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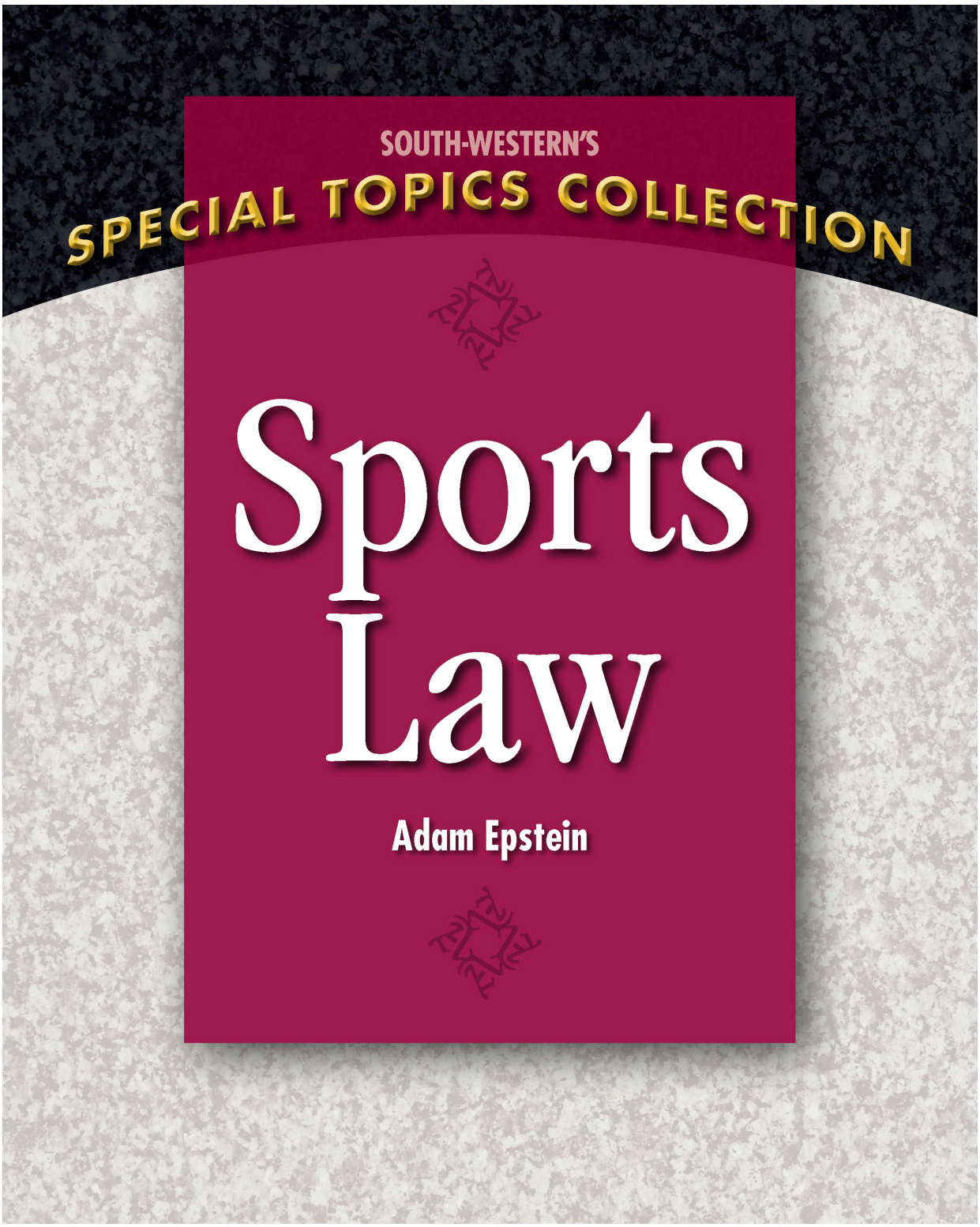
SPECIAL TOPICS COLLECTION

Sports Law

Adam Epstein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Adam Epstein, J.D./M.B.A.

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Preface

For old-school lawyers and most law professors, there exists no distinct area of the law known as *sports law*. To them, at best, it is better described as *sports and the law*.

For years, most of these individuals—many of whom graduated from Ivy League schools—sarcastically suggested that the most important issue in

sports law involved interpreting baseball's infield fly rule. Many still do not acknowledge any serious academic concern with the relationship between sports and the law. After all, the important areas of study in law school involve hardcore subjects like the rampant discrimination which apparently permeates all aspects of American society.

Today, however, interest in studying, practicing and teaching sports law is booming. Sports law courses are some of the most popular at certain schools, and sports law blogs continue to grow and are among the most popular law-related websites. Numerous faculty members around the country have made significant contributions to the scholarship and study of sports law and teach it regularly. Colleges and universities nationwide sponsor sports law seminars each year. And there is professional support in the way of the Sports Lawyer's Association, and the Forum on Entertainment and Sports Industries (a section of the American Bar Association).

Colleges of business around the United States continue to expand courses in sports law and offer degrees in sport business, as exemplified by the programs at St. Louis University, Ohio University, University of Massachusetts, and elsewhere.

Many sports management programs—traditionally housed in colleges of education and departments of exercise science, with merely ancillary courses in sports law—

are now more appropriately merging with departments in the business schools.

At the graduate level, several law schools have separated themselves from the ranks of others by establishing sports law certificate programs and offering several courses in sports law, covering both amateur and professional sport issues. Graduate law faculty around the world continue to do outstanding research in sports law, including professors at Marquette University, Florida Coastal School of Law, Tulane University, Valparaiso University, and a few others.

This boom of interest in sports law makes sense: the sports industry keeps hundreds of thousands of people employed nationwide. Some jobs require a

law degree, while others may require a business degree, or other credentials. Whatever the other credentials, sports law requires an understanding of the sports business and its various subcultures.

The increase in interest likewise is not limited to the academy. *Sports Illustrated* online publishes regular contributions by law professor Michael McCann (Vermont Law School), who provides readers insight into sports law issues in the sports business which until recently have not appeared in the mainstream media.

McCann also organizes the *Sports Law Blog*, a must for anyone with a serious interest in sports law, which provides instant access to some of the best sports law discussion and analysis anywhere.

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Preface

Law firms continue to establish dedicated sports law practices as well. Consider that the NCAA, a non-profit organization under the IRS tax code, just agreed to a 14-year, $10.8 billion television and media rights contract to broadcast its *March Madness* basketball tournament, arguably the most exciting element of sports in the month of March. No doubt, the deal required the skill and expertise of lawyers deeply and expertly involved in the sports business. Meanwhile, the continuous litigation related to the NCAA and its myriad rules, investigations, violations and appeals has

created enough billable hours to generate considerable bonuses for many lawyers. The NCAA has been good to the legal profession.

Key to understanding sports law is an appreciation of the history of the various leagues and organizations, past and present. It requires an understating of the players involved in the various industries of sport, the role of "private justice"

within leagues and organizations such as the NCAA, and an appreciation of the statutory and common law that has evolved significantly in sports law over the last 100 years.

It is also important to appreciate the differences and similarities among professional sports, intercollegiate sports, interscholastic sports and the Olympic Movement.

They all have different and unique legal issues and laws. Additionally, the influence of television (and now the Internet) cannot be underestimated in terms of revenue streams, through advertising and sponsorship, for organizations, leagues, teams, colleges, and universities.

Politics has influenced sports law considerably. This became obvious in the several recent judicial decisions involving the 2011 litigation between the NFL and the NFL Players Association concerning the players' work stoppage. President Jimmy Carter did not send an Olympic team to Moscow for the 1980 Summer Olympics for political reasons. The Soviet Union returned the favor for the 1984

Olympics in Los Angeles. One would be naïve not to believe that politics plays some role in legal decisions made by judges or justices who are appointed by Presidents of the United States to the various federal courts and the Supreme Court.

Equally important for the student of sports law is to recognize that sports law and entertainment law are not the same, although they do cross over in many cases. Entertainment law has a different history, different laws, and a different culture. Sports-entertainment such as WWE (World Wrestling Entertainment) is scripted…well, for the most part. Therefore, there are

different legal issues associated with scripted performances versus non-scripted performances. Writers, directors, and producers work from story boards leading viewers to the intentionally desired outcome. This is the fundamental difference between the entertainment industry and the sports business. In fact, intentionally influencing the outcome of a sporting event is a criminal act. It destroys one of the most important aspects of sports in general: the uncertainty of the outcome of the event.

The goal of this book is to provide succinct access to the legal issues involved in sports and the sports business. *Sports Law*'s twelve chapters should be easy to read for all students, while still oriented towards those in courses on legal studies in business, sports management, and law. The book covers the basics of the legal issues surrounding sports, introducing the reader to new skills sets, while some chapters focus on the development of a particular area of sports law from an historical perspective. In the Internet era, and with the advent of online teaching resources, the instructor is encouraged to provide his or her own course supplementation to accompany the different chapters.

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The primary focus of the book is on U.S. jurisprudence, though relative weight is given to international issues as well, particularly with regard to the Olympic Movement. Some legal cases and court opinions, all abridged, have been included in the text. However, ubiquitous Internet access allows both

the student and the instructor to easily search online for the full text of these and other complete cases. Since topics in sports law are continually developing, it has been a challenge to keep up with numerous cases which continue to shape sports law. In this regard, Lexis and Westlaw are extremely valuable resources which most law schools should already provide access to, although these days almost all the cases can be found for free on the Internet. Chapter summaries and questions have been included in each chapter to allow students and instructors to ponder both open-ended questions and those with more clear-cut answers.

This book demonstrates the impact and influence of sports law to those who remain firm that it does not exist *per se*. Take a look around you. College football and basketball coaches are sometimes the highest paid employee at your educational institution (and in some cases, in the entire state). Explore this text and the many academic contributions made by professors, the advocacy by lawyers from small and large firms, and the impact on society of significant decisions made by judges at all levels. Look at the blogs and count the number of law firms and lawyers who broadcast their interest and practice in the area of sports law.

Attend some of the interesting sports law conferences around the country every year. Consider joining sports law related organizations such as the Sport and Recreation Law Association (SRLA).

Sports law continues to grow as a field. Schools with sports law specialties are attracting more and more students to their programs, many of whom hope to be sports lawyers or sports agents. Others might desire to provide university athletic departments and professional leagues with legal insights and skill someday. These students continue to advance sports law beyond the academy, outside the classroom and into the world-at-large.

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CHAPTER ONE

Sports Agency

After reading this chapter you will be able to:

1. Discuss the relationship between principals and agents and the duties of each.

2. Describe the role of a sports agent.

3. Explain the qualifications to become a sports agent.

4. List the fiduciary duties that are required of agents.

5. Describe the history and development of sports agency.

6. Discuss the state and federal laws involving agents.

7. Provide examples of civil, criminal and other improper acts by agents and boosters.

8. Discuss the relationship between NCAA rules, sports agents, and eligibility.

9. Provide examples of legal cases involving challenges to NCAA rules.

10. Discuss the various other contemporary concerns involving the NCAA.

▪ Introduction

This chapter introduces the student to sports agency. It is not designed to teach you to be a sports agent, but it will provide a solid understanding of agent roles, the agent business, and its history, as well as the legal framework surrounding sports agency. Since so much discussion of sports agency involves recruitment of college **student-athletes** to the professional ranks, a special section is provided at the end of this chapter to explore the National Collegiate Athletic Association (**NCAA**), its evolution and influence over American amateur sports, and its relationship to sports agency over the years. Legal issues involving the NCAA will appear throughout this textbook.

One need not be a lawyer to be a sports agent, but many agents are lawyers or have earned the graduate law degree, the J.D. (Juris Doctor), even if they choose not to practice law. Many people envision sports agency as a glamorous profession involving lucrative contract negotiations in the multi-billion dollar international sports business. In some cases, this certainly is true. However, the number of agents continues to increase while the number of potential clients has remained relatively stable, causing sports agents to focus not only on recruiting clients but also on keeping them away from the temptations of competitors.

student-athlete

student who participates as an individual or member of a college or university team

NCAA

National Collegiate Athletic Association

1

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Chapter One

Traditionally, the phrase ***sports agent*** describes an advocate, marketer, or negotia-tor for a professional athlete. However, the role of sports agents has changed remarkably in the last decade. Today, college and professional coaches, sports reporters and broadcasters, professional (and retired) athletes, all have agents who assist in marketing their skills and achievements to secure contracts, engagements and other money-making opportunities. Agents are notorious for being intense, diligent, persistent, and occasionally overzealous in advocating the client's interests to secure a contract with a team, an event, a network, a league, or a sponsor. Lawyers, too, often serve agents for their legal clients, but some lawyers prefer to be called *sports lawyers* or *sports managers* rather than *agents* since "sports agent" is often viewed in a condescending way.

Laws related to the sports agency relationship continue to evolve. Many questions remain unresolved in this high-profile occupation. Players' unions in major league professional sports have become much more aggressive in how they certify and regulate the sports agents who represent players in their union. Today, almost all of the states have adopted the **Uniform Athlete**

Agents Act (**UAAA**) entirely, or with modifications. Various regulatory schemes have attempted to level the playing field in the sports representation business.

As a general rule, however, student-athletes who attend colleges and universities within the United States and who have remaining athletic eligibility *may not* have an agent represent their interests in a particular sport. If a student-athlete hires an agent, then, he or she is deemed a *professional* and immediately loses their privilege to compete in university-sponsored college sports.

- **The Agent**

A sports agent is an advocate who represents the business interests of a professional athlete, coach, or other for a fee. Over the years, many states have attempted to regulate sports agents. However, a myriad of inconsistent state licensing requirements led to confusion, at times causing some agents to simply ignore state laws that often had no real enforcement mechanisms.

Sports agents are not required to have a law degree or law license, since negotiating a contract in the sports business is similar to negotiating a real estate sales contract or a residential lease. That is, while the sports-related contract is legally binding and is often drafted by lawyers, being a sports agent (or real estate agent) is not considered to be engaging in the practice of law.

In fact, having a law degree or license is not always an asset in sports agency. As a general rule, it is a violation of ethical codes for lawyers to solicit business in-person, though that activity has become essentially mandatory in order to establish a successful sports agent practice. The line between when a lawyer wears the "sports agent" hat and when he or she wears the "lawyer" hat is often unclear. In fact, a few successful sports agents who are also attorneys have declined to renew their law licenses and discontinued their law practice altogether, due to tougher laws and ethical standards governing lawyers compared to those of non-lawyer sports agents. This is particularly true with regard to the in-person solicitation of clients. Therefore, because representing clients as a sports agent (and sports agency in general) is not normally considered **sports agent**

individual who represents the interest of a professional athlete **Uniform Athlete Agents Act (UAAA)**

model act governing sports agents authored by the National Conference of Commissioners on Uniform State Laws

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to be the practice of law *per se*, allowing a law license to become inactive might be the best alternative for the sports agent in some cases.

Sports agents have a special **fiduciary** relationship with their clients, and maintaining a relationship of trust and confidence is of utmost importance. Agents must be careful, skillful, and diligent. Agents are sometimes referred to as *promoters*, *managers*, *contract advisors*, or *player representatives*. Some professional athletes might also hire additional publicists or marketing agents to assist in management or publicity opportunities as opposed to contract negotiations alone, but most only use the services of one agent to do all these things.

Recruiting

Many sports agents solicit varsity student-athletes who have remaining collegiate eligibility. They want to represent that student-athlete when their eligibility has expired and the time comes to secure and negotiate a professional sports contract.

This often involves face-to-face contact. Student-athletes are free to talk to agents at any time despite popular misconceptions. Student-athletes may even meet with sports agents to discuss their future as a paid professional athlete. However, under NCAA rules, the moment there is a verbal or written agreement, the student-athlete will immediately lose their eligibility to compete at the college level.

Assuming a successful recruitment, the agent then charges the former student-athlete a fee or commission for the negotiation of a professional sports contract—

assuming one is offered—and for additional product endorsements. Usually, only premier professional athletes receive product endorsements, and this is usually due to the fact that they are highly talented or otherwise unique or prominent in the sponsor's eyes. For Olympic athletes, that prominence might occur only once every four years.

At times, an agent might employ or associate with an individual known as a **runner**, someone who is hired to scour college campuses and interact with student-athletes (potential clients) to lay the foundation for a meeting for representation by the actual agent. A runner is a general term and could include anyone who attempts to assist an agent in seeking to represent the marketing of any student-athlete's ability or reputation. Runners have gotten sports agents into legal troubles for unscrupulous activities of their own, including violations of state law and NCAA rules.

Qualifications

Generally speaking, there are no clear or consistent qualifications to become a sports agent. Sports agents may need to attain certain minimum educational requirements if they wish to represent professional athletes in those sports governed by a collective bargaining agreement (**CBA**), the contract between the league (owners) and the players associations (unions). However, such educational standards are not state or federal law: they are union requirements. For example, the National Football League Players Association (**NFLPA**) requires at least a four-year college degree from an accredited institution in order to represent professional football players in the National Football League (**NFL**).

fiduciary

one who owes another a higher duty of good faith and care **runner**

individual who assists a sports agent in recruiting a student-athlete for representation **CBA**

collective bargaining agreement

NFLPA

National Football League Players Association

NFL

National Football League

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Still, there is no real typical, formal education program for sports agents in general. A few agents have no formal education after high school, but that number has dwindled to almost nothing compared to the early days of sports agency.

Those agents who attend college earn degrees in a variety of fields, including in business studies, legal studies, and sports management. Practically

speaking, however, obtaining a law degree has become an unwritten prerequisite to break into the profession, especially in terms of maintaining competitiveness. The days of the friend-next-door or the close relative or parent of a professional athlete serving as the sports agent are generally past, with a few exceptions. Still, as long as the client is pleased with the services that the sports agent provides, and the agent meets the minimum union-required qualifications, then questions over their further qualifications are moot.

Costs

Being a sports agent can be quite costly, especially during the recruiting process.

An upstart sports agent had better be well funded to compete with big firms who can provide their clients with the means to attend specialized training camps, hire individual coaches, and attend other pre-draft workout preparations after their college eligibility has expired.

Big Four

In the major professional sports leagues of the NFL, Major League Baseball (**MLB**), National Basketball Association (**NBA**), and National Hockey League (**NHL**), organized players associations function as unions and regulate who may negotiate contracts on behalf of the players in their leagues. These four major league organizations are also known as the **Big Four** sports leagues. The players unions are very powerful and are quite capable of dismissing an agent from its ranks for a violation of its policies and procedures. Agents are required to pay annual dues to the players associations just for the right to negotiate a contract on behalf of its membership. Such initial costs can discourage a novice agent from entering the sports agent profession among the Big Four.

