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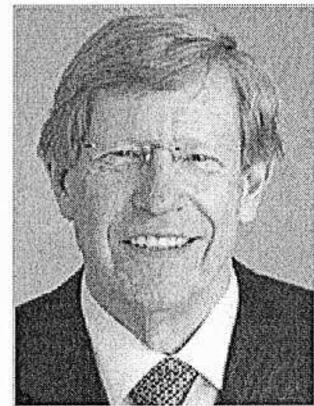
# Brady Calls Hail Mary With Olson Pick In Deflategate Fight

By **Zachary Zagger**

Law360, New York (May 3, 2016, 9:06 PM ET) -- New England Patriots quarterback Tom Brady and the NFL players union last week brought in famed appellate litigator and former U.S. Solicitor General Theodore Olson in what experts said is a last ditch effort to keep alive a challenge to Brady's Deflategate suspension, against long odds.



Theodore Olson

A Second Circuit panel issued a **2-1 decision** in favor of the NFL last week upholding Commissioner Roger Goodell's decision as an arbitrator to enforce a four-game suspension imposed on Brady for his alleged role in a scheme to deflate footballs right before a playoff game. The decision was a **resounding loss** for Brady and the National Football League Players Association and seemingly put an end to their federal court challenge.

But on Friday, Brady and the players union **filed papers** with the Second Circuit indicating that they have added Gibson Dunn & Crutcher LLP's Olson, a former U.S. solicitor general under President George W. Bush, to the legal team and asking for a 14-day extension to prepare a petition to request an en banc hearing. The appeals court on Tuesday granted the extension over **opposition from the NFL**.

While experts said granting a potential rehearing is highly unlikely, they said the addition of Olson creates a new wrinkle in the case that could entice the Second Circuit judges into rehearing the case and hints at an attempt to open the scope of the case to broader issues of federal labor law.

"Brady and the NFLPA had to do something to raise their profile, raise their chances — and this does it. Maybe it is not enough, but it gets the court's attention," said appellate attorney Daniel Wallach of Becker & Poliakoff PA.

The case centers around the alleged release of a few pounds per square inch of air pressure in game balls, which Brady may have had a role in, before a playoff game the Patriots won by 38 points en route to a Super Bowl. Goodell upheld a four-game suspension imposed on Brady after an investigation led by Paul Weiss Rifkind Wharton & Garrison LLP's Ted Wells and after Goodell found it to be significant that Brady destroyed a cellphone with text messages sought in the investigation.

Labor law experts maintain that it is not the place of the federal courts to second-guess the factual findings of an arbitrator, a system that has been in place for decades, with Supreme Court precedent going back to the so-called "Steelworkers Trilogy" of labor cases

defining the scope of arbitration in collectively bargained workplaces. The trilogy has been hailed as providing an efficient way of handling union-management grievance disputes.

The Second Circuit majority came out and said its "role is not to determine for ourselves whether Brady participated in a scheme to deflate footballs or whether the suspension imposed by the commissioner should have been for three games or five games, four or none at all. Nor is it our role to second-guess the arbitrator's procedural rulings."

Labor law professor Michael H. Leroy of the University of Illinois College of Law said his research indicates that in the more than 2,000 labor arbitration awards challenged, the federal courts have enforced the arbitration award in about 75 percent of the cases.

Given all of these cases, the chances of Brady even winning in an en banc hearing or an appeal — if it goes to the Supreme Court — is still slim, with or without Olson, Leroy said. And this prediction holds even when taking into account Olson's 75 percent win percentage before the Supreme Court, which is strikingly close to Brady's 77 percent win percentage in the NFL over his football career.

It is not like Brady and the NFLPA were not already represented by a high-powered legal team led by Winston & Strawn LLP's Jeffrey Kessler, who has had success in litigating against the NFL and knows the case inside and out, having been involved from the beginning.

"The real question is whether there is this buzz factor that Olson creates when he manages the briefing process that can cast a spell over judges that other highly experienced lawyers aren't capable of doing," Leroy said. "I have my doubts whether this will help Brady."

With Olson coming aboard, the potential en banc hearing would pit two former Bush solicitor generals against one another in Olson and the NFL's lead attorney Paul Clement. Earlier this year, they argued opposing sides of an en banc rehearing in the Third Circuit over New Jersey's attempts to legalize sports betting.

This makes it more enticing for the Second Circuit to take another look at the cases, regardless of how it ends up ruling.

"Maybe it is viewed as a cosmetic measure from the outside, but for those of us who practice in the appellate field and for judges, when you see Clement and Olson on the papers, it gets your attention," Wallach said.

Some attorneys say Brady and the NFLPA may be gearing up for an attack on the whole system of deference to arbitration decisions. They could be preparing to take the appeal to the Supreme Court by waving the flag of employees aggrieved by arbitration decisions.

"It seems to me that the only way that you could really go after an award like this is to just attack the system itself and attack the historic deference of courts when the bargaining power is so unbalanced," said Patrick R. Scully of Sherman & Howard, a former National Labor Relations Board attorney.

If that is the case, Olson may be the attorney to do it, given his success at the Supreme Court and as an appellate attorney taking on such major issues.

The request for additional time further raised this possibility, as Olson argued that the Second Circuit's opinion goes beyond Brady and the 1,600 members of the NFLPA, addressing the very "contours of an arbitrator's duty to consider and address probative terms under a collective bargaining agreement, and to consider and address the arguments raised by an employee subject to discipline under that agreement."

"These aspects of the court's opinion are of great importance not only to NFL players, but to all unionized employees," Olson argued in the request.

Scully said, however, that the Second Circuit is not the best forum to bring such a challenge, adding that even if the court decides to grant an en banc petition, the circuit will likely still side with the NFL.

Further, for the Supreme Court to take the case, it may require a circuit split. That event could come this year, depending on how the Eighth Circuit rules in another pending appeal involving a challenge to NFL discipline by Minnesota Vikings running back Adrian Peterson.

"If Peterson wins that case and creates an inconsistent body of law, it could help in the Second Circuit, but frankly it could create a circuit split and help [Brady] reach the Supreme Court," said Pullman & Comley LLC labor and employment attorney Mark J. Sommaruga. "It is [Brady's] best hope."

Labor expert Michael C. Harper, of Boston University School of Law, said that even with Olson, Brady and the NFLPA's case is a loser whether en banc or before the Supreme Court, given labor law precedent.

"It means nothing to have some famous lawyer on your side when the law is against you," Harper said. "The players association should stop wasting their money on litigation and should instead concentrate on building a stronger union so they can negotiate a collective bargaining agreement that protects their rights."

The case is National Football League Management Council v. National Football League Players Association, case numbers 15-2801 and 15-3228, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Sarah Golin and Philip Shea.

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