes, have provided for the prosecution of athletes in the absence of an analytical positive test result. Michelle Collins was suspended for 8 years (USADA had sought a life ban) based on email evidence and blood and urine test results that evidenced a pattern of doping. Michelle Collins had never failed a drug test, and denied doping.

Interestingly, Michelle Collins had relied on her Fifth Amendment (due process) right against self-incrimination. The CAS Tribunal, however, agreed with USADA that this right did not apply outside criminal cases, and that it was open to CAS to draw an adverse inference against her. CAS repeated this approach for Chryste Gaines and Tim Montgomery.

CAS suspended Michelle Collins for 8 years, on the rationale that that BALCO athletes who admitted guilt, and cooperated by giving evidence against others, such as Kelli White, had been suspended for 2 years, BALCO athletes who admitted guilt, but would not cooperate by giving evidence against others, such as Alvin Harrison and Regina Jacobs, had been suspended for 4 years, Michelle Collins had not been shown by USADA to have “trafficked” or encouraged others, so a lifetime ban was not warranted, Michelle Collins’ failure to plead guilty warranted double the suspension of BALCO athletes who admitted guilt, but would not cooperate by giving evidence against others.

There have followed, in the USA, Chryste Gaines (2 years), Tim Montgomery (2 years), in Australia, Mark French (cyclist) and Sevi Marinov (weightlifting national coach) (drugs found in their rooms, both suspended at the initial 1 member CAS hearing, both then successful on appeal to the 3 member CAS), Olga Yegoreva and others (7 Russian athletes with manipulated samples) and Boevski and others (3 Bulgarian weightlifter with manipulated samples) (all suspended where samples were manipulated, albeit no evidence that they had done the manipulating themselves), and others.

The key legal question has always been whether these non-analytical positive athletes should be entitled or not to the same Fifth Amendment due process protections afforded to any criminal defendant? or something less on the basis that they are contractually bound to the processes decided by the sports federations to which they belong?

Lance Armstrong is the latest in this line. He is looking like a defendant who may take the argument further than ever before.

Lance’s Federal Court Action

Lance, like always, was invited by USADA to put material before the USADA Review Board (an athlete protection mechanism designed to require USADA to establish a sufficient basis for the process to proceed to a hearing), contesting whether there was sufficient in the USADA charging letter to charge Lance. Lance’s response was that USADA had failed to disclose the proposed witnesses or their evidence, he was unable to know/answer the charges made against him, that USADA was treating the review board as a rubber stamp, effectively seeking to deny him the protection of that review board process, that USADA had obtained evidence wrongly, in trading concessions/reduced penalties, etc, (the "jailhouse snitch" argument), for evidence, and in obtaining evidence leaked from the now-discontinued grand jury process, that the only 2 identifiable claims against Armstrong (the Swiss lab tests from 2001 where the lab director had since denied the tests

were sufficient to found a violation, and USADA providing, raw data only, no expert analysis, 2009/2010 blood test results, which showed no abnormality and had been published on Armstrong's own website at the time as proof of the opposite) had no merit. In addition, Lance said, most of the material was outside the 8 year limitation period. USADA, conversely, said, in response, that it had ten-plus witnesses (without naming them, or setting out what they would say), who would say that Armstrong doped, trafficked, and participated in a conspiracy. The USADA Review Board decided in favour of USADA.

On 10 July 2012, Lance Armstrong's lawyers filed an (Amended) Complaint before Judge Sam Sparks in the Federal Court, Texas Division, seeking an injunction staying the USADA requirement that Lance, within 3 days, elect to go to AAA arbitration or accept sanctions (this date was later extended, by agreement with USADA, for 30 days, to allow the Federal Court proceeding to be determined), a permanent injunction staying USADA from imposing sanctions (including disqualification of previous results) on the basis of the facts in the USADA charging letter, declarations that USADA lacked jurisdiction to bring the charges asserted in the USADA charging letter, plus damages against USADA and costs.