- **Agency Law**

Principal-Agent

Business students should recognize that agency law has existed for centuries and its roots in U.S. jurisprudence can be traced back to ancient Roman law. The basis of agency law is to allow an **agent** to act on behalf of a **principal** (client).

Thus, an agent expressly enters into an agreement with a principal to further the **MLB**

Major League Baseball

NBA

National Basketball Association

NHL

National Hockey League

Big Four

term used to describe the four major professional sports leagues in the U.S.

agent

individual authorized to act on behalf of a principal **principal**

one who grants another, an agent, the right to act on his or her behalf
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Sports Agency

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interests of that principal. The agent can bind the principal to an agreement depending upon the authority granted to the agent.

Today, for example, a common form of agency is the **employer-employee** relationship. An employee who acts within their ***scope of employment*** furthers the business interests of the employer within a legally enforceable relationship that holds the employer responsible for their actions. Sometimes the phrase *scope of employment* is referred to as ***respondeat superior***, a Latin expression which literally means

"let the master answer." It is also referred to as **vicarious liability**. While the terms *master* and *servant* no longer have a place in U.S. law, such terms have been replaced with *principal-agent* or *employer-employee* and the duties owed to each other remain the same. In sum, the doctrine of *respondeat superior* means that an employer could be held responsible for the acts of an employee if the employee's actions fall within the scope of their employment.

Contractor-Independent Contractor

Sports agents serve the interests of their clients, but rarely would the relationship between a sports agent and his or her client be regarded as employer-employee.

Because the relationship between player and agent is contractual in nature, it is more akin to **contractor-independent contractor**.

In legal terms, an independent contractor is one who contracts to do certain tasks, but is generally not subject to the other's right to control. The contractual relationship simply focuses on the task(s) to be done. This also means that the relationship can be terminated at any time by either one of the parties. A properly drafted sports agency contract can define all the rights, roles and duties between the agent and the client, including a formal process for ending the relationship if necessary. Again, this is quite similar to the role the real estate agent plays in attempting to secure the sale of property between a buyer and seller of residential or commercial real estate.

Express Agency

Sports agent relationships with their clients are almost always **express** agreements memorialized in writing. That is, agents represent their clients based upon terms defined in an expressed, written agreement. Sometimes agreements might be oral, handshake deals, but that is usually unwise and not very common today.

Rarely would an agent be considered to have an implied agency agreement, but it is possible. For example, college **boosters** (also known as **employer-employee**

business relationship in which employer may be held responsible for actions of employee who acts within the scope of employment **scope of employment**

responsibilities an employee carries out on behalf of an employer
respondeat superior

Latin expression literally meaning "let the master answer." Translated today means that an employer is responsible for the actions of the employee if they are within the scope of employment

vicarious liability

modern expression for *respondeat superior*

contractor-independent contractor

freelance business relationship in which contractor only has the right to control that the work be done by the independent contractor for a specified duration **express**

explicit statement, either written or oral

boosters

various categories of individuals who support a college athletic program and fall under NCAA rules

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representatives of athletic interests according to NCAA vernacular) have an implied agency relationship with the college or university according to the official NCAA rules. These rules are known in the college sports as the NCAA **bylaws**. Throughout this textbook, the terms NCAA *bylaws* and NCAA *rules* are used interchangeably.

Athletic departments, particularly through their NCAA rules compliance departments, have been extremely proactive in educating donors, boosters, booster clubs, alumni and others who could potentially be viewed as an implied agent for the university with regard to NCAA rules. Most legitimate athletic department websites link to NCAA compliance issues and concerns to help educate the general public about booster and sports agent issues. Of course, if a university is out of compliance with NCAA bylaws the penalties can be quite severe.

Social Media: Implied Agency & Vicarious Liability Under current law, student-athletes are not considered employees and *respondeat superior* is usually irrelevant. However, it is possible that their conduct could hold a university, its athletic department or coaches responsible under the tort of *negligent supervision*. Tort (personal injury) law is discussed in greater detail in Chapter 3: Sports Torts.

As the Internet era continues to impact business transactions and life in general, there have been heightened concerns regarding social media postings on Facebook, Twitter, MySpace and so on, especially by coaches and student-athletes.

The very nature of the relationship between the student-athlete and university has evolved and, in some cases, an implied agency relationship has been established, even though student-athletes on do not normally act as employees in the classic employer-employee sense.

Thus, from a legal perspective, universities might be held vicariously responsible in an implied agency relationship for the actions student-athlete misconduct unrelated to their athletic activities, such as postings and pictures on the Internet.

In fact, specialized software has been designed to look for key words or phrases that might damage a coach or student's reputation or harm the institution. Well-financed athletic departments might hire an individual who, as part of their other duties, regularly checks various social media outlets used by student-athletes to avoid potential legal issues.

Problems with postings on websites have included disturbing pictures or inappropriate or defamatory statements. For example, in 2006, Northwestern University's women's soccer program was suspended and given mandatory education sessions for hazing due to postings on Facebook showing underage drinking.

Numerous other schools have been involved in social media controversies including Rider University, the University of Delaware, and the University of Oregon. In 2005, several Louisiana State University swimmers were dismissed from their team after ridiculed their coach on Facebook.

However, is it fair to hold coaches and universities responsible for the actions of their student-athletes during on or off-campus activities that are unrelated to a sports competition? Is it plausible to hold coaches and administrators responsible for the non-practice and non-competition antics of the modern day student-athlete, who thrives and operates in a virtual world? The answer is not clear on this subject.

representatives of athletic interests

NCAA Manual's expression for a booster

bylaws

the hundreds of pages of specific rules found in the NCAA Manual
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On the other hand, university employees who themselves participate inappropriately social media might certainly be held accountable since they are, indeed, employees. It will be interesting to see whether or not postings on the Internet create a duty of care which could hold the college institution vicariously responsible and the degree to which the law extends potential liability in the social media context. In some of the most egregious cases, coaches and other employees who use social media inappropriately have been severely sanctioned or even fired.

▪ History of Sports Agency

Sports agency traces its roots to 1925 when a football player from the University of Illinois named Harold "Red" Grange, also known as the "Galloping Ghost," hired an agent-manager named C.C. ("Cash and Carry") Pyle to negotiate his professional football contract. This was a novel concept at that time. Pyle, the owner of a chain of movie theatres, persuaded Grange

to allow him to act as his personal manager, and Grange signed with Pyle before his college eligibility had ended.

The sports agent profession really began to flourish from the work of several individuals during the 1960s. In particular, Cleveland, Ohio attorney Mark McCormack's agency work with golfer Arnold Palmer changed how sponsors deal with professional athletes by generating significant endorsement income in addition to prize money from competition. McCormack's business blossomed and over time his International Management Group (IMG) became one of the most powerful agencies in the sports representation business, although its focus today is more on event and multi-media rights management.

Since the 1960s, many other remarkable sports agents have made an impression on the profession, now dominated by high-profile individuals working for large sport management agencies. As cable television and other broadcast outlets grew in the 1980s and 1990s, more money poured into amateur and professional sports for the rights to broadcast the events. As a result, and in part due to numerous player strikes or league lockouts, players were ultimately paid more, had more rights, and, with the help of agents and the unions, salaries skyrocketed.

During the 1990s, mergers of sport management firms offered corporate economies of scale. For example, some agencies became so big that they were able to establish divisions of agents who focused on one sport, one league, or one type of client, such as specialized representation of coaches. Many agents flocked to larger sports agencies who could guarantee them salaries, removing the pressure of having to rely on commission-based income alone. This increased pressure on upstart sports agent hopefuls who operated at a much smaller scale and with a limited budget.

Meanwhile, egregious actions by agents and college boosters caused grave concern for colleges and universities nationwide. After all, the inability to monitor their student-athletes and to maintain compliance with NCAA rules could result in harsh financial penalties and scholarship reductions to the schools.

Some schools were penalized for excessive (and illegal) sports agent involvement with their student-athletes. As a result, other colleges and universities became proactive in attempting to weed out sports agents—those with a history of violations and those without a proven track record—in order to avoid potential NCAA sanctions.

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▪

Chapter One

Sports Agency Today

Today, a number of smaller sports agency firms have emerged again and have demonstrated that they, too, can effectively handle many aspects of the athlete's business or legal affairs. The competitive advantage of sports agencies mergers which led to the economies of scale in the 1990s has waned somewhat. Remarkable advances in technology have expanded the potential reach of the recruiting efforts of the smaller firms or the novice agent. Without doubt, the Internet, e-mail, smartphones, computers, social media and text messages have leveled the playing field between the larger agencies and smaller brick-and-mortar operation. In fact, once athletes, coaches, broadcasters and others have established their careers, their name and market value, it is not uncommon for them to leave larger sports agencies and use the services of smaller, more personal, sports agent firms. Regardless, most professional athletic careers last only a short time. Therefore, choosing an effective representative, no matter what the size of

the firm, can be one of the most important decisions athletes make, and can greatly affect their income during the course of their career.

- **Agent Business**

Becoming a sports agent is a highly competitive venture. In the 1996 film *Jerry Maguire*, actor Tom Cruise plays a persistent, yet struggling, sports agent who must compete with his former employer, a sports superagency. Jerry's ultimate success rides on a professional football player who eventually secures a big contract.

As a result, the agent secures a profitable fee or commission. The movie correctly illustrates the adage that a sports agent is only as effective as the client's talents when it comes to marketing the athlete. It also accurately shows that one client can make all the difference in a sports agent's career development.

Big Four Certification

Due to the large sums of money that are involved, sports agents serve as formidable go-betweens for professional athletes, broadcasters and others, and a team or sponsor. Most popular agents represent professional athletes in the Big Four sports. This is where most of the money is found in the sports representation business. Certified Big Four agents are subject to strict rules imposed by their respective players associations in addition to the myriad of state regulations governing their activities. It is vital to explore the requirements to become certified in the Big Four sports before attempting to represent a player in those leagues. All of the Big Four player associations have easily accessible websites that provide a host of information on the initial fees, qualifications and requirements.

Non-Big Four Sports

There are, of course, a wide variety of sports agents who represent professional athletes, coaches and other individuals who are not in the Big Four. In fact, a subculture of profitable sports agents and agencies has developed for those who market and manage summer and winter Olympic-sport competitors, professional boxing, motor sports, mixed martial arts

(**MMA**), soccer, tennis, golf, fitness and bodybuilding, and others. Of course, many of these sports occupy the spotlight only briefly, so agents who work outside the Big Four must be especially tuned in to their sport and industry to maximize earning potential for their clients.

MMA

mixed martial arts

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Exclusivity

It is the generally held practice for agents to require their client to sign an **exclusive contract** or agency agreement as a condition of representation. However, **non-exclusive contracts** are acceptable when outsourcing media and marketing efforts to other firms for a flat fee.

▪ **Agent Roles**

Sports agents do much more than negotiate a contract. Some assist non-Big Four sports clientele in managing their daily affairs and in seeking sponsorships, guest appearances, and other endorsements in exchange for cash and products in-kind.

This also includes managing talented athletes whose primary purpose is to display their athletic prowess and charisma in arenas and to television audiences in a **sports-entertainment** format such as scripted professional wrestling. It is not uncommon for a popular player or coach to appear on radio and television commercials. A few even can land roles in television shows and movies as well.

Agents also deal with the media, issue press releases and market the athlete's image to prospective future employers after the expiration of a player's contract.

The sports agent may assist in deciding what events to compete in, what types of insurance the athlete should carry, what financial services companies might manage their money, what real estate agent to choose, and what sponsor best serves the image of the athlete and vice-versa.

Agents serve the interests of both male and female athletes. Agents are predominantly male, though many successful female agents have made their mark in this industry. Agents may also act as the go-between for regional or community sports corporations to attract revenue-generating events such as local, regional and national events and championships. This is quite common when organizing a local running event such as a 5k or marathon, often to raise money for particular causes, such as breast cancer research. Understanding the nature and business of the particular sport industry is essential to becoming a successful sports agent.

Fiduciary Duties

The sports agent, as fiduciary, must act in the best interests of clients. Sports agents are subject to the same general legal duties as found in any agency relationship, such as duty of loyalty, duty of care, duty of accounting. Breakdowns can occur in the relationship especially if a **conflict of interest** has been created. That is, an agent might be put in a situation in which he appears to be forced to advocate for one client over another. This can create curious legal issues involving sports agents and reflects the adage that no man can serve two masters.

exclusive contract

agreement for sole rights to sponsor, promote, and advertise between an agent and athlete

nonexclusive contract

agreement allowing either party to pursue other similar contractual relationships

sports-entertainment

scripted performances by highly athletic talent

conflict of interest

situation in which personal or professional interests individuals are perceived to be at odds with larger goals, responsibilities or duties of care owed to others Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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Interestingly, unions owe all their members a fiduciary duty as well. This can present challenges when a union, for example, chooses to strike or chooses to decertify as the NFLPA did in 2011 during the longest work stoppage in the NFL's history. Large disparities in salaries among member-players can create a conflict within the union as to whose interest the union is actually serving, since those who make significantly less money than the top-paid

members might not be able to afford to survive a lengthy strike or other work stoppage.

Unlike litigation lawyers, whose function is to represent clients in the often adversarial process of the U.S. legal system, sports agents are often called upon to manage athletes and give advice far outside the scope of law. Of course, licensed attorneys can give legal advice to athletes if and when requested, though non-attorney agents may not give legal advice. That would constitute the unauthorized practice of law (**UPL**). The line between giving legal advice that requires a law license and general advice is often unclear and in many cases quite blurry, though it has been relatively a non-issue.

Conflicts of Interest: Questions

It is not uncommon for a sports agent to have a stable of clients seeking employment for a limited number of jobs. How does the agent reconcile promoting one client over another? For example, if a professional football team wants to sign one more quarterback to its roster and the agent represents two quarterbacks at that time, how can the agent promote one quarterback over the other? To do so might breach a fiduciary duty, right?

A more intriguing quandary involves situations where agents represent players and coaches on the same team at the same time. Whose interest is at heart: the player, the coach, both, or just the agent's interest?

Similarly, a sport management agency and a financial services company might work so closely together that there appears to be a conflict of interest in pushing the athlete to invest his or her money with that firm over others. What if the financial services company actually *owns* the sports agency? Such apparent conflicts of interest exist in the sports agency business and raise questions over the legitimacy of these arrangements, in some cases, resulting in legitimate lawsuits.

Conflict of Interest: Policies

To address these conflict-of-interest concerns, some leagues or unions have established sports agent conflict-of-interest policies. For example, in Major League Soccer (**MLS**), NBA and NHL policies, agents may not represent

both players and coaches at the same time. In MLB, however, agents can represent both players and coaches. In the NFL, **certified contract advisors** (a sports agent certified with the NFLPA) must disclose to players which college or professional coaches they also represent, but these certified agents are allowed to represent both as long as there is disclosure.

UPL

unauthorized practice of law

MLS

Major League Soccer

certified contract advisors

Term used to describe a player agent that has been certified by a players union such as the NFLPA

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Conflict of Interest: Facilitator

Since many college coaches strongly influence the decisions made by the impres-sionable student-athletes they recruited out of high school, would the temptation not exist to promote the coach's agent over others when the

student-athlete turns professional? For example, if the head coach at the University of Alabama has an agent, and repeatedly the same agent represents the star athletes coming out of that university, is it fair to suggest that there might be intense pressure for the student-athlete to work with his coach's agent?

Or, what if the agent represents both the employer and the employee at the same time? If the same agent represents both the college coach, the professional team coach, and now the former student-athlete (turned professional), might there be preferential treatment to assist the player in making the team, since he has the same agent as his college coach and now professional coach?

Maybe the answer to all these conflict-of-interest questions in sports is that a conflict exists only if one of the parties believes it is a conflict and subsequently files a complaint. Maybe sports agents should be viewed more like promoters are in sports like professional wrestling, boxing or mixed martial arts, where the fiduciary duties are to facilitate a deal or transaction, rather duties of loyalty to one client over others. After all, influential promoters such as Don King have been very successful in this regard. As promoters they serve as **facilitators** of events rather than agents.

In sports agency, dual representation occurs to the point where one might argue that it is standard procedure for an agent to represent both sides of what is traditionally considered relationship involving competing interests, such as the employer-employee relationship. Still, while promoters help secure deals, agents are supposed to serve as an advocate for their clients. The question of whether a sports agent breaches a fiduciary duty by representing both employer and employee or by promoting one client over the other remains unclear and unanswered.

At the very least, it would be appropriate and wise to disclose such potential conflicts to the client and other parties to the deal in writing. This would deter—

or at least minimize—the likelihood of a claim of breach of fiduciary duty or other conflict of interest.

▪ Agent Regulation

Sports agents are regulated in three ways: 1) state laws; 2) federal law; 3) the Big Four players associations certification process. The following sections explore all three.

State Regulation

In 1997, the NCAA and several academic institutions urged the National Conference of Commissioners on Uniform State Laws (**NCCUSL**) to consider drafting a model act that would provide a uniform system for regulating sports agents that states could adopt if they so desired. The NCCUSL adopted the final version of the UAAA in August 2000. Utah was the first state to adopt the UAAA. As of 2011, the UAAA has been adopted in 40 states, the District of Columbia and the **facilitators**

term used to describe role of individuals who assist parties in creating their own deal akin to a mediator

NCCUSL

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U.S. Virgin Islands. California has active UAAA legislation in its legislative cham-bers being considered for adoption; three states have existing, non-

UAAA laws designed to regulate sports agents (California, Michigan and Ohio); and seven states and one territory have no existing law regulating sports agents (Alaska, Maine, Massachusetts, Montana, New Jersey, Puerto Rico and Vermont).

In those states which have adopted the UAAA, sports agents are required to register with the secretary of state's office when they recruit a student-athlete with remaining collegiate eligibility. The state secretary of state's office (through the office of attorney general) regulates and prosecutes sports agents for violations of the law.

The advent of the Internet and social media outlets has made the representation and recruitment of student-athletes (and others) much easier, adding to the problem of regulating agent activity and calling into question the efficacy of this model act.

UAAA Criticism

One of the most prominent critiques of the UAAA is that it only applies to student-athletes with remaining eligibility. It does not apply to those who have turned professional or those who have exhausted their eligibility to participate as an amateur in a college sport. So, in sports such as motor sports, mixed-martial arts, boxing, and many others, agents could scour the nation's colleges and universities looking to recruit clients to which the UAAA no longer applies.

It is also important to question the motivation behind the enactment of the UAAA and whose interest it really serves. Certainly, it was designed to create uniformity among the myriad of inconsistent state laws. This reflects the principles other uniform (model) acts such as the Uniform Commercial Code (**UCC**), Uniform Arbitration Act (**UAA**), and Uniform Residential Landlord and Tenant Act (**URLTA**), all prominent model acts adopted by most of the states and studied by business students.

However, was the UAA drafted and enacted to protect student-athletes from unscrupulous agents? Or was the real impetus to protect colleges and universities from NCAA financial penalties and sanctions, by enabling states to sue sports agents for the loss of revenue as a result of NCAA penalties

(such as being unable to compete in a post-season bowl)? Under this act, universities who are sanctioned by the NCAA for bylaw violations involving sports agents can pursue civil damages under the UAAA against agents who cause student-athletes to lose their eligibility. Many have noted that the latter is indeed the primary motivation, since the UAAA does not apply to professional athletes. It only applies to agents who solicit or recruit student-athletes who have remaining eligibility. Indeed, it appears that the UAAA might not be designed exclusively to protect the student-athlete's best interests.

Federal Regulation

In 2004 a federal law was enacted to regulate sports agents that many believed was significant. This law is known as The Sports Agent Responsibility and Trust Act of 2004 (**SPARTA**), available at 15 U.S.C. § 7801-7807. Former University of Nebraska **UCC**

Uniform Commercial Code

UAA

Uniform Arbitration Act

URLTA

Uniform Residential Landlord and Tenant Act

SPARTA

The Sports Agent Responsibility and Trust Act of 2004

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head football coach Tom Osborne (who became a member of the House of Representatives) was the sponsor of this act. However, as of 2011, there are no known violations of the law and it might not be the hallmark federal law some had hoped it would be.

SPARTA is similar to federal or state consumer protection laws designed to protect against misleading advertising in general, in this case the recruiting of a student-athlete. Under SPARTA, if an agent falsely advertises their qualifications or services as part of the recruiting and signing of contracts with student-athletes, they may be subject to an injunction or penalty up to $11,000 per act by the Federal Trade Commission (**FTC**), the federal agency which regulates any unfair or deceptive acts or practices in labeling and advertising in the United States. As long as sports agents do not misrepresent their qualifications, skills or services, however, SPARTA will not apply.

Regulation by Players Associations/Unions

At one time, there were virtually no requirements to become a certified agent in the Big Four sports. That has changed remarkably since the 1990s. Today, regulating sports agents by the players associations has been very effective. These associations are the exclusive bargaining agents for the players and are subject to the rules and procedures set forth in the National Labor Relations Act (**NLRA**).

Recently, the Big Four unions have stepped up the punishment for unethical, unprofessional or illegal conduct by their certified agents. Penalties have included suspensions and permanent decertification of the sports agent. The unions have also established standard representation agreements and standard player contracts for their approved contract advisors. The following are brief summaries of the Big Four unions.

NFLPA

The National Football League Players Association (NFLPA) was established in 1956. Its first Executive Director was Ed Garvey, an attorney, who served from 1971–1983. In order to represent an NFL player in contract negotiations, sports agents must be certified with the NFLPA which refers to them as *contract advisors*.

To be certified as a contract advisor, one must meet various requirements including having a degree from an accredited four year college or university. The NFLPA caps agent fees at three percent.

The NFLPA regulations set forth a standard of conduct for contract advisors, which includes paying fees, abiding by the maximum fee schedule, and annual attendance at an NFLPA seminar on contract negotiations. An agent may lose certification if he or she fails to negotiate at least one contract in a three-year period.

No certified agent can recommend use of non-NFLPA certified financial advisor.

Agents must maintain malpractice insurance, too.

The NFLPA requires annual dues, a non-refundable application fee of nearly $2,000, a background check, attendance at a two-day seminar, and a written exam.

Registration may only be done in January of a particular year. Providing monetary inducements to college athletes, or to the athlete's family and friends, in order to sign a player is prohibited, as is negotiating a contract in violation of the CBA, **FTC**

Federal Trade Commission

NLRA

National Labor Relations Act

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engaging in unlawful conduct, conduct involving fraud or dishonesty, or violating the maximum fee schedule. When the NFLPA decertified in 2011 during its labor dispute with the NFL, many claimed the (former) union had no authority to regulate agents since it technically no longer existed, turning the representation landscape into the Wild West.

MLBPA

The Major League Baseball Players Association (**MLBPA**) became a labor union in 1966. Marvin Miller, an economist with the United Steel Workers of America, was chosen by the players to be the Association's first executive director. In 1968, the MLBPA negotiated the first-ever CBA in American professional sports.

Agent fees are negotiated freely between the player and agent. However, an agent cannot charge a fee unless the player's salary negotiated exceeds the MLB

minimum salary. Then, only a percentage can be charged and that is based upon the difference between the negotiated salary and the league minimum. This can be costly for an agent who works with the player in the minor leagues hoping to make it to the Major League, because the agent can not normally charge any fee while the player is in the minors.

After a player on a 40-man roster has designated an agent as his representative, the agent must apply for certification by the MLBPA. A college degree is not required for the agent, but given the length of time many players remain in the minor league system, patience is.

NBPA

Agents for athletes in the National Basketball Association must be certified with the National Basketball Players Association (**NBPA**). A player agent must have a degree from an accredited four-year college or university (or sufficient negotiating experience to be granted an exception) and must submit an application to the NBPA.

Once an agent is certified, the agent is subject to the *Standard of Conduct* regulations. Prohibited acts include providing inducements to college athletes, or to the athlete's family and friends in order to sign a player; creating a conflict of interest by taking a financial interest in a professional team, and by representing a general manager or coach of an NBA team in matters relating to the job.

NBA players must use certified agents to represent them during contract negotiation, or players may negotiate contracts themselves, and teams negotiating with non-certified agents can be fined.

NHLPA

The National Hockey League Players Association (**NHLPA**) is a hockey labor union based in Toronto, Ontario. The NHLPA dates back to June 1967 when player representatives met to adopt a constitution and elect a president. Alan Eagleson was appointed as the first Executive Director and served until 1991

when the players replaced him with Robert (Bob) W. Goodenow, who then resigned in July 2005 following the season-ending lockout.

MLBPA

Major League Baseball Players Association

NBPA

National Basketball Players Association

NHLPA

National Hockey League Players Association

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Sports Agency

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Without certification by the NHLPA, an individual cannot become a player representative. Similarly to MLB, the NHL does not cap agent fees as long as the player earns the minimum salary after the agent is paid.

Agent Fees and Commissions

The fees that agents charge their clients are both regulated and unregulated. As mentioned, when an agent is required to register with the Big Four professional sports, maximum caps regulate fees that agents charge for the negotiation of contracts, usually between two and four percent of the team salary and bonuses. Some agents charge by a billable hour rather than a percentage, but this is the exception not the rule.

For endorsement contracts or other contracts outside the standard player contracts in the Big Four, there are no caps on the fee an agent may charge an athlete for representation, though market forces generally have indicated that fees between 10 and 20 percent of an endorsement contract are reasonable. This may seem high, but the money generated in endorsements is not guaranteed and agents may spend considerable amounts of time and financial resources to promote their client, seek sponsorship and ultimately secure the deal. Accordingly, most athletes do not object to higher fees for such non-salaried income.

Agent Violations

Enforcement of state laws related to sports agents can become extremely time-consuming, difficult, and expensive. State attorneys general might not pursue violations of state laws except in the most obvious or extreme cases. However, some agents have paid a price for non-compliance with state sports agent laws. This has included criminal charges for failing to register as a sports agent in that state. Players unions might be the best watchdog for agent improprieties by decertifying an agent from their ranks, but that only applies to certified agents in the Big Four.

In addition to failing to register as a sports agent, criminal charges against agents have included tampering with a sports contest, human trafficking (for bringing under-age Cuban baseball players into the United States without permission), filing illegitimate tax returns and, of course, misappropriating money from clients.

Josh Luchs

On October 18, 2010, the *Sports Illustrated* cover article "Confessions of an Agent"

presented a lengthy discussion of the depth and breadth of the sports agent business as told by former agent Josh Luchs to writer George Dohrmann. The article presented numerous examples of the extreme efforts Luchs and others took just to remain competitive in this business, including countless examples of ethical improprieties, violations of NCAA rules, and violations of state sports agent laws, particularly in terms of registration.

While some debate the veracity of Luchs' claims, and others refused to be interviewed in the process, students of sports law are highly encouraged to explore the magazine article. Indeed, Luchs was subsequently decertified by the NFLPA's Committee on Agent Regulations and Discipline in 2010.

Agents: Criminal Cases

The following examples are a few of the more prominent criminal cases involving sports agents over the years. It is important to be familiar with

these incidents, some of which are seen as landmark turning-points in the sports agent business.

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Chapter One

Norby Walters and Lloyd Bloom

Entertainment industry booking-agent Norby Walters and his former bouncer-partner Lloyd Bloom were charged in federal district court in Chicago in the 1980s for violation of NCAA rules for inducing student-athletes to sign professional contracts before their collegiate eligibility had expired. The 58 student-athletes cited in the case were showered with cash, loans, cars, airfare and other products, as were their families.

Walters and Bloom had the student-athletes post-date the contracts so as to avoid the appearance of impropriety before their collegiate eligibility expired. Ultimately, all but two athletes remained with Walters and Bloom until the NFL draft.

Walters and Bloom did not take too kindly to the decisions of most of their clients to not return the cash or gifts they had been given, and some players alleged that they feared they would physically harmed by Walters and Bloom if they did not remain as clients with them. Walters and Bloom were charged with mail fraud, extortion, wire fraud, conspiracy and racketeering [RICO] in 1989.

While initially convicted in 1990 on five of seven counts, Walters and Bloom's conviction was overturned in 1993 and, after both parties were retried separately, Walters pleaded guilty to mail fraud alone in exchange for dropping the other charges. Then, the Seventh Circuit Court of Appeals contested the sufficiency of the evidence overall and noted in its decision, "Walters is by all accounts a nasty and untrustworthy fellow, but the prosecutor did not prove that his efforts to circumvent the NCAA's rules amounted to mail fraud." Walters' appeal reversed his conviction and he was free. Sadly, Bloom was found murdered in his Malibu home in 1993 at the young age of 36.

As a result of the Walters and Bloom scandal, at least two dozen states enacted sports agent laws. These events also served as a motivation for enacting the UAAA.

Florida State University and Footlocker

Characterized as scandalous at the time, several agents paid $6,000 to finance a shopping spree at a Footlocker store during the 1993 football season. A man from Las Vegas named Raul Bey allegedly financed the FSU scandal using the services of a runner named Nate Cebrun, among others, who enlisted the help of numerous individuals, including a Tallahassee high school football coach to pull off the scheme. Neither of the individuals filed with the state of Florida to register as an athlete agent, none paid the mandatory state fees, and both were charged with the crime of failing to register as an athlete agent ($250 at that time), which was a felony in Florida.

This case was the cover story of a *Sports Illustrated* article in 1994, "Tainted Title," which focused on the massive amounts of illicit cash and gifts given to members of the FSU Football program. Like the Luchs interview, though written many years previously, this article reflected concerns over the behavior of sports agents around the country and their complete disregard of NCAA rules. It drew national attention, yet again, to the lengths to which agents will go to recruit student-athletes. It was also reminiscent of the worst scandal in NCAA football history, the complete suspension of the Southern Methodist University football team from competition in 1987 due to the

reckless disregard and repeated violations of NCAA bylaws by boosters, agents and others affiliated with that football program.

Norby Walters and Lloyd Bloom

sports agents charged with racketeering, conspiracy, and fraud in recruiting student-athletes

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Sports Agency

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William H. "Tank" Black

Sports agent William "Tank" Black, based out of Columbia, South Carolina, developed an impressive clientele of professional athletes over time. In fact, in 1999 he represented five first-round NFL draft picks. Unfortunately for Black, he was also later convicted of federal fraud charges for swindling almost $14 million from his clients. A federal jury convicted Black of defrauding the federal government, conspiracy to commit mail fraud, conspiracy to commit wire fraud and obstruction of justice. There was testimony that Black stole millions through illegitimate financial investments and a pyramid investment scheme. His clients included NFL players Fred Taylor, Ike Hilliard, Jevon Kearse, and others including NBA star Vince Carter, whom he later sued (and settled with) over unpaid agent fees.

Black's legal troubles involved myriad criminal and civil complaints. Black, like Bey and Cebrun, was charged with failing to register as a sports agent in

the state of Florida. In 2000, he admitted to providing unauthorized loans to student-athletes. He was charged by the Securities and Exchange Commission (**SEC**) for engaging in a stock-swindle, though he successfully defended himself on appeal.

Black was decertified by the NFLPA and was released from federal prison in 2007. He later authored the book *Tanked!* , an exposé on his life and the inner workings of sports agency.

Agents: Civil Cases

Civil litigation involving agents focus on a variety of alleged misdeeds including violations of no-compete clauses and allegations of client poaching or **tampering** (stealing clients while under contract with another agent). To protect financial interests, agents and sports agencies often include **no-compete clauses** so that if a member of the agency leaves the firm that he or she cannot take the clients with them. These are also known as **covenants not to compete** in some states.

Clients leaving the sports agent relationship is part of the business, and, due to a variety of reasons, many agents do not wish to litigate when a client leaves their agency for another. This could include litigation costs, bad publicity, and stress.

Competition for clients is fierce, yet very few cases are actually litigated when there is an allegation of the legal claim of **intentional interference with contractual relations**, the more formal way to describe tampering.

Leigh Steinberg and David Dunn

In the 2002 case *Steinberg, Moorad & Dunn, Inc. v. Dunn*, David Dunn was sued and initially found to have unfairly competed against Steinberg in violation of a no-compete clause when he left the firm. A California jury awarded $47 million to Steinberg's firm, though that was later reversed on appeal in 2005. Dunn was **SEC**

Securities and Exchange Commission

tampering

Also known as intentional interference with contractual relations **no-compete clauses**

contractual provision which states that a party may not participate in or operate any activity which competes with the same business or profession for a specific amount of time or within a certain geographic area

covenants not to compete

synonym for no-compete clause

intentional interference with contractual relations When one knows the existing of a contract

between two other parties and proceeds to interfere with that contractual relationship likely to induce one of the parties to break their working relationship in the future Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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suspended by NFLPA and later filed Chapter 11 bankruptcy. The California Appeals Court reversed the decision entirely and vacated the damages award, holding that the no-compete clause (and no-compete clauses in general) was invalid under California law. While both Steinberg and Dunn continued to maintain successful sports agency firms, this case stands as one of the few most prominent decisions in sports agency litigation involving the legitimacy of non-competition clauses.

The Steinberg-Dunn lawsuit demonstrated the highly emotional aspect of agents and clients leaving a firm. Neither Steinberg nor Dunn really won in the end. This case, among others, caused the Big Four to reconsider their policies with regard to client tampering. Due to the frequency of agents moving from one firm to another, and agency mergers, it is possible that courts will not enforce covenants not to compete nationally, taking their cue from California's approach.

However, the NFLPA now specifically prohibits agents from initiating contact with players who are under contract with another agent.

Recent Cases

In 2010, Aroldis Chapman, a Cuban defector and high profile pitching prospect, switched from Athletes Premier International (**API**) sports agency to Hendricks Sports Management. A lawsuit was filed by Edwin Mejia of API, though the parties settled prior to a trial. The same year, an arbitrator ordered NBA agent Andy Miller to pay $40,000 in damages for tampering with agent Keith Glass' representation of NBA player Quincy Douby. It is likely that more claims involving the *intentional interference with contractual relations* will emerge in the coming years as the number of agents increases and the number of potential clients remains stable.

Ending the Agency Relationship

Competition for lucrative agent fees creates a kind of merry-go-round; that is, clients switch agents on a regular basis. While changing representation can be contentious, or even illegal, there are many legitimate reasons to end an agency relationship just like any relationship including employer-employee or contractor-independent contract. In some cases, the agency relationship might end due to under-zealous representation, the appearance of conflicts of interest, broken trust, immoral acts, personality conflicts, or the intentional interference with a contract. A family member who believes he or she knows better than the agent (or who believes they are just as competent) might also force the agent to withdraw representation. On the other hand, the sports agency might believe that the client is no longer talented, brings disrepute to the firm, or is otherwise unsuitable to continue representing.

Sometimes players or coaches simply wish to represent themselves without an agent. After all, there is no law that says one must have an agent. For example, in 1999, NBA star Ray Allen successfully represented himself and secured a six-year, $70.9 million guaranteed contract with the Milwaukee Bucks. Regardless of the reason, it is common for clients to switch agents over the course of their career.

Updates of which agents represent which clients are often published in editions of the *Sports Business Journal*, a premier, weekly sports business magazine available online and in print (and highly recommended for sports law students who can receive it at a discounted rate).

API

Athletes Premier International

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■ Introduction to the NCAA

Since much of sports agency focuses on the recruitment from the ranks of student-athletes, this section is designed to introduce the student to the fundamentals of the history, purpose, and relevant rules involving the largest and most influential amateur sports organization in the United States: the National Collegiate Athletic Association (NCAA). NCAA issues are

addressed throughout this textbook, and this section is designed to present a fundamental understanding of the organization and its methods.

History

Founded in 1906 as the Intercollegiate Athletic Association of the United States (**IAAUS**), it changed its name to the National Collegiate Athletic Association in 1910. It remains a voluntary association of approximately 1,200 colleges and universities. Since 1973 it has been divided among three divisions (I, II, and III) for the purpose of administering intercollegiate athletics. The national headquarters opened in Kansas City, Missouri in 1952, and moved to Indianapolis, Indiana in 1999 where they currently remain. The NCAA today has:

- Over 400,000 student athletes;
- 3 divisions (I, II, III);
- 1,281 member institutions;
- 23 sports;
- 88 national championships (41 men's, 44 women's, 3 coed);
- 49,000 student athletes who compete in NCAA championships each year; and
- 400 full-time employees at the national office.

NCAA Division I

Division I is the largest and most influential of the divisions, and so merits specific attention. In order to qualify for Division I, institutions must offer at least 14 sports (at least seven for men and for women, or at least six for men and eight for women). Additionally, members in Division I must sponsor at least two team sports for each gender, and must play a minimum number of contests against Division I opponents.

Most of the land-grant state colleges and universities in the United States are Division I, and football is the sport that warrants the most attention. However, there are many Division I programs that do not have football, including Marquette University, Xavier University, Pepperdine University and other prominent institutions. The Division I schools that do not have football teams can no longer vote on issues related to football.