Lance's team makes multiple arguments in the action:

1. USADA's procedures, designed primarily for cases where there have been positive results, do not afford Armstrong due process.
2. Armstrong has not had a charging document that fairly tells him the claims that he must defend (not even when they occurred, which rules apply?).
3. Armstrong has no guarantee of a hearing by the Tribunal with final say (the AAA panel is appealable to CAS, which need not decide to hold a hearing).
4. Armstrong has no right to cross-examine his accusers (citing the Greg Lemond example, where Floyd Landis was refused the right to cross-examine, yet the Lemond statement was accepted).
5. Armstrong has no right to an impartial arbitration panel (CAS members all appointed, limited term, paid, by USOC, incentivised therefore to side with USADA, very limited examples of athletes succeeding).
6. Armstrong would have no right to exculpatory evidence, contrary to the legal position in a criminal trial.
7. Armstrong would have no right to disclosure by USADA of witness agreements, contrary to the legal position in a criminal trial.
8. Armstrong would have no right to disclosure by USADA of investigative witness statements, contrary to the legal position in a criminal trial.
9. Armstrong would have no right to obtain full disclosure by USADA of laboratory analyses, nor impartial assessment whether the laboratory procedures are accurate (and the panel can be comfortably satisfied that any improper procedure did not cause an adverse finding).
10. Under USADA's procedures, Armstrong has no right of review by a USA court.
11. The charges are outside the 8 year limitation period.

12. USADA improperly induced witnesses, in violation of the WADA Code provisions (requiring reduction in ineligibility periods on this ground only after charges are brought and a period of ineligibility has been determined). Further, the offering of inducements violates federal law in relation to offering inducements for sworn testimony.
13. The Review Board process, meant to be a check on abusive charging decisions, was circumvented, in USADA hand-picking the neutral experts, not providing the evidence supporting the charges to the Review Board, and having ex parte communications with the Review Board. The Review Board did not issue a considered evaluation. Armstrong was not given adequate notice of the charges or opportunity to respond.
14. USADA is using information collected from the grand jury process.
15. Lance having retired, USADA does not have jurisdiction, UCI does.

The substantive complaint by Lance Armstrong is that USADA's processes deny him his Fifth Amendment right to due process. This argument has usually failed. But the circumstances here militate towards that due process right, maybe more so than in previous instances.

On 19 July 2012, USADA filed a Notice of Motion to Dismiss Lance Armstrong's Action seeking an injunction to restrain the USADA anti-doping violation process. USADA's key grounds:

1. The *Ted Stevens Olympic and Amateur Sports Act* ("Sports Act") (a federal Act establishing arbitration as the exclusive forum for eligibility disputes in sports) pre-empts Armstrong's claims.
2. Armstrong has failed to exhaust his administrative remedies (a strong historical, factor relevant to the court's discretion, against granting an injunction).
3. Armstrong's claims must be arbitrated (Lance, like all athletes, has regularly contracted to be bound by the arbitration process).
4. Armstrong's claims fail on the merits.

The USADA argument, on its face, is the traditional view, adopted by the courts in previous cases, (eg Mary Decker Slaney's case), ie that Congress has determined, in clear terms, that USOC and USA Cycling are the bodies best able to deal with such disputes. Further, the courts have, consistently, required a person to exhaust their administrative remedies before seeking court intervention in relation to those processes. On this basis, USADA says, the Federal Court must dismiss, or at least stay, the court action pending the arbitration process.

The Federal Court action will be hard fought. Both sides raise valid arguments. Judge Sparks may or may not prefer the long-held view argued by USADA. Either way, we can expect to see the Judge's ruling on this important legal argument, before 12 August 2012 (when the 30 day agreed USADA extension runs out), referred, by whoever loses, in the Appeals Circuit.

On balance, the due process argument seems to be at least worthy of better court examination, not to be dismissed simply because, right or wrong, that is what courts have always done previously. The difference, here, might be the enormous stature of Lance (not merely as an athlete, but as a cancer messiah), and the overdue court examination of the unusual position of the athletes charged on circumstantial evidence rather than a failed test.

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