Division I football was divided into I-A and I-AA in 1978. For a while, Division I schools that did not have a football team were characterized as Division I-AAA, but that terminology has fallen by the wayside. In 2006, the NCAA changed the term I-A to the Football Bowl Subdivision (**FBS**) and I-AA to the Football Championship **IAAUS**

Intercollegiate Athletic Association of the United States **FBS**

Football Bowl Subdivision

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Subdivision (**FCS**). While the FCS has a post-season championship playoff system, the FBS does not, and instead uses a modified post-season ranking and bowl system, hence the distinction drawn between them. There are approximately 120

FBS football teams, 118 FCS football teams, and 97 Division I teams without football for a total of 335 total Division I members.

NCAA Core Values & Mission

According to the NCAA's website, the NCAA—through its member institutions, conferences and national office staff—shares a belief in and commitment to:

- The collegiate model of athletics in which students participate as an avocation, balancing their academic, social and athletics experiences.

- The highest levels of integrity and sportsmanship.

- The pursuit of excellence in both academics and athletics.

- The supporting role that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions.

- An inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds.

- Respect for institutional autonomy and philosophical differences.

- Presidential leadership of intercollegiate athletics at the campus, conference and national levels.

The mission of the NCAA, according to its Division I Manual, is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports"

(Bylaw 1.3.1, *Basic Purpose*). Each of the three NCAA divisions has its own manual, but this text references only the Division I Manual.

NCAA Manual

The NCAA's main duties include establishing and enforcing rules that govern intercollegiate athletics, and overseeing programs aimed at serving

its purposes and goals. The **NCAA Manual** is the comprehensive statement of principles, policies and rules for NCAA membership and changes significantly each year. Often the Manual, which describes NCAA rules as bylaws, is updated in response to votes taken at the annual NCAA Convention which meets in January of each year.

Scholarships

Though athletic scholarships are offered in Divisions I and II, Division III schools may not offer any athletic scholarships at all. At this time, NCAA scholarships are only given once per year and only for one year. There are no athletic scholarships that last for more than one year, but most awards are renewed on an annual basis.

In general, student-athletes are only allowed five seasons of competition in any **FCS**

Football Championship Subdivision

NCAA Manual

compilation of hundreds of pages of rules (bylaws) for member educational institutions

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given sport. Exceptions exist, for example being allowed an extra season because of medical hardship or injury during a previous season, but the injury usually must have occurred within the first 30 percent of contests for that sport's season, and any exceptions must be approved by the NCAA in advance.

NCAA Leadership

The NCAA has had very few leaders since its inception. Interestingly, the title of its leaders changed from *Executive Director* to *President* in 1998. Also, college and university Presidents were formerly referred to as Chief Executive Officers (CEOs) in the NCAA Manual until 2006. The NCAA has had the following leaders: **Walter Byers** (1951–1988) (attributed to coming up with "student-athlete") **Richard Schultz** (1988–1993) (University of Virginia athletics director) **Cedric Dempsey** (1993–2002) (University of Arizona athletics director) **Myles Brand** (2003–Sept. 16, 2009) (Indiana University president) **James L. Isch** (Sept. 2009–2010) (former NCAA senior vice president and CFO) **Mark Emmert** (2010–present) (University of Washington president) **Revenues**

The NCAA generates hundreds of millions of dollars annually from its men's *March Madness* national championship basketball tournament. Other sources of revenue include ticket sales and concessions at post-season championship events, official sponsorships, Division I football bowl games, and royalties from licensing goods.

However, only a few sports such as men's football, basketball and sometimes hockey are considered **revenue sports**. Every other sport in the NCAA is characterized as either **non-revenue** or, in some circles, **Olympic sports**. Each sport has its own rules and limits on the number of scholarships that can be given in a particular sport.

Currently in Division I FBS football, whether by design or circumstance, a significant financial gap exists because of the BCS. The Bowl Championship Series (**BCS**) is a post-season national championship system which only six conferences and one team, the University of Notre Dame, have automatic qualifier (AQ) status, essentially excluding teams from other conferences. The excluded conferences are often referred to as the five non-AQ or *mid-*

major conferences. BCS games generate millions of dollars for their participants, whose coaches are paid in the millions as well, while many of the mid-major schools barely make enough money to maintain a football program.

NCAA Evolution and Expansion

Like any organization, the NCAA has changed over time and has adapted quite well. Originally, the organization was founded to establish rules for safety in the sport of football. Many college players died during football games due to the lack of fundamental safety equipment such as helmets, and formations such as the now **revenue sports**

those sports which tend to be self-supporting and sometimes make a profit among NCAA institutions such as football, basketball and ice hockey **non-revenue**

sports which depend upon other revenue sports for financial well-being **Olympic sports**

synonym for non-revenue sports

BCS

Bowl Championship Series

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illegal “flying wedge” were designed to generate the greatest impact among the participants.

Cheating was common and the NCAA, sometimes just called the *Association*, decided to establish the 1948 *Sanity Code*, as it was called. This was a book of rules for interpretation, rule-making and recruiting college athletes. As interest in college sports grew, so did the book, which later became known as the NCAA *Manual*.

The NCAA legislated bylaws involving granting financial aid, methods of compliance with the organization’s rules, and a continued emphasis on amateurism and educational purposes as driving themes.

Once the rules were solidified, the organization began to strictly enforce those rules. For example, the University of Kentucky was banned entirely for the 1952–53

season for a point-shaving incident. In 1987, Southern Methodist University football program received the harshest penalty ever handed down by the NCAA for repeat violations: complete suspension for the season, now known as the “death penalty.”

As interest in college sports continued to grow, the NCAA eventually expanded to over 1,000 members. Women were allowed to participate in college sports when the NCAA began to include women’s sports in Division I membership in 1981. With the advent of cable television and an unfavorable Supreme Court decision in 1984, which held that the NCAA violated federal antitrust laws by restricting the number of times a school could appear on national television, the NCAA and its membership entered an era of unprecedented financial revenues.

In 1999 the NCAA shocked the sports industry by signing an 11-year, six billion dollar agreement with CBS Sports for the right to broadcast its *March Madness* basketball tournament. However, that contract pales in comparison to the 2010 contract the NCAA signed with CBS Sports and Turner Broadcasting. The 14-year, 10.8 billion dollar contract includes broadcasting

on TBS, TNT, TruTV, and online. It also includes marketing rights; and every game will be shown live on one of four national television networks. The NCAA and its members will receive approximately $740 million annually under this agreement. No surprise, then, that more than 95 percent of the NCAA's revenue comes from the *March Madness* basketball tournament, which now starts with a field of 68 teams.

NCAA Enforcement

NCAA punishes schools for improprieties and bylaw violations, and has an entire enforcement staff dedicated to this purpose. Legally speaking, the NCAA is not considered a state actor, following the 1988 Supreme Court decision involving former University of Nevada Las Vegas coach Jerry Tarkanian, *NCAA v. Tarkanian*. The effect of the decision is that the NCAA may not subpoena college or school records like the government can. On the other hand, the NCAA does have rules which clearly state that non-compliance with NCAA requests is a violation itself and that its members have a responsibility to cooperate during an investigation.

Sometimes the NCAA investigations are lengthy and punishment is doled out far after a violation has occurred. In fact, sometimes the coaches, student-athletes or others are no longer involved with the university (due to graduation, new employment, etc.) and the NCAA is left to retroactively punish schools by vacating wins for games already played. In other instances, the NCAA might assess a loss of future scholarships, prohibit appearance in post-season bowls or other competitions, or reduce the number of televised games the school play.

Many universities are rightfully admonished for rules violations. Some punish themselves with the hope that such in-house or *self-imposed* penalties will deter the Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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NCAA from applying additional penalties. In some cases, though, schools are found to foster a culture of non-compliance with NCAA bylaws. Those schools are usually punished severely by the NCAA.

NCAA Violations

The NCAA Division I Manual is well over 400 pages today and continues to grow annually. It is full of rules, policies, themes, definitions, explanations and examples which all members much follow. When the NCAA enforcement staff begins an investigation, they send a **Letter of Inquiry** to a school's President or Chancellor. The investigation then turns into a formal **Notice of Allegation**(**s**) when the staff believes that there is enough evidence to indicate major violations by a member college or university.

Each of the three divisions in the NCAA have their own Committee on Infractions (**COI**), a group of lawyers, law professors and others who are formed to assess penalties against schools and individuals who violate NCAA bylaws. The NCAA also has an **Infractions Appeals Committee** which considers appeals of COI findings concerning major violations.

In some cases, schools will choose to report violations and punish themselves preemptively in order to gain good will among NCAA enforcement staff. According the NCAA Manual, there are two types of violations: major and secondary.

A **major** rules violation (infraction) is one that results in an extensive recruiting or competitive advantage over other schools. A **secondary** rules violation is isolated or inadvertent, or provides only a minimal recruiting or competitive advantage.

Non-Compliance

Institutions are "responsible for monitoring compliance, identifying and reporting violations, cooperating with the NCAA and taking corrective action," as well as being responsible for monitoring coaches, players and boosters (Bylaw 2.8.1, *Responsibility of Institution*). If the NCAA believes adequate systems of compliance were in place, but school either did not pay proper attention to a limited area of its program or did not pay proper attention for a limited period of time, the school could be charged with a **Failure to Monitor** the program, a somewhat lesser violation. The more serious charge for non-compliance with NCAA bylaws is characterized as a **Lack of Institutional Control** (LOIC).

Letter of Inquiry

Letter sent to college president informing the institution of alleged facts of a violation and that the NCAA enforcement staff will begin an investigation
Notice of Allegation(s)

Letter to educational institution's leadership informing them that there is enough evidence to indicate major violations of NCAA rules **COI**

Committee on Infractions

Infractions Appeals Committee

A committee of five individuals who hear appeals of penalized member institutions

major violation

Usually involve an infraction that gives a school an extensive recruiting or competitive advantage

secondary violation

An isolated or inadvertent infraction that provides only minimal recruiting or competitive advantage

Failure to Monitor

Charge against an institution though less serious than Lack of Institutional Control

Lack of Institutional Control

Most serious allegation against a member institution which demonstrates an on-going disregard of NCAA rules and policies Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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Chapter One

Show-Cause Orders

Occasionally, individual coaches are punished in accordance with Bylaw 19.02.1, *Show-Cause Order*. According to the 2010-11 NCAA Manual, A show-cause order is one that requires a member institution to demonstrate to the satisfaction of the Committee on Infractions why it should not be subject to a penalty (or additional penalty) for not taking appropriate disciplinary or corrective action against an institutional staff member or representative of the institution's athletics interests identified by the committee as having been involved in a violation of NCAA regulations that has been found by the committee.

In plain English, this bylaw allows the NCAA to punish coaches by suspending them from recruiting or coaching. This provision has been used to prevent them from coaching at another NCAA member school for a

period of time as well, and most coaches lose their jobs when a show-cause order is issued. In real terms, this could derail a coach's career. Prominent coaches who have received show-cause penalties include former Indiana University basketball coach Kelvin Sampson (5-year), University of California-Berkeley football coach Todd Bozeman (8-year), and Baylor University basketball coach Dave Bliss (10-year). Former University of Southern California coach Todd McNair received a one-year show-cause order for his alleged knowledge that sports agents were providing extra benefits to star running back Reggie Bush, and that he knowingly provided the NCAA with false and misleading information.

Social Agenda

The NCAA remains a private, not-for-profit organization, though many of its members are public institutions. It establishes and maintains a commitment to membership-wide diversity including gender minority equity within its ranks. In fact, the NCAA created an Office of Diversity and Inclusion in 2008. At times, however, the NCAA engages in activity not normally associated with a tax-exempt organization, such as imposing politically correct standards of tolerance on its member organizations, or signing multi-billion dollar television contracts.

For example, in 2005, the NCAA mounted an effort to eliminate the use of individual school mascots and nicknames that could be perceived as reinforcing negative stereotypes about Native Americans. Many of the names had been in use for over a century, before issues of diversity were commonly considered important. Though most schools intended no harm or offense by continuing to use these traditional names, schools had to demonstrate to the NCAA that such mascots or nicknames did not, despite their intentions, create hostile or abusive environments. If they did not successfully demonstrate their legitimate use, the NCAA reserved the right to refuse to allow the school to participate in its post-season championships. One might ask whether that is legitimate action for a tax-exempt organization.

Watchdog Groups

The Knight Commission on Intercollegiate Athletics (**Knight Commission**) was formed in 1989 to ensure that intercollegiate athletics programs operate within the educational mission of their schools. The commission has expressed concern **Knight Commission**

Organization created to monitor and provide suggestions to NCAA to maintain true to its overall educational mission

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over the "arms race" in college sports and continues to make recommendations to the NCAA regarding this issue. It also reports on university athletic departments that do not reach benchmark performance related to the NCAA's Academic Progress Rate (**APR**). Students should visit their website at www.knightcommission.org to find the latest issues.

Other independent watchdog organizations, such as the **Drake Group**, have raised questions about the efficacy and legitimacy of the NCAA as a whole. They point out that the NCAA will not change independently so long as money keeps pouring in to college sports. Indeed, the purpose of the Drake Group is "to help faculty and staff defend academic integrity in the face of the burgeoning college sport industry." Many Drake Group members criticize the NCAA for devolving into purely a commercial (money-making) enterprise. Students are encouraged to visit the Drake Group online at www.thedrakegroup.org to learn more about their work.

NCAA and Amateurism

The NCAA considers amateurism to be one of its most important core principles.

The NCAA's primary mission, as already discussed, is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports" (Bylaw 1.3.1, *Basic Purpose*). The "clear line of demarcation" is explained and expanded upon in Bylaw 2.9, *Principle of Amateurism*:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

To the NCAA, participation in intercollegiate sports is an avocation (hobby, that is, not the primary goal of attending an institution of higher learning), and student-athletes' primary motivation should be educational in nature. Still, a few years ago the University of Oregon hired an athletic director who did not have a college degree at all. That seems to send the mixed messages to student-athletes. It seems that, despite their claims of importance, some NCAA core principles have become merely goals.

Still, the NCAA prohibits student-athletes from using his or her athletics skill (directly or indirectly) for pay in any form. The NCAA has strictly applied this bylaw to include current NCAA student-athletes from selling or bartering sports-related items they received, including awards and apparel. For example, the NCAA suspended five Ohio State University football players who sold awards they received for their participation in bowl games and gave away team jerseys in exchange for free tattoos. One question the student might consider is whether student-athletes should be entitled to some type of compensation (additional to tuition and educational compensation), given the amount of revenue that is generated by NCAA men's basketball and football programs?

APR

Academic Progress Rate

Drake Group

Private, independent organization critical of NCAA

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Chapter One

NCAA and Sports Agents

The NCAA remains adamant in its resolve to maintain its integrity as an amateur organization. NCAA rules prohibit student-athletes from having agents, and the organization has an Agents, Gambling and Amateurism (**AGA**) division for enforcing their regulations. In addition to state laws, the NCAA has expressed serious concerns over student-athletes with have remaining eligibility being abused by agents. Still, agents who are adept at recruiting student-athlete clients can use a variety of resources to get to know a student-athlete with the expectation of retaining the student-athlete as a professional client.

If a student-athlete agrees to be represented by an agent, orally or in writing, that student-athlete may have to forfeit his or her remaining collegiate eligibility for the sport he or she is represented in. The NCAA says that having an agent makes an athlete professional and not *amateur*. In addition

to the obvious harm to the student-athlete, violating this rule may also result in school having to forfeit games, appearances in a post-season bowl, scholarships, and even a share in the revenues of the NCAA and its member conferences. It is the final concern that is often the most important in terms of state regulation of agents.

It is not against NCAA regulations for an agent to contact a student-athlete, though some state laws prohibit such conduct. The NCAA Manual states: An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.

Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport. (Bylaw 12.3.1, *Use of Agents*) However, the NCAA bylaws say that a student-athlete can have an agent in one sport (and therefore be a professional) but remain an amateur in another sport.

In fact, in professional baseball talented athletes often end their career in the minor league and return to school in their mid-to-late 20s as a freshman with five years to play four seasons. In order for this to work, the sports agency contract must be sport-specific. Otherwise, the NCAA's position is that the agency contract applies to all sports.

Professional Sports Counseling Panels

Since 1984, the NCAA has endorsed the use of a **professional sports counseling panel** by colleges and universities to educate student-athletes about agents. This legislation was intended to encourage member institutions to provide guidance to their student-athletes regarding future professional athletic careers. The panel can assist student-athletes in deciding whether to remain in school or turn professional, and to provide guidance to student-athletes regarding contacts and agreements with agents. The NCAA notes that such panels should attempt to provide information to student-athletes regarding professional athletics that they may not be able to obtain or understand sufficiently on their own.

AGA

Agents, Gambling and Amateurism

professional sports counseling panels

groups formed by colleges and universities to advise student-athletes on potential careers in professional sports Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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However, might there be a conflict of interest? That is, coaches or other athletic department members may be biased to further the athletic interests of the college or university, rather than the careers of the student-athletes seeking guidance. Similarly, might these panels promote one agent over another. In all, the efficacy and purpose of the campus professional sports counseling panels is questionable, especially when, at some institutions, sports agents are still seen standing on the sidelines in plain sight and adjacent to student-athletes and coaches during competition.

Andy Oliver and the No Agent Rule

Does the NCAA's no-agent rule deny student-athletes their constitutional right to counsel? This was one of the issues in a case involving Andy Oliver, a student-athlete who pitched for Oklahoma State University (**OSU**). Oliver lost his NCAA eligibility after being billed by lawyers for their services prior to his tenure at the university, when he was drafted out of high school

by the Minnesota Twins in the 17th round of the 2006 MLB draft. He was later drafted by the Detroit Tigers in the 2nd round while at Oklahoma State. It is common practice for a player to get drafted in MLB out of high school, turn down the offer, attend college, and then get re-drafted as a junior.

When Oliver was drafted in high school, he consulted with the Baratta brothers who were both certified MLBPA agents and attorneys and served as his advisors in the process. NCAA rules allow baseball student-athletes to consult with a legal advisor, but the advisor cannot orally or formally agree to negotiate on the player's behalf. Then, after two years at OSU, Oliver decided to use another agent, Scott Boras, as his contract adviser when the Detroit Tigers drafted him. As a result, the Barattas sent Oliver a bill for $113,750 for their services and reported this incident to the NCAA.

The NCAA remained convinced that Oliver's consultation with the Barattas constituted an agency relationship and under the NCAA's no-agent rule, the NCAA rendered him permanently ineligible. However, Oliver disagreed and sued the NCAA in Ohio. An Ohio state trial court judge ordered the NCAA to reinstate Oliver, finding that the NCAA rule violated the public policy of the state of Ohio and that Oliver, like anyone in Ohio, was allowed to seek legal counsel to make informed decisions about his career. The judge issued a permanent injunction against NCAA. However, just before a hearing on damages in 2009, the NCAA settled the case for $750,000 and avoided establishing any legal precedent for future challenges to this rule. Nonetheless, many have called for the no agent rule to be severely modified.

- **CASE 1**

Andrew A. Oliver v. National Collegiate Athletic Association State of Ohio, Court of Common Pleas, Erie County

University ("OSU"). Since August 2006, the plaintiff February 12, 2009, Decided

has pitched for the baseball team at OSU.

The defendant, the National Collegiate Athletic Associ-OPINION

ation (“NCAA”), is an unincorporated business associa-The plaintiff, Andrew Oliver, is a resident of Vermilion, tion having its principal place of business in Marion Erie County, Ohio. In 2006, the plaintiff graduated

County, Indiana; it has member institutions not only from Vermilion High School, where he was the primary in Oklahoma but also in Ohio. OSU is a member insti-pitcher for its baseball team. The plaintiff is currently tution of the defendant; the NCAA association regu-in his junior year of college at Oklahoma State

lates the student-athlete activities at OSU.

(continued)

OSU

Oklahoma State University

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Chapter One

The plaintiff, in February 2006, retained the services of had violated NCAA Bylaw 12.3.1 by (1) allowing his pre-Robert M. Baratta, Tim Baratta, and Icon Sports

vious attorneys to contact the Minnesota Twins by tele-Group, d.b.a. Icon Law Group, as his sports advisors phone and (2) by allowing Tim Baratta to

be present in and attorneys. In June of the same year, the Minnesota his home when a representative from the Minnesota

Twins of Major League Baseball drafted the plaintiff in Twins tendered an offer to him.

the 17th round of the draft. At the end of the summer, On August 18, 2008, the plaintiff was reinstated as a the Minnesota Twins met with the plaintiff and his

result of a temporary restraining order issued by this father at the Oliver family home in Vermilion before court. However, in October 2008, OSU filed for rein-the plaintiff left for his freshman year of college. Tim statement of the plaintiff with the NCAA even though Baratta also attended the meeting, at his own request, the temporary restraining order had reinstated the

at the Oliver home. During the meeting the Minnesota plaintiff. Subsequently, in December 2008, the plaintiff Twins offered the plaintiff $390,000 to join their orga-was suspended for one year and charged a year of eligi-nization. After heeding the advice of his father, the bility by the defendant. The penalty was subsequently plaintiff rejected the offer and chose to attend OSU

reduced to 70 percent of the original suspension and in the fall on a full scholarship for which he had

no loss of eligibility for the plaintiff.

already signed a letter of intent in the fall of 2005.

As a result of deciding to go to OSU and accepting

Arguments

amateur status, the plaintiff would not be eligible for the draft again until his junior year of college in June The plaintiff requests that this court enter a declaratory 2009. The plaintiff played his freshman and sophomore judgment and injunctive relief enjoining the NCAA

years for OSU, and during that period he never

Bylaw 12.3.2.1 as unenforceable because the plaintiff received any invoices requesting payment for any ser-retained legal counsel (the Barattas) to represent him vices rendered by his advisors. In fact, the plaintiff avers and that legal counsel is subject to the exclusive regula-that the advisors provided nothing of value to him.

tion of the Ohio Supreme Court. Therefore, the defendant has no authority to promulgate a rule that would In March 2008, plaintiff decided to terminate the Ba-prevent a lawyer from competently representing his cli-rattas and Icon Sports and retain the Boras Corpora-

ent. As such, the plaintiff maintains that, NCAA Bylaw tion. The plaintiff communicated his intentions of

12.3.2.1 is void because it is against the public policy of termination to Robert Baratta. At that time, Robert

the state of Ohio.

Baratta attempted to reconnect with the plaintiff and his father, but to no avail. In April 2008, the plaintiff Furthermore, the plaintiff argues that NCAA Bylaw

received a letter and an invoice from the Barattas for 12.3.2.1 is arbitrary and capricious because, it does not $113,750 for legal services. The invoice did not contain impact a player's amateur status but instead limits the any detail of services rendered or time entries. The player's ability to effectively negotiate a contract that plaintiff took the invoice to the OSU baseball team

the player or a player's parent could negotiate. In that coach, the OSU Athletic Compliance Office, and the

regard, the plaintiff contends that he was the victim of Boras Corporation. Subsequently, the plaintiff retained unethical attorneys who, under the laws of the state of attorney Michael Quiat to assist him with the matter.

Ohio, had a duty to protect him, but instead the defen-Quiat requested the time records supporting Baratta's dant punished him even though he bore no fault. Thus, invoice. In May, in response to the request, the Barattas according to the plaintiff, the defendant should vacate sent a letter dated February 8, 2006, and a contract the findings that were the foundation of the plaintiff's dated February 8, 2006, to Quiat. The letter listed six suspension and reinstate him immediately with no fur-items of assistance rendered by them on behalf of the ther punishment.

plaintiff. The plaintiff has argued that the contract is Finally, the plaintiff requests that this court also enter a fictitious and the assistance stated in it was in fact never declaratory

judgment

and

permanent

injunction

performed.

enjoining the defendant from enforcing NCAA Bylaw

On May 19, 2008, the previous attorneys mailed, faxed, 19.7. The plaintiff argues that the bylaw interferes with and e-mailed a letter to the defendant complaining

the Ohio Constitution's delegation of all judicial power about the plaintiff and reporting alleged violations by to the courts of this state and, consistent with that the plaintiff, i.e. the meeting at the Olivers' home that premise, exists solely to coerce or direct its agents and Tim Baratta had attended. As a result of the allegations, members to ignore court orders that are binding upon OSU and the defendant investigated the alleged viola-member institutions of the defendant.

tions in relationship to the plaintiff's amateur status. In Contrarily, the defendant argues that the plaintiff did May 2008, the plaintiff was

indefinitely suspended from not overcome the presumption that its bylaws and deci-playing baseball and was informed by OSU staff that he sions as a voluntary association are valid. As such, the Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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defendant contends that it has the right to manage its a protected interest in performing in Major League

affairs and apply its bylaws, within legal limits, without Baseball.

interference from the judiciary and since the plaintiff The defendant also proclaims that the balance of harm has failed to prove that its bylaws are illegal, arbitrary or militates against the entry of injunctive relief. The fraudulent, the defendant's internal affairs are pre-defendant contends that its bylaws are rationally

sumptively correct.

related to the NCAA constitution and preserving the

The defendant argues that the plaintiff must prove by amateur model of collegiate athletics and the bylaws, clear and convincing evidence that any decision made in particular Bylaw 12.3.2.1, help to retain a clear line by the defendant was arbitrary or capricious. The

of demarcation between collegiate and professional

defendant also argues that the plaintiff has failed to sports, which is a goal of its members. Consequently, sustain such proof. The decision made to reinstate

the defendant argues that striking Bylaw 19.7 leaves the plaintiff's eligibility, even though a penalty was the members without a remedy, and it admonishes

imposed, was based on admitted and objective evi-

the court that it should not strike a bylaw simply

dence obtained by the defendant and this court should because the court believes the members of the institu-not substitute its judgment for that of the defendant's.

tion should govern themselves in a different way.

Furthermore, the defendant argues that it is not in con-The defendant also argues that the public is not served tract with the plaintiff and that such a relationship by judicial intervention in the bylaws and decisions of a must be proven in order to support an entry of a per-private association and the public would not be served manent injunction. Likewise, the defendant maintains because such injunctive relief would violate the *United* that since there is no underlying contract claim, there *States Constitution's Commerce Clause* and First Amend-can be no independent basis for granting declaratory ment Right of Association.

relief. The defendant argues that it did not owe a con-Finally, the defendant asserts that injunctive relief is tractual duty of good faith and fair dealing since there inappropriate in the absence of a necessary and indis-can be no implied duty where there is no underlying

pensable party. The plaintiff failed to comply with this contract. The defendant supports its contention by stat-court's order (to add OSU as an indispensable party) ing that Oklahoma's law does not allow this court to in the December 12, 2008 judgment entry, and the

imply terms in a contract that the parties did not bar-defendant argues that the plaintiff's demand should be gain for, nor does it allow the court to disregard the denied.

plaintiff's violation.

[…]

The defendant also argues that the plaintiff waived any contractual benefits by his prior breaches, namely, vio-I. Choice of Law The first issue that must be addressed lation of NCAA bylaws and concealing his agent re-is regarding the choice-of-law issue. The defendant

lationship. In accordance with this argument, the

defendant declares that these prior breaches bar recov-argues that there is no dispute that Oklahoma law

ery of any equitable relief since the plaintiff has failed applies to the plaintiff's tort and contract claims

to come to court with clean hands. Similarly, the defen-because his demand is to play baseball at a university dant professes that even if the plaintiff had proven lia-in Oklahoma and the alleged wrongdoing was an inves-

bility on a contract claim, the remedy, according to the tigation and interview of the plaintiff in occuring Okla-defendant, is not immediate reinstatement or revisions homa. Even though the defendant asserts that there

to the "agent rule." The defendant states that what the can be no dispute about which state law is applicable, plaintiff is seeking is overreaching and the remedy

the court, before engaging in any choice-of-law analysis sought is dramatic and improper.

must determine whether such analysis is necessary.

The defendant further contends that it in no way tor-It is elementary that if the competing state would use the tiously interfered with any contract of the plaintiff.

same rule of law or would otherwise reach the same result Consequently, the evidence cannot support a finding

(i.e., Ohio or Oklahoma) there is no need to make a

by clear and convincing evidence that the defendant

choice-of-law determination because there is no conflict took actions against the plaintiff for the purpose of of law. Neither party has set forth an Oklahoma law, rule, inducing any party to breach a contractual obligation or statute that would be in contradiction to that of Ohio's to the plaintiff. The defendant asserts that the plaintiff law. Therefore, for the purpose of expediency, the court has failed to prove any harm which cannot be compen- shall determine this decision based on Ohio law. It

sated at law. As such, the defendant argues that a

should be noted that if there is a contradiction in a law student-athlete has no legally protected interest in paras it relates to the analysis of the issues in this case where ticipating in intercollegiate athletics nor does he have said contradiction would result in a different result if *(continued)*

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Chapter One

Oklahoma's law would be applied, the court will alert the plaintiff's financial-aid package. However, an action for parties to the same and the necessary procedure shall be breach of contract by a third party can be brought

taken to bring about a fair and just resolution based on when the parties to a contract intended to benefit the the choice-of-law analysis.

third party. *Construction Advancement Program v. A. Bent-The court notes that Ohio law would be appropriate in ley & Sons Co. (1975), 45 Ohio App.2d 13, 17, 340 N.E.2d this matter, either as it relates to a tort action or a con-849*. The Ohio Supreme Court, in *Hill v. Sonitrol of* tract action, because (1) the plaintiff is not an out-Southwestern Ohio (1988), 36 Ohio St.3d 36, 40, 521

of-state plaintiff but is a resident of Erie County and *N.E.2d 780*, addressed the difference between inciden-has appropriately filed his complaint in that county; tal and intended third-party beneficiaries when decid-

(2) the defendant, as an unincorporated business asso-ing whether a third party who lacks contractual privity ciation, has its principal place of business in Marion is entitled to enforce the terms of the contract. The County, Indiana, but is subject to Ohio's unincorpo-Ohio Supreme Court concluded that an intended

rated business association law since it has members in third-party beneficiary has enforceable rights under the state of Ohio; (3) the defendant does business

the contract only when the contracting parties

within the state of Ohio and is considered a citizen of expressly intend that a third party should benefit

the state; (4) the meeting that was the cause of the from the contract. *Hill*. There must be evidence that plaintiff's alleged violation (Bylaw 12.3.2.1) took place the promisor assumed a duty to the third party. *TRI-in Vermilion,*

Erie County, Ohio. Without reciting each NOVA Corp. v. Pilkington Bros., P.L.C. (1994), 70 Ohio and every factor as it relates to the choice-of-law analy-St.3d 271, 1994 Ohio 524, 638 N.E.2d 572. "The mere sis, the court would be quite comfortable in holding conferring of some benefit on the supposed beneficiary that Ohio's law would be applicable because it has the by the performance of a particular promise in a con-most significant relationship to the relevance of this tract is insufficient; rather, the performance of that litigation. See, *Morgan v. Biro Mfg. Co. (1984), 15 Ohio* promisee must also satisfy a duty owed by the promise *St.3d 339, 342, 15 Ohio B. 463, 474 N.E.2d 286.* Since to the beneficiary." Id., quoting *Norfolk & Western Co. v.*

such a determination is unnecessary to construct,

United States (C.A.6, 1980), 641 F.2d 1201, 1208.

because the court has no conflicting laws before it, It is unquestionable that the defendant and OSU's con-the analysis will proceed no further, and the court

tractual agreement is created to confer a benefit on the directs the parties' attention to the type of legal rela-student-athletes. The purpose of the NCAA, see Bylaws tionship, if any, that exist among the parties.

1.2 and 1.3.1, and the obligation of member institutions, *see* Obligations of Member Institutions, Article 1.3.2, II. Breach of Contract Since the inception of this case, forms a contract in which the defendant promises,

the defendant has argued that it has no contractual

among many things, to initiate, stimulate and improve relationship with the plaintiff. What is obvious is that intercollegiate athletic programs for student athletes, there is a contractual relationship between the defen-see Article 1.2 (a). OSU promises to enforce the defendant and its member institution, OSU. The defendant, dant's legislation as it relates to its members and "proas an unincorporated association consisting of public tect and enhance the physical and educational well-and private universities and colleges, adopts rules gov-being of student athletes." See Article 1.3.2 and 2.2.

erning member institutions' recruiting, admissions,

The constitution of the NCAA, the operating and the

academic eligibility, and financial-aid standards for stu-administrative bylaws (the NCAA Divisional Manual)

dent athletes. The basic purpose of the NCAA is stated the contract between the association and its member

in Bylaw 1.3.1:

institutions whereby student-athletes remain amateurs in an intercollegiate sport, where they are "motivated The competitive athletics programs of member

primarily by education and by the physical, mental and institutions are designed to be a vital part of the

social benefits to be derived." See Article 2.9. According educational system. A basic purpose of this Associ-to the principles of the agreement, "student participa-ation is to maintain intercollegiate athletics as an tion in intercollegiate athletics is an avocation, and integral part of the educational program and the

student-athletes should be protected from exploitation athlete as an integral part of the student body and, by professional and commercial enterprises." Id. Each by so doing, retain a clear line of demarcation

entity binds itself to follow the directives of the contrac-between intercollegiate athletics and professional

tual manual in order to promote an intercollegiate ama-sports.

teur athletic program for student-athletes.

The defendant has argued and this court agrees that

As a rudimentary matter, to enforce rights as an

there is no contract between the defendant and the

intended third-party beneficiary, this court is satisfied plaintiff by way of the national letter of intent or the that the plaintiff has established by way of the

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contractual agreements within the manual that there is with the plaintiff honestly or reasonably and the defen-an underlying enforceable contract and there are

dant has breached the contract.

duties owed by the promisee as well as the promisor

The court continues this analysis by examining the plain-to the plaintiff. The plaintiff argues that the defendant tiff's argument that he retained lawyers to represent him breached its duty of good faith and fair dealing to the and that those lawyers are subject to the exclusive regula-plaintiff, thereby placing him in a tenuous position tion of the Ohio Supreme Court. Thus the defendant,

because his ignorance as to what was required became according to the plaintiff, had no authority to promul-not only a menace but also an obstruction to the plain-gate Bylaw 12.3.2.1. The plaintiff asserts that the bylaw tiff's eligibility to compete as a student-athlete for OSU.

promulgated by the defendant prevented his lawyers

To the extent that the plaintiff's claim of arbitrary and from competently representing him. Therefore the

capricious action asserts a violation of the duty of good plaintiff argues, the bylaw is void because it is against pub-faith and fair dealing that is implied in the contractual lic policy. Bylaw 12.3.2.1 states:

relationship between the NCAA and its members, his

A lawyer may not be present during discussions of

position as a third-party beneficiary of that contractual a contract offer with a professional organization or relationship affords him standing to pursue his claims.

have any direct contact (in person, by telephone

Previously, Ohio law held that not every contract impli-or by mail) with a professional sports organization

cates an implied obligation to use good faith and fair on behalf of the individual. A lawyer's presence

dealing. There had to be a distinction between written during such discussions is considered representa-terms and implied promises within a contract. Without tion by an agent.

explaining the history of the distinctions, the Sixth Appellate District of Ohio, in whose jurisdiction this In contrast, the defendant argues that Bylaw 12.3.2.1

court lies, holds that the parties to a contract "are helps to retain a clear line of demarcation between col-bound toward one another by standards of good faith

legiate and professional sports that is a fundamental and fair-dealing." Ohio law now supports that good

goal of the member institutions. Furthermore, accord-faith is part of a contract claim. Furthermore, the

ing to the defendant, it preserves an amateur model of court in *Brown v. Otto C. Epp Mem. Hosp.* determined collegiate athletics, and the defendant contends that that "good faith is required of every contract," and this court should not intervene since the bylaw is the this court is in agreement with that premise. Thus,

will of the NCAA membership.

this court holds that a party can be found to have

It is important to fully understand the fact pattern of breached its contract if it fails to act in good faith.

what transpired and what caused the plaintiff to be pro-III. Good Faith and Fair Dealing Even though the obli-nounced ineligible. At the end of the summer of 2006, representatives from the Minnesota Twins met with the gation of good faith exists in a contractual relationship, plaintiff and his father at the Oliver home. According this is not an invitation for this court to rewrite the bene-to the plaintiff's testimony, the plaintiff's father con-fit bestowed on the parties. The court agrees with the tacted the Barattas to inform them of the meeting.

defendant that this is not a case about whether the

Tim Baratta told the plaintiff's father that he thought court agrees or disagrees with the bylaws in question. Nei-he should be there. While all the parties were at the ther is it a case about how the defendant voted at either Oliver home, the Twins offered the plaintiff a

the 1975 or 2002 membership conventions. However,

$390,000 contract, which he rejected after seeking the since this court has determined that the agreement

advice of his father. However, Tim Baratta's presence between the defendants has an implied covenant of

at the Oliver home, even though no testimony ever

good faith and fair dealing as it relates to the plaintiff, portrayed that Mr. Baratta was involved in any of the there must be in fact honesty and reasonableness in the conversations between the plaintiff and the Twin's rep- enforcement of the contract. Therefore, the defendant, resentative, just Baratta's presence (the presence of an and for that matter OSU, was required to deal honestly attorney/advisor who advised the plaintiff that he would and reasonably with the plaintiff as a third-party benefi-keep his amateurism status safe) in that room, violated ciary regarding their contractual relationship. Surely Bylaw 12.3.2.1 and stripped the plaintiff of his eligibility each party is entitled to the benefit of its bargain. With to play baseball through the entire season.

that stated, if this court determines that Bylaw 12.3.2.1 is Let us also remember that the rules and testimony are void because it is against the public policy of Ohio or clear that amateurism is the bedrock and founding

because it is arbitrary and capricious, and Bylaw 19.7

principle of the NCAA. And so, the court has listened interferes with the delegation of judicial power to the to and read much about Bylaw Article 12, set forth

courts of this state, then the defendant has not dealt in the NCAA division manual, which is entitled

(continued)

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Chapter One

“Amateurism” and sets forth the rules governing the

contract and whose father testified to the same, was a protection of a student-athlete’s amateur status that professional? According to Bylaw 12.3.2.1, the no-agent must be maintained in order for an athlete to partici-rule, he was. As such the following issues must be

pate in an intercollegiate sports program.

resolved: Is the no-agent rule against the public policy Bylaw 12.3, entitled “Use of Agents,” states the general of Ohio? Is it arbitrary? Is it capricious?

principle that a student-athlete is ineligible to partici-The plaintiff testified that he hired the Barattas in part pate in intercollegiate sports if he or she agrees to be because they were attorneys and they promised that

represented by an agent. Hence, the “no agent rule” is they would protect his amateur status. From the testi-as follows:

mony given at trial, the court is aware that the defen-An individual shall be ineligible for participation

dant permits student-athletes and their parents to

in an intercollegiate sport if He or she ever agreed negotiate contracts while in the presence of a sports (orally or in writing) to be represented by an agent representative but to have an attorney present in the for The purpose of marketing his or her athletics

room would in some way smear the line of demarcation ability or reputation in that sport. Further, an

between what is amateurism and what is professional-

agency contract not specifically limited in writing

ism. An attorney's duty, in Ohio, in Oklahoma, in all 50

to a sport or Particular sports shall be deemed

states, is to represent his client competently. Perhaps applicable to all sports, and the individual shall

another term is used, other than that of "competently"

Be ineligible to participate in any sport.

within each state's professional code of conduct, but it all boils down to the attorney being skilled and profi-NCAA Bylaw 12.3.2.1.

cient and simply having the know-how to represent the However, the crux of this case falls under Bylaw 12.3.2, best interests of his client.

which carves out an exception to the no agent rule by For a student-athlete to be permitted to have an attor-allowing a student-athlete to retain a lawyer (not even ney and then to tell that student-athlete that his attor-the defendant can circumvent an individual's right to ney cannot be present during the discussion of an offer counsel). Yet, the exception to the rule, i.e., NCAA from a professional organization is akin to a patient Bylaw 12.3.2 which allows legal counsel for student-hiring a doctor, but the doctor is told by the hospital athletes attempts to limit an attorney's role as to that board and the insurance company that he cannot be

representation and, in effect, such as in the case here, present when the patient meets with a surgeon because puts the onus on the student-athlete. See NCAA Bylaw the conference may improve his patient's decision-12.3.2.1.

making power. Bylaw 12.3.2.1 is unreliable (capricious) The status of the no-agent rule, as firmly pointed out in and illogical (arbitrary) and indeed stifles what attor-the direct testimony of Kevin Lennon, vice president of neys are trained and retained to do.

membership services, is a prohibition against agents, The process advanced by the NCAA hinders represen-not lawyers. Therein lies the problem.

tation by legal counsel, creating an atmosphere

It is impossible to allow student-athletes to hire lawyers fraught with ethical dilemmas and pitfalls that an

and attempt to control what that lawyer does for his attorney consulting a student-athlete must encounter.

client by Bylaws 12.3.2 or 12.3.2.1. These rules attempt Will the attorney be able to advance what is best for to say to the student-athlete that he or she can consult the client or will a neutral party, the NCAA, tie his with an attorney but that the attorney cannot negotiate hands? What harm could possibly befall the student-a contract with a professional sport's team. This surely athlete if such a rule were not found? What occurs if does not retain a clear line of demarcation between

the parents of a student are attorneys or for that mat-amateurism and professionalism. The student-athlete

ter sport agents? What would have happened if Tim

will never know what his attorney is doing for him or Baratta had been in the kitchen or outside or on the her, and quite frankly neither will the defendant. The patio instead of in the same room as his client when evidence is very clear that this rule is impossible to the offer from the Minnesota Twins was made to the

enforce and as a result is being enforced selectively.

plaintiff?

Further, as in this case, it allows for exploitation of the This court appreciates that a fundamental goal of the student-athlete "by professional and commercial enter-member institutions and the defendant is to preserve prises," in contravention of the positive intentions of the clear line of demarcation between amateurism

the defendant.

and professionalism. However, to suggest that Bylaw

Was Barratta's presence in that room a clear indication 12.3.2.1 accomplishes that purpose by instructing a

that the plaintiff, a teenager who had admitted at trial student-athlete that his attorney cannot do what he or that he was in no position to negotiate a professional she was hired to do is simply illogical. An example of a Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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clear line of demarcation between amateurism and

ineligible. Just because member institutions agree to a professionalism is indeed drawn within the bylaws and rule or bylaw does not mean that the bylaw is sacro-is done so in Bylaw 12.02.3:

sanct or that it is not arbitrary or capricious.

Throughout the history of this country many institu-

A professional athlete is one who receives any kind

tions and entities have agreed to bylaws that were

of payment, directly or indirectly, for athletics par-against the notion of a fair judicial process. The regula-ticipation except as permitted by the governing

tions must be fair to the people to whom they were

legislation of the Association.

meant to serve, especially when it comes to the right If the membership and the NCAA decide that Bylaw

of an individual to petition the court system. Courts 12.02.3 does not accomplish that purpose, so be it.

of appeal have never been without remedies for cases But no entity, other than that one designated by the that they overturn as it relates to the parties that are state, can dictate to an attorney where, what, how, or involved. Student-athletes must have their opportunity when he should represent his client. With all due

to access the court system without fear of punitive

respect, surely that decision should not be determined actions against themselves or the institutions and

by the NCAA and its member institutions, no matter

teams of which they belong. The old adage that you

what the defendant claims is the purpose of the rule.

can put lipstick on a pig, but it is still a pig, is quite If the defendant intends to deal with this athlete or any relevant here. The defendant may entitle Bylaw 19.7

athlete in good faith, the student-athlete should have

“Restitution” but it is still punitive in its achievement, the opportunity to have the tools present (in this case and it fosters a direct attack on the constitutional right an attorney) that would allow him to make a wise deci-of access to courts.

sion without automatically being deemed a profes-

Bylaw 19.7 takes the rule of law as governed by the

sional, especially when such contractual negotiations courts of this nation and gives it to an unincorporated can be overwhelming even to those who are skilled in business association. The bylaw is overreaching. For their implementation.

example, if a court grants a restraining order that per-IV. Arbitrary and Capricious With that stated, the

mits a student-athlete the right to play, the institution court now addresses the issue of whether

will find itself in a real dilemma. Does the institution Bylaw 19.7 is arbitrary and capricious. Bylaw 19.7 states: allow the student-athlete to play as directed by the court's ruling and in so doing face great harm should If a student athlete who is ineligible under the

the decision be reversed on appeal? Alternatively, does terms of the constitution, bylaws or other legisla-the institution, in fear of Bylaw 19.7, decide that it is tion of the Association is permitted to participate

safer to disregard the court order and not allow the in intercollegiate competition contrary to such

student-athlete to play, thereby finding itself in con-NCAA legislation but in accordance with the

tempt of court? Such a bylaw is governed by no fixed terms of a court restraining order or injunction

standard except that which is self-serving for the defen-operative against the institution attended by such

dant. To that extent, it is arbitrary and indeed a viola-student-athlete or against the Association, or both, tion of the covenant of good faith and fair dealing

and said injunction is voluntarily vacated, stayed or implicit in its contract with the plaintiff, as the third-reversed or it is finally determined by the courts

party beneficiary.

that injunctive relief is not or was not justified,

V. Tortious Interference with Contract To prevail on a the Board of Directors may take any one or more

of the following actions against such institution in claim of tortious interference with contract, the plain-the interest of restitution and fairness to compet-

tiff must prove (1) the existence of a contract, (2) the ing institutions: (a) through (e).

wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's

Following the above-mentioned paragraph, subsections breach, (4) lack of justification, and (5) resulting (a) through (e) list penalties that impinge on institu-damages.

tions, student-athletes, or team records for following the dictates of a court order that may later be over-The plaintiff argues that the defendant tortiously inter-turned by a higher court. The plaintiff would ask:

fered with his contracts by coercing OSU to suspend

"How could any entity punish an individual for acceshim, by illegally obtaining attorney-client privilege sing their right to Court?" The defendant argues that information from the Barattas, and by circumventing

the member institutions agreed that it was improper to the plaintiff's attorney, Michael Quiat.

allow an institution to reap the benefits of playing a The defendant argues that the plaintiff has failed to student-athlete who was finally adjudicated to be

produce any contract between himself and Quiat.

(continued)

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Therefore, the terms of their contract were unknown

attorney, he has no clients and he does not carry mal-to any defendant employee at the time of the investiga-practice insurance, nor is he apart of the defendant's tion and at the time of trial. The defendant asserts that General Counsel office.

since knowledge of the contract is a requisite element Furthermore, Shukie asserts that he had knowledge

of tortious interference with contract, the plaintiff's that Quiat represented the plaintiff only in connection claim must fail. Furthermore, the defendant also con-with a fee dispute with the Barattas and in that regard tends that even if it did interfere with the plaintiff's he had no knowledge that he was to represent the

relationship with Quiat, the remedy would not be rein-plaintiff in the matter of the investigation. *Prof.Cond*.

statement of the plaintiff's eligibility or removal of the *R. 4.2* is unambiguous that "in representing a client, a bylaws from the defendant's manual.

lawyer shall not communicate *about the subject of the* The plaintiff further argues that certain of the defen-representation with a person the lawyer knows to be dant's employees (including John Shukie) violated

represented by another lawyer in the matter…." At

rules of professional responsibility. This claim is feck-trial, no evidence was produced contrary to that rule less because Shukie was not representing a client and or the defendant's assertion. Therefore, the court

even if he was subject to the canons of professional rules that the interference-of-contract claim involving responsibility, he satisfied any obligation thereto.

the contract between the plaintiff and his attorney, A voluntary association, such as the NCAA, has the right Quiat, by Shukie, must indeed fail.

to manage its affairs and apply its bylaws. No court, including this one, has the right to reverse the defen-Attorney-Client Privilege Violations

dant's policies or procedures unless they are not within The attorney-client privilege applies to communica-legal limits or are based on fraud, arbitrariness, or collu-tions made by clients to their attorneys with the intent sion. Here the plaintiff is asserting that the defendant that the communications remain confidential. Only the went beyond its legal limits and interfered with the client can waive the attorney-client privilege. The

plaintiff's contractual relationship with his attorney.

moment confidence ceases, the privilege ceases; this First, let us consider the plaintiff's encounter with John much is universally conceded. One of the circum-Shukie. Shukie is an attorney and is employed by the stances by

which it is commonly apparent that the com-defendant as an investigator. The plaintiff's argument munication is not confidential is the presence of a third is that Shukie violated the rules of professional conduct person, not the agent of either client or attorney. If the because Shukie spoke with the plaintiff without getting client chooses to make or receive his communication in his attorney's permission, in violation of *Prof.Cond.R.*

the presence of third persons, it ceases to be confiden-4.2.

tial and is not entitled to the protection afforded by the attorney-client privilege. *See*, 28 Ruling Case Law, 561, It is true that under a contractual analysis, the attorney-562, Section 151.

client relationship can be formed by either an express or implied contract. An implied contract occurs when The plaintiff alleges that the defendant knew or should

"(1) a person seeks advice or assistance from an attor-have known that the information that it received from ney, (2) the advice or assistance sought pertains to the Barattas was attorney-client information and that maters within the attorney's professional competence, any further solicitation of such was totally inappropri-and (3) the attorney expressly or impliedly agrees to ate, illegally obtained, and used to initiate an investiga-give or actually gives the desired advice or assistance."

tion of the plaintiff that would not have otherwise

Here, neither an implied nor an express contract exists occurred. Furthermore, the defendant knew or should

between Shukie and the defendant that forms an

have known that an attorney may not publicize a fee

attorney-client relationship. An attorney-client relation-dispute against a client and that such action is prohib-ship is essentially a contract to perform services. The ited by Ohio, Oklahoma, New Jersey, and New York's

determination of whether an attorney-client relationrules of professional conduct.

ship is created turns largely on the reasonable belief *Prof.Cond.R. 4.4* deals with Respect for Rights of Third of the prospective client. Here, the defendant's posi-Persons and states in part that a lawyer shall not "use tion, as well as Shukie's position, is that Shukie is methods of obtaining evidence that violate the legal employed by the defendant to perform as an investiga-rights of such a person." Robert Baratta provided a let-tor, not as counsel. According to the testimony of Kevin ter dated May 19, 2008, that was a chronology of events Lennon, Jennifer Henderson, and Rachel Newman-that involved the plaintiff but that also spoke of conver-Baker, Shukie was not hired to provide legal services sations that he and the plaintiff had in February and for the association, he did not nor does he now repre-March of 2008. He explicitly states that his law firm sent the NCAA or any institution or person as an

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an attorney-client relationship, prior to and during the academic year with the university. The defendant

2006 Major League Baseball amateur draft. Here we

knew of the contract with the plaintiff and, in addition have an attorney, (*See* letterhead of letter sent to the to its own liability, the defendant is liable for any torti-Defendant-Exhibit 6) Robert Baratta, explicitly telling uous conduct committed by OSU toward the the plain-the defendant (via Rachel Newman Baker and Steve

tiff. To be precise, since OSU was acting as the

Mallonee) the exact conversations that he had with his defendant's agent in its enforcement of its Division I former client (the plaintiff) that occurred at least two Manual, which governs student-athletes, the defendant months prior to the writing of the letter. Baratta specifi-is liable for any tortious interference of the contract.

cally states that he spoke with the plaintiff and quoted Keep in mind that all the witnesses of the defendant the plaintiff in the letter. He also made reference in the testified that they were acting under the defendant's same paragraph of the letter that the conversation with rules and regulations and that the investigation of the the plaintiff was done without the father's presence, stat-plaintiff, as well as the resulting finding of ineligibility, ing that he informed the plaintiff's father in separate was consummated under their rules.

conversations of certain matters. This only bolsters the After this court has engaged in a balancing process that supposition that the conversation between the Barattas was designed to weigh the equities between the parties, and the plaintiff was not destroyed by the presence of the court determines by clear and convincing evidence any third party. Such a scenario leads this court to sur-that the plaintiff would suffer immediate and irrepara-mise that this was indeed a conversation that was under-ble injury, loss, or damage if injunctive relief is not stood to be confidential between his client (the plaintiff) granted. If an injunction is not granted, the plaintiff and himself (Robert Baratta) and that such conversation would suffer loss of his college baseball experience, was indeed privileged.

impairment or loss of his future baseball professional That information assisted in the investigation against career, loss in being available for the upcoming draft the the plaintiff. These are the same attorneys who

because he is less likely to be seen, and ongoing dam-should have advised the plaintiff that they would not age to the plaintiff's reputation and baseball career.

be appearing at his home while the representative

In comparison, the defendant's witnesses stated that if of the Minnesota Twins was there, but who instead, at relief were granted, it would be confusing as to which their request, came to the Oliver home. Concerning

institutions would have to follow this court's ruling.

the action of the defendant, as it relates to tortious Would it be Ohio members, Oklahoma members, all

interference, the court finds that the plaintiff has suc-institutions? However, since this court has personam cessfully shaped the elements for a prima-facie case.

jurisdiction, this argument is not as persuasive as the Here we have a contractual relationship between the

plaintiff's and the scales of justice have tilted in the plaintiff and the defendant's agent. The plaintiff had plaintiff's favor.

signed his letter of intent with the college, received Judgment accordingly.

his financial aid package, and was set to begin his

Jeremy Bloom and the No Endorsements Rule

The NCAA has a rule that a student-athlete who wishes to maintain their eligibility in any sport cannot promote any commercial product. Jeremy Bloom, a football player for the University of Colorado and also a world-class skier, contended that financial endorsements were required in order to afford to stay competitive in freestyle moguls skiing. NCAA Bylaw 12.5.2.1, *Advertising and Promotions after Becoming a Student-Athlete* states:

Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

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The NCAA declared Bloom permanently ineligible after he sued them in state court to obtain an injunction on this rule. (For details, see *Bloom v. NCAA* at the end of this chapter.)

Bloom quit football, kept his endorsements and pursued the Olympics. Bloom competed for the USA in the 2006 Turin Olympics in the moguls, and later became a 5th round pick for the Philadelphia Eagles in the 2006 NFL draft.

Many criticize this no-endorsements rule. It seems especially arbitrary in light of the fact that around the same time, Notre Dame football player Tom Zbikowski, who was also a talented competitive boxer, was allowed to earn prize money for a boxing tournament in held in Madison Square Garden (**MSG**). The NCAA's position was that Zbikowski's participation in the MSG event did not constitute the sale or promotion of a commercial product

or service. Students should recognize that the NCAA's no-endorsements rule is not sport specific. It applies to all student-athletes with eligibility in any sport.

- **CASE 2**

Jeremy Bloom, Plaintiff-Appellant, v. National Collegiate Athletic Association, an unincorporated association; and Regents of the University of Colorado, a body corporate, Defendants-Appellees

Court of Appeals of Colorado, Division

Bloom became concerned that his endorsements and

entertainment activities might interfere with his eligibil-Five May 6, 2004, Decided

ity to compete in intercollegiate football. On Bloom's **OPINION BY DAILEY**

behalf, CU first requested waivers of NCAA rules

restricting student-athlete endorsement and media

In this dispute concerning eligibility to play college activities and, then, a favorable interpretation of the football, plaintiff, Jeremy Bloom, appeals the trial NCAA rule restricting media activities.

court's order denying his request for a preliminary

injunction against defendants, the National Collegiate The NCAA denied CU's requests, and Bloom discontin-Athletic Association (NCAA) and the University of Colued his endorsement, modeling, and media activities to orado (CU). We affirm.

play football for CU during the 2002 fall season. However, Bloom instituted this action against the NCAA for I. Background The NCAA is a voluntary unincorpo-declaratory and injunctive relief, asserting that his rated association that regulates intercollegiate amateur endorsement, modeling,

and media activities were nec-athletics among its more than 1200 member colleges

essary to support his professional skiing career, some-and universities. Its rules are established by representa-thing which the NCAA rules permitted.

tives of member institutions and are carried out by its In his complaint, Bloom alleged: (1) as a third-party ben-Council. Among other things, it maintains rules of

eficiary of the contract between the NCAA and its mem-eligibility for student participation in intercollegiate bers, he was entitled to enforce NCAA bylaws permitting athletic events.

him to engage in and receive remuneration from a pro-Bloom, a high school football and track star, was recruited fessional sport different from his amateur sport; (2) as to play football at CU. Before enrolling there, however, he applied to the facts of this case, the NCAA's restrictions competed in Olympic and professional World Cup skiing on endorsements and media appearances were arbitrary events, becoming the World Cup champion in freestyle and capricious; and (3) those restrictions constituted moguls. During the Olympics, Bloom appeared on

improper and unconscionable restraints of trade.

MTV, and thereafter was offered various paid entertain-For these reasons, Bloom requested that the NCAA

ment opportunities, including a chance to host a show on restrictions be declared inapplicable, and that the

Nickelodeon. Bloom also agreed to endorse commer-

NCAA and CU be enjoined from applying them, to

cially certain ski equipment, and he contracted to model activities originating prior to his enrollment at CU or clothing for Tommy Hilfiger.

wholly unrelated to his prowess as a football player.

MSG

Madison Square Garden

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The trial court ordered CU joined as an indispensable With respect to a claim of arbitrary and capricious action, party in the case, and CU aligned with the NCAA as an the Kentucky Supreme Court observed that "relief from involuntary defendant. After an evidentiary hearing, our judicial system should be available if voluntary athletic the trial court determined that, although Bloom was a associations act arbitrarily and capriciously toward third-party beneficiary of NCAA bylaws, he was not enti-student-athletes." *NCAA v. Lasege, 53 S.W.3d 77, 83*

tled to preliminary injunctive relief under the six-part *(Ky. 2001)*. The basis upon which the court made that test of *Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo*.

observation, however, is not altogether clear.

1982). The trial court found that Bloom had satisfied There is some suggestion in *Lasege* that judicial review three parts of the test: (1) there is a danger of real, was justified because the NCAA occupied the role of a immediate, and irreparable injury which may be pre-quasi-state actor with

respect to individual studentvented by injunctive relief; (2) no plain, speedy, and athletes. *See NCAA v. Lasege, supra, 53 S.W.3d at 83*

adequate remedy is available at law; and (3) the injunc-n.9 (analogizing the NCAA and a state high school tion would preserve the status quo pending trial on the athletic association). However, in an analogous cir-merits. However, the trial court found that Bloom had cumstance, the United States Supreme Court connot satisfied the other parts of the test: (4) there is a cluded that the NCAA is not a state actor and that a reasonable probability of success on the merits; (5) state university's adherence to NCAA rules does not

granting a preliminary injunction would not disserve implicate the "state action" necessary to trigger a

the public interest; and (6) the balance of equities civil rights claim. *See NCAA v. Tarkanian, 488 U.S.*

favors the injunction.

179, 195, 109 S. Ct. 454, 463-64, 102 L. Ed. 2d 469

Bloom appeals the trial court's ruling under *C.A.R. 1(a) (1988)* (concerning coach, not student-athlete); *see (3).*

also Matthews v. NCAA, 79 F. Supp. 2d 1199, 1207

(E.D. Wash. 1999)(NCAA not a state actor, for pur-

[…]

poses of assessing student-athlete's due process claim contesting NCAA's eligibility determination).

IV. Standing We reject the NCAA's assertion that

Bloom lacked standing to pursue claims for breach of Courts are reluctant to intervene, except on the most limited grounds, in the internal affairs of

voluntary contract or arbitrary and capricious action on the part associations. Even then, it would appear that a plaintiff of the NCAA.

must ordinarily allege an invasion of some type of civil A party has standing to seek relief when he or she has or property right to have standing.

suffered actual injury to a legally protected interest.

Here, Bloom is not a member of the NCAA, and he

A person not a party to an express contract may bring does not have a constitutional right to engage in ama-an action on the contract if the parties to the agree-teur intercollegiate athletics at CU. Nor does he assert ment intended to benefit the nonparty, provided that any property interest in playing football for CU.

the benefit claimed is a direct and not merely inci-

However, to the extent Bloom's claim of arbitrary and dental benefit of the contract. While the intent to

capricious action asserts a violation of the duty of good benefit the nonparty need not be expressly recited in faith and fair dealing that is implied in the contractual the contract, the intent must be apparent from the

relationship between the NCAA and its members, his

terms of the agreement, the surrounding circum-

position as a third-party beneficiary of that contractual stances, or both.

relationship affords him standing to pursue this claim.

Here, the trial court found, and we agree, that the

See O'Reilly v. Physicians Mut. Ins. Co., 992 P.2d 644, 646

NCAA's constitution, bylaws, and regulations evidence *(Colo. App. 1999)* (implied duty of good faith and fair a clear intent to benefit student-athletes.

And because dealing requires "parties to the agreement to perform each student-athlete's eligibility to compete is deter-their contractual obligations in good faith and in a reamined by the NCAA, we conclude that Bloom had

sonable manner"); *see also Hall v. NCAA, supra, 985 F.*

standing in a preliminary injunction hearing to contest *Supp. at 784* (implied duty of good faith and fair deal-the meaning or applicability of NCAA eligibility restric-ing "requires that a party vested with contractual discre-tions. *See Hall v. NCAA, 985 F. Supp. 782, 796-97 (N.D.*

tion exercise that discretion reasonably, not arbitrarily *Ill. 1997)*(given importance of NCAA's function to ben-or capriciously"); *Dayan v. McDonald's Corp., 125 Ill.*

efit student-athletes, and NCAA's role in determining *App. 3d 972, 991, 466 N.E.2d 958, 972, 81 Ill. Dec. 156*

eligibility of student-athletes, court assumed student-

(1984)(implied duty to deal fairly and in good faith athlete was likely to succeed in proving third-party ben-requires party vested with discretion to act reasonably eficiary standing vis-a-vis the contract between the and not "arbitrarily, capriciously, or in a manner in-NCAA and its members); *see also NCAA v. Brinkworth,* consistent with the reasonable expectations of the

680 So. 2d 1081, 1083 (Fla. Dist. Ct. App. 1996).

parties").

(continued)

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Chapter One

In sum, we conclude that Bloom has third-party benefi-athletics if the individual: (a) Accepts any remuneration ciary standing to pursue what in essence are two claims for or permits the use of his or her name or picture to for violation of his contractual rights.

advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or V. Probability of Success Bloom contends that the trial (b) Receives remuneration for endorsing a commercial court erred in assessing the probability of success on his product or service through the individual's use of such contract claims. We disagree.

product or service.

Initially, we note that, as a third-party beneficiary, Additionally, while NCAA Bylaw 12.5.1.3 permits a

Bloom has rights no greater than those of the parties student-athlete to continue to receive remuneration

to the contract itself, here, the NCAA and its member for activity initiated prior to enrollment in which his institutions. *See United Steelworkers v. Rawson, 495 U.S.*

or her name or picture is used, this remuneration is *362, 363, 110 S. Ct. 1904, 1906, 109 L. Ed. 2d 362*

only allowed, if, as pertinent here, "the individual *(1990).*

became involved in such activities for reasons independent of athletics ability; … no reference is made in **A. INTERPRETATION OF NCAA**

these activities to the individual's name or involvement In interpreting a contract, we seek to give effect to the in intercollegiate athletics; [and] … the individual does intent and the reasonable expectations of the parties.

not endorse the commercial product."

To determine the intent and expectations of the par-

Further, NCAA Bylaw 12.4.1.1 prohibits a student-

ties, we view the contract in its entirety, not in isolated athlete from receiving "any remuneration for value or portions, and we give words and phrases their plain

utility that the student-athlete may have for the

meaning according to common usage.

employer because of the publicity, reputation, fame

If its meaning is clear and unambiguous, the contract is or personal following that he or she has obtained

enforced as written. If, however, the contract is suscep-because of athletics ability."

tible of more than one reasonable interpretation, it is Unlike other NCAA bylaws, the endorsements and

ambiguous, and its meaning must be determined as an

media appearance bylaws do not contain any sport-

issue of fact. In resolving an ambiguity, a court will fol-specific qualifiers. *See, e.g.* , NCAA Bylaw 12.3.1 (ineligi-low the construction placed upon it by the parties

bility of student-athlete to compete in intercollegiate themselves before the controversy arose.

sport based on agreement with agent to market ath-

The interpretation of a contract and the determination lete's athletic ability or reputation "in that sport").

whether it is ambiguous are questions of law subject to In our view, when read together, the NCAA bylaws

de novo review by this court.

express a clear and unambiguous intent to prohibit

Bloom relies on NCAA Bylaw 12.1.2, which states that student-athletes from engaging in endorsements and

"[a] professional athlete in one sport may represent a paid media appearances, without regard to: (1) when

member institution in a different sport." He asserts the opportunity for such activities originated; (2)

that, because a professional is one who "gets paid" for whether the opportunity arose or exists for reasons

a sport, a student-athlete is entitled to earn whatever unrelated to participation in an amateur sport; and

income is customary for his or her professional

(3) whether income derived from the opportunity is

sport, which, in the case of professional skiers, pri-customary for any particular professional sport.

marily comes from endorsements and paid media

The clear import of the bylaws is that, although

opportunities.

student-athletes have the right to be professional ath-We recognize that, like many others involved in indiletes, they do not have the right to simultaneously

vidual professional sports such as golf, tennis, and engage in endorsement or paid media activity and

boxing, professional skiers obtain much of their

maintain their eligibility to participate in amateur com-income from sponsors. We note, however, that none

petition. And we may not disregard the clear meaning of the NCAA's bylaws mentions, much less explicitly

of the bylaws simply because they may disproportion-

establishes, a right to receive "customary income" for ately affect those who participate in individual profes-a sport.

sional sports.

To the contrary, the NCAA bylaws prohibit every

Further, the record contains ample evidence support-

student-athlete from receiving money for advertise-

ing the trial court's conclusion that this interpretation ments and endorsements. In this regard, NCAA Bylaw

is consistent with both the NCAA's and its member

12.5.2.1 states:

institutions' construction of the bylaws. An NCAA offi-Subsequent to becoming a student-athlete, an individual cial testified that both the endorsement and media

shall not be eligible for participation in intercollegiate appearance provisions have been consistently applied Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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and interpreted in a nonsport-specific manner. Indeed, According to NCAA officials: (1) endorsements invoke another NCAA official related that association mem-concerns about "the commercial exploitation of student-bers had resisted efforts to change the endorsement

athletes and the promotion of commercial products"; and rule to be sport-specific. Although the evidence is con-

(2) it is not possible to distinguish the precise capacity in flicting, the record supports the trial court's conclusion which endorsements are made. A CU official related that that, from the beginning, CU understood that the

generally, the endorsement rule prevents students from endorsement and media activity rules were nonsport-becoming billboards for commercialism, and in Bloom's specific in scope.

case, there would "be no way to tell whether he is receiv-Thus, even if the bylaws were viewed as ambiguous, the ing pay commensurate with his …

football ability or skiing record supports the trial court's conclusion that the ability."

bylaws would ultimately be interpreted in accordance In this respect, the trial court observed:

with the NCAA's and its member institutions' construc-In an honest world where there is no attempt to avoid tion of those bylaws.

an ideal, there wouldn't be an impact on amateurism if Mr. Bloom was allowed to be compensated as is custom-B. APPLICATION OF BYLAWS TO BLOOM

ary for professional skiers; however, it's naive to think The United States Supreme Court has recognized the

that we live in such a world. There are those who would NCAA as "the guardian of an important American tra-be less than honest and seek profit for profit's sake. …

dition," namely, amateurism in intercollegiate athletics.

If Mr. Bloom was allowed to receive the [endorsement]

See NCAA v. Bd. of Regents, 468 U.S. 85, 101, 104 S. Ct.

income that is customary for professional skiers, it is *2948, 2960, 82 L. Ed. 2d 70 (1984).*

not difficult for me to imagine that some in other pro-Under that tradition, "college sports provided an impor-fessional sports would decide that in addition to direct tant opportunity for teaching people about character, monetary compensation … endorsements or promo-motivation, endurance, loyalty, and the attainment of tion of goods would become customary.

one's personal best—all qualities of great value in citizens.

Similar concerns underlie the NCAA's prohibition on

In this sense, competitive athletics were viewed as an paid entertainment activity. Paid entertainment activity extracurricular activity, justified by the university as part may impinge upon the amateur ideal if the opportunity of its ideal objective of educating the whole person."

were obtained or advanced because of the student's

James J. Duderstadt, *Intercollegiate Athletics and the American* athletic ability or prestige, even though that activity *University* 70 (Univ. Mich. Press 2003).

may further the education of student-athletes such as The NCAA's "Principle of Amateurism" states:

Bloom, a communications major. As the trial court

noted, there are "various shades of gray within which Student-athletes shall be amateurs in an intercollegiate such events could fall." And, as should be evident, the sport, and their participation should be motivated

NCAA does not prohibit *unpaid* internships, extern-primarily by education and by the physical, mental

ships, or other educational opportunities in the enter-and social benefits to be derived. Student participation tainment field.

in intercollegiate athletics is an avocation, and

student-athletes should be protected from exploitation In this case, Bloom presented evidence that some of his by professional and commercial enterprises.

acting opportunities arose not as a result of his athletic ability but because of his good looks and on-camera

NCAA Const. art. 2.9.

presence. However, the record contains evidence that The NCAA's purpose, in this regard, is not only "to

Bloom's agent and the Tommy Hilfiger company mar-

maintain intercollegiate athletics as an integral part of keted Bloom as a talented multi-sport athlete, and a the educational program," but also to "retain a clear representative from a talent agency intimated that

line of demarcation between intercollegiate athletics Bloom's reputation as an athlete would be advanta-and professional sports." NCAA Const. art. 1, § 1.3.1.

geous in obtaining auditions for various entertainment Here, the trial court found that application of the

opportunities. Further, the NCAA indicated, when

endorsement and media appearance rules in Bloom's

asked to interpret its rules, that it was unable, due case was rationally related to the legitimate purpose of to insufficient information, to determine which of

retaining the "clear line of demarcation between inter-Bloom's requested media activities were, in fact, unre-collegiate athletics and professional sports."

lated to his athletic ability or prestige.

The trial court noted that salaries and bonuses are an Under these circumstances, we perceive no abuse of

acceptable means for attaining income from professional the trial court's discretion in failing to fault the NCAA sports, but endorsement income is not acceptable if a for refusing to waive its rules, as requested by CU, to student-athlete wishes to preserve amateur eligibility.

permit Bloom "to pursue any television and film

(continued)

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opportunities while he is a student-athlete at CU." *See* Finally, we are not convinced that the NCAA treated

Cole v. NCAA, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga.

Bloom unfairly in the manner in which it denied the

2000) (NCAA decisions regarding "challenges of requests to waive or interpret its rules.

student-athletes are entitled to considerable defer-

Although Bloom is correct that he was not permitted to ence," and courts are reluctant to replace the NCAA

personally petition the NCAA, he effectively submitted as the "decision-maker on private waiver applications"); three petitions to the NCAA with the full assistance and *see also NCAA v. Lasege, supra, 53 S.W.3d at 83* (voluntary support of CU. The trial court's finding that Bloom

athletic associations "should be allowed to 'paddle their had "an ability to fully present his … position through own canoe' without unwarranted interference from the the membership institution" is amply supported by the courts").

record.

Bloom also asserts that the NCAA is arbitrary in its Further, the court found, with record support, that the application of the endorsement and media bylaws. He

NCAA requested additional information on CU's petition notes that, while the NCAA would bar him from accept-

(evidencing that the NCAA was not acting arbitrarily or ing commercial endorsements, it will allow colleges to capriciously), and that there was no evidence that the commercially endorse athletic equipment by having

NCAA gave CU's petition any less consideration than its students wear the equipment, with identifying logos

other "hundreds of administrative and waiver requests."

and insignias, while engaged in intercollegiate compe-The record thus supports the trial court's findings that tition. But the trial court determined, and we agree, the NCAA's administrative review process is reasonable that this application of the bylaws has a rational basis in general and that it was reasonably applied in this in economic necessity: financial benefits inure not to case. As such, these findings, as well as those with any single student-athlete but to member schools and respect to the NCAA's application of its bylaws, are thus to all student-athletes, including those who partic-not manifestly arbitrary, unreasonable, or unfair.

ipate in programs that generate no revenue.

For these reasons, we agree with the trial court that Bloom further argues that the NCAA is arbitrary in the Bloom failed to demonstrate a reasonable probability way it applies its bylaws among individual students.

of success on the merits.

Bloom presented evidence that, in one instance, a

student-athlete was permitted to make an unpaid,

VI. Other Issues As noted earlier, to obtain a pre-

minor appearance in a single film. But the NCAA

liminary injunction, Bloom had to satisfy every part of could rationally conclude that this situation was differ-the *Rathke v. McFarlane* test. Because he failed to satisfy ent: Bloom did not seek permission to make an unpaid the part requiring a reasonable probability of success appearance in one specific instance; he wanted to take on the merits, Bloom was not entitled to a preliminary advantage of any number of television and film oppor-injunction.

tunities, and he wanted to be paid. Bloom also pre-

sented evidence that a second student-athlete was

In light of this conclusion, we need not address whether, permitted to appear on television while he participated as the trial court found, Bloom also failed to show that a in his professional sport. But Bloom did not show that preliminary injunction would not disserve the public the NCAA would prohibit him from appearing on tele-interest and was justified by the balance of equities in vision while participating in his professional sport.

the case. Consequently, we do not address the parties'

[…]

remaining arguments, including the validity of the

NCAA's restitution rule, NCAA Bylaw 19.8, or the effect, Bloom has thus failed to demonstrate any inconsistency if any, of the federal Commerce Clause on the trial court's in application which would lead us to conclude that the ability to fashion a remedy for Bloom in this case.

NCAA was arbitrarily applying its rules.

Accordingly, the trial court's order is affirmed.

Representatives of Athletic Interests (Boosters)

NCAA rules indicate that all alumni, friends, and employees of a member NCAA institution might be characterized as *representatives of athletics interests* also known as a booster, especially if they contribute to the athletic department. Because of past improprieties, the NCAA continues to expand its rules regarding boosters, donors and others; compliance coordinators have been hired by virtually all schools to keep abreast of changes in NCAA rules and to remain in compliance with the rules.

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However, some boosters have given millions of dollars to universities and their athletic departments, and exert such an influence over a university that many question who actually runs the athletic department: the college president, the athletic director or the booster?

Some boosters are also members of the Board of Trustees for the school, creating even further potential conflicts of interest. Individuals with great influence and heavy ties to universities have included Ralph Engelstad (University of North Dakota), Phil-lip Knight (University of Oregon), Robert Burton (University of Connecticut), and Bobby Lowder (Auburn University), though none have been found to have provided extra benefits. Booster Ed Martin, at the University of Michigan, violated NCAA rules and caused the vacating of wins during that school's "Fab Five" era.

In 2011, following the termination of University of Tennessee basketball coach Bruce Pearl, boosters and donors sent angry and threatening e-mails to athletic director Mike Hamilton vilifying him for the decision-making process. Others were sent to the university's chancellor and newly appointed president. Many of the emails referenced the amount of money they contributed to the program and that they might no longer contribute as a result of Hamilton's decision. Some e-mails were subsequently made public, in order to illustrate the shocking amount of influence boosters have over internal university affairs.

NCAA's Extra Benefit Rule

One of the most pressing concerns for the NCAA and its membership is to ensure that student-athletes do not receive extra benefits from coaches, alumni and others who are interested in the well-being of the athlete or the program. According to Bylaw 16.02.3, *Extra Benefit*:

An extra benefit is any special arrangement by an institutional employee or a representative of the institution's athletics interests to provide a student-athlete (or a student-athlete's relative or friend) a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body (e.g., foreign students, minority students) determined on a basis unrelated to athletics ability.

Given the concern over booster influences and the sports agent recruitment process overall, the NCAA's extra benefit rule is often a concern for its membership.

Southern Methodist University: Repeat Violator

In 1987, the Southern Methodist University football program received the NCAA's harshest sanction: suspension for the entire season. This was the first time that the NCAA's Committee on Infractions barred a school from playing football for an entire season (and it has not occurred since). It is more commonly known as the **death penalty**. One reason for the harshness

of the penalty was that the NCAA was forced to sanction the football program for the sixth time since 1958.

In addition to a ban on games, practice and scholarships for the 1987–88 academic year, the NCAA restricted SMU to seven games in 1988, no home games, and limited its scholarships, coaching positions and television and post-season appearances through the length of the probation, which expired on September **death penalty**

Expression used to describe suspension of an entire program or team due to most serious violations of NCAA rules

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1, 1990. The NCAA determined that 13 football players were paid over $40,000

during the 1985–86 academic year and that 8 student-athletes continued to receive payments from September to December 1986.

Of course, the violations demonstrated breaches of the NCAA's extra-benefit rule and the relatively new rule at that time, the **repeat violator** rule, which the NCAA established to add impact to continued major violations of its Bylaws.

According to Bylaw 19.5.2.3, *Repeat Violator*, a member is considered a repeat violator if a second major violation occurs within five years from the penalty of the first major violation, and violations do not have to be in the same sport.

University of Southern California

Numerous allegations against the University of Southern California (**USC**) of cheating in football and men's basketball reminded many of the scandals involving other universities in years past. Reggie Bush relinquished his Heisman Trophy in 2010 after the court of public opinion put considerable pressure on him for allegedly accepting cash payments, transportation and other extra benefits—including free housing—

from two prospective agents, Lloyd Lake and Michael Michaels. Somewhat similar to the Andy Oliver situation, the two agents sued for reimbursement when Bush did not agree to be represented by Lake and Michaels. Bush settled with the plaintiffs.

However, USC was also involved in a case involving allegations that a booster had made payments to an Amateur Athletic Union (**AAU**) coach in order to sign one of the most sought after recruits in basketball, O.J. Mayo. In 2010, the NCAA COI determined that the athletic programs at USC lacked institutional control and accepted USC's self-imposed sanctions which included reducing the number of scholarships in basketball. In football, the NCAA declared that USC was a repeat violator and banned USC for two years from postseason competition and a reduction of football scholarships by 30 from 2011–14. To the NCAA's credit, junior and senior football players were given immediate eligibility to transfer to other schools under the NCAA's *One-Time Transfer* rules.

NCAA Criticism

The NCAA continues to battle popular opinion of the organization. After all, a non-profit organization that generates over $700 million in annual revenues with a 14-year television contract is bound to be the subject of national discussion. The organization has gotten so big and powerful that it has been

referred to by critics as a monolith, cartel, monopoly, behemoth bureaucracy and private government.

The NCAA often defends itself by demonstrating the difference between the goals of the organization and transgressions of individual membership institutions.

Additional criticism has been raised about the legitimacy of the NCAA's tax-exempt, non-profit organization under the federal tax code. Some have called for an outright repeal of its 501(c)3 status. Certainly, eyebrows should raise when, under the tax code, the NCAA is treated no differently than Salvation Army, Goodwill, United Way, Red Cross, or the Ronald McDonald House. None of them have a $10 billion television contract with CBS Sports. Meanwhile, student-athletes **repeat violator**

A major violation that occurs within a five year window since the start of a major violation penalty

USC

University of Southern California

AAU

Amateur Athletic Union

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Sports Agency

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remain an unpaid labor force generating the hundreds of millions of dollars each year for the NCAA membership. Only time will tell how long the NCAA can maintain a system in which college coaches have multi-million dollar salaries and student-athletes cannot be paid at all.

Much of the criticism appears warranted, especially when its member schools exploit loopholes in the rules or are punished for violations with slaps on the wrist.

In recent years, the NCAA has handed down inconsistent and unequal penalties among its members for similar violations of NCAA rules, though the NCAA maintains that each investigation and penalty are judged on a case-by-case basis. Public opinion remains steadfast that the NCAA has turned a blind eye to violations involving some of its more powerful members but punishes similar infractions by less influential institutions. Many question why the U.S. Congress, the FBI, and state attorneys general have not assumed a greater watchdog role in the NCAA's affairs as the Knight Commission and the Drake Group have.

Recent Scandals

In 2010–11 alone, there were many examples of improper activity involving the NCAA membership. Consider first one rule pertaining to coaches, Bylaw 11.1.2.1, *Responsibility of Head Coach*. The rule states, "It shall be the responsibility of an institution's head coach to promote an atmosphere for compliance within the program supervised by the coach and to monitor the activities regarding compliance of all assistant coaches and other administrators involved with the program who report directly or indirectly to the coach."

Several members of The Ohio State University (OSU) football team who violated NCAA extra-benefit rules were allowed by their coach Jim Tressel to play in their post-season bowl game, though he was aware of their violation. By not reporting the incident Tressel was in clear violation of his contract, but received minimal punishment for his inaction at first. To add injury to insult, the OSU's president, Gordon Gee, when asked about the

breach of contract and whether Tressel should be fired, responded by saying that he was more worried that the football coach would fire him. Tressel, however, resigned from his position a few months later after extremely intense scrutiny demonstrated that he was aware of the violations and did not report them.

Coach Bruce Pearl of the University of Tennessee's basketball team violated NCAA recruiting rules and his contract was terminated, but he was retained by the university in a letter of appointment. Then, he violated NCAA rules again and was fired, along with his coaching staff, but not before the university paid him almost $1 million to go away.

Also in 2010-11, the University of Connecticut won the men's basketball championship, despite the fact that their coach Jim Calhoun had violated NCAA rules, and was reprimanded and suspended for "failing to create an atmosphere of compliance."

The entire relationship between the Fiesta Bowl and the Bowl Championship Series (BCS)—though not operated directly by the NCAA—was tainted after the IRS demonstrated that the operation violated federal laws. The Fiesta Bowl's CEO

John Junker was ousted after allegations of a culture of excessive spending, corruption and violations of state of Arizona campaign finance laws, including an attempt to cover it up.

Still in the same year, sports agents were arrested in many states for failing to register, several football players (including Marvin Austin of University of North Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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Carolina) were suspended for allegations of accepting extra benefits, and a member of the UNC coaching staff resigned as a result of the investigation. Then, HBO did a television special on Auburn University during which several former student-athletes claimed they were paid thousands of dollars to play. It was also revealed that Heisman Trophy winner Cam Newton's father Cecil was involved in a pay-for-play scheme during the recruitment of his son for which he received no penalty.

Just prior to the 2010-11 football season, troubled quarterback Jeremiah Masoli (University of Oregon) was kicked off the team, transferred to the University of Mississippi, was denied a waiver to compete by the NCAA (he had earned his degree already), and then, despite no apparent change in circumstances, was cleared to play.

After the 2011 *March Madness* basketball tournament, ten players and an assistant coach who had been members of the University of San Diego were charged with point-shaving (sports bribery) after an FBI investigation. Several coaches were also awarded contract bonus payments for graduating student-athletes who were members of their programs.

Meanwhile, former UCLA basketball star Ed O'Bannon and more than two dozen former student-athletes have initiated a lawsuit against the NCAA and EA Sports for using their images in video games without their consent.

All this in 2010-11: what a complete mess and an embarrassment to the state of higher education and its relationship to intercollegiate athletics!

Penalties

The NCAA as a whole and its individual members must demonstrate their serious-ness about enforcing penalties. For example, when coaches or student-athletes violate NCAA Bylaws, suspending them after the season (rather than immediately) sends the wrong message to outsiders and, most

importantly, the student-athletes themselves. More frequent use of the show-cause order might be the best way to weed out coaches who violate NCAA rules.

Penalties must also be given fairly by the NCAA. That is, it should not matter whether an institution is a state university, a private school or even a national champion. It should not matter what conference the institution is a member of, or how large an athletics budget they have. Otherwise, the NCAA continues to indicate that winning at all costs, including cheating or other rules violations, is in line with the educational mission of the non-profit organization. This tacit approval of its own rules demonstrates a lack of organizational control itself.

Presidential Leadership

College presidents, such as The Ohio State University's Gordon Gee, must also be proactive and take control of their campuses. Otherwise, the NCAA's mission, core values and rules are meaningless. College presidents themselves—not the college coaches or athletic directors—must set the tone and tempo for their institution's future, including NCAA membership. This might mean having to terminate the contract of a popular (and winning) coach and staff despite public outcry and booster support for them. Compliance departments should also be operated entirely separate from the athletic department, allowing compliance officers report to the college presidents rather than the athletic director.

Without a doubt, there are systemic problems in the NCAA as evidenced by the many legal concerns involving the NCAA and its member institutions in recent years. Still, this organization has provided the opportunity for hundreds of Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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thousands of student-athletes to earn a college degree paid for by their school's athletic department.

With the signing of the latest billion dollar media rights contract for the *March Madness* basketball tournament, the NCAA is thriving in a depressed economy.

Thousands of jobs have been created to coach, manage, recruit and support student-athletes in their academic and athletic endeavors.

Canadian Membership

In 2008, the NCAA accepted a pilot project to allow Canadian institutions to apply to the NCAA's Division II for membership. Simon Fraser University is scheduled to be the first Canadian institution to join the NCAA, though it must first be accredited by a U.S. regional accreditation agency. This expansion into Canada is remarkable. In 2011, the University of British Columbia (**UBC**) decided against joining Simon Fraser in its attempt to join the NCAA. Canada has its own version of the NCAA, the Canadian Interuniversity Sport (**CIS**) system, and UBC already competes in the National Association of Intercollegiate Athletics (**NAIA**), an Olathe, Kansas-based amateur athletic association for smaller colleges.

Future of the NCAA

Obviously, the NCAA is at another crossroads in its history. Public scrutiny from all angles dissects and analyzes the organization's every move. While the NCAA remains adamant that its primary purpose is educational, the actions of many of its individual members clearly demonstrate otherwise. Given the changing times, changes in technology, and the continued influx of billions of dollars, it seems doubtful that the NCAA will be able to continue maintain its non-profit status unless it demonstrates that its priority is education and that it is not a commercial entity hiding behind its tax-

exempt designation. In 2010, several members of Division I football conferences made membership changes for the primary purpose of gaining more television exposure and therefore revenue. This is not motivated by education at all.

Students should consider the disparity between the NCAA's stated purposes as educational in nature and their actions as a money-making commercial enterprise.

Groups such as the Knight Commission and the Drake Group continue to demonstrate the differences between the NCAA and that of a tax-exempt organization whose primary purpose is education. The increased frequency of cheating-run-rampant have given critics cause to ask whether the organization truly serves an educational mission, whether it should remain a not-for-profit organization, or, at the very least, whether its leaders can effectively oversee a large-scale, tax-exempt operation with hundreds of members who have gone astray.

Some have suggested that the NCAA radically change its rules to allow student-athletes to have agents. If this occurs, then the UAAA, SPARTA and other individual state sports agent laws would become obsolete. After all, it is only "illegal" to have a sports agent (or have endorsements for that matter) as a student-athlete because the NCAA Bylaws say so.

CIS

Canadian Interuniversity Sport

NAIA

National Association of Intercollegiate Athletics

UBC

University of British Columbia

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Chapter One

Has the NCAA become too big for its own good? Has the NCAA veered off course from its original purpose, mission and core values? Should the NCAA be to blame for the misconduct of its membership? Why do some schools share in the wealth much more than other NCAA members in the same division? Why do some conferences thrive while others are struggling to survive or in a constant state of flux? Students should realize that the shape of the NCAA might change dramatically in the coming years.

▪ Summary

Sports agents serve a valuable role for the professional athlete. Most agents require exclusive agency contracts. General agency law principles prevail in sports agency as well. The Uniform Athlete Agents Act (UAAA) has been drafted and approved by the National Conference of Commissioners on Uniform State Laws as a model to ensure uniformity throughout the nation. Most states have adopted it already.

Sports agents need not be lawyers, and lawyers may actually be at a disadvantage when it comes to recruiting clients. The sports agent serves in a fiduciary role for the athlete. There are numerous examples of egregious conduct by sports agents in violation of state laws, including the infamous case of Norby Walters and Lloyd Bloom.

Major league players associations have added a regulatory framework for agents who wish to represent athletes in their respective sports through the collective bargaining process. Meanwhile, the NCAA does not allow student-athletes to have agents represent their interest in the sport in which

the student-athlete participates at the amateur level. The question of who is an amateur and who is a professional is not always clear, however, as demonstrated in the Oliver and Bloom cases. Concerns over rules violations and excessive external involvement and influence by donors and boosters have given the NCAA significant challenges throughout the years. The NCAA has adapted well to changing times, but has received harsh criticism in recent years for veering away from its stated core values.

▪ Key Terms

agent individual authorized to act on behalf of a principal **Big Four** term used to describe the four major professional sports leagues in the U.S.

boosters various categories of individuals who support a college athletic program and fall under NCAA rules

bylaws the hundreds of pages of specific rules found in the NCAA Manual
certified contract advisors Term used to describe a player agent that has been certified by a players union such as the NFLPA

conflict of interest situation in which personal or professional interests individuals are perceived to be at odds with larger goals, responsibilities or duties of care owed to others

contractor-independent contractor freelance business relationship in which contractor only has the right to control that the work be done by the independent contractor for a specified duration

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covenants not to compete synonym for no-compete clause **death penalty** Expression used to describe suspension of an entire program or team due to most serious violations of NCAA rules

Drake Group Private, independent organization critical of NCAA **employer-employee** business relationship in which employer may be held responsible for actions of employee who acts within the scope of employment **exclusive contract** agreement for sole rights to sponsor, promote, and advertise between an agent and athlete

express explicit statement, either written or oral **facilitators** term used to describe role of individuals who assist parties in creating their own deal akin to a mediator

Failure to Monitor Charge against an institution though less serious than Lack of Institutional Control

fiduciary one who owes another a higher duty of good faith and care **Infractions Appeals Committee**

intentional interference with contractual relations When one knows the existing of a contract between two other parties and proceeds to interfere with that contractual relationship probably to induce one of the parties to break their working relationship in the future

Knight Commission Organization created to monitor and provide suggestions to NCAA to maintain true to its overall educational mission **Letter of Inquiry** Letter sent to college president informing the institution of alleged facts of a violation and that the NCAA enforcement staff will begin an investigation

major violation Usually involve an infraction that gives a school an extensive recruiting or competitive advantage

NCAA Manual compilation of hundreds of pages of rules (bylaws) for member educational institutions

NFL National Football League

no-compete clauses

nonexclusive contract agreement allowing either party to pursue other similar contractual relationships

non-revenue sports which depend upon other revenue sports for financial well-being

Norby Walters and Lloyd Bloom sports agents charged with racketeering, conspiracy, and fraud in recruiting student-athletes **Notice of Allegation(s)** Letter to educational institution's leadership informing them that there is enough evidence to indicate major violations of NCAA rules **Olympic sports** synonym for non-revenue sports **principal** one who grants another, an agent, the right to act on his or her behalf **professional sports counseling panels** groups formed by colleges and universities to advise student-athletes on potential careers in professional sports **repeat violator** A major violation that occurs within a five year window since the start of a major violation penalty

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Chapter One

representatives of athletic interests NCAA Manual's expression for a booster **respondeat superior** Latin expression literally meaning "let the master answer."

Translated to day means that an employer is responsible for the actions of the employee if they are within the scope of employment

revenue sports those sports which tend to be self-supporting and sometimes make a profit among NCAA institutions such as football, basketball and ice hockey **runner** individual who assists a sports agent in recruiting a student-athlete for representation

scope of employment responsibilities an employee carries out on behalf of an employer

secondary violation An isolated or inadvertent infraction that provides only minimal recruiting or competitive advantage

sports agent individual who represents the interest of a professional athlete **sports-entertainment**

student-athlete student who participates as an individual or member of a college or university team

tampering Also known as intentional interference with contractual relations **Uniform Athlete Agents Act (UAAA)** model act governing sports agents authored by the National Conference of Commissioners on Uniform State Laws **vicarious liability**

- **Acronyms**

AAU Amateur Athletic Union

AGA Agents, Gambling and Amateurism

API Athletes Premier International

APR Academic Progress Rate

BCS Bowl Championship Series

CBA collective bargaining agreement

CIS Canadian Interuniversity Sport

COI Committee on Infractions

FBS Football Bowl Subdivision

FCS Football Championship Subdivision

FTC Federal Trade Commission

IAAUS Intercollegiate Athletic Association of the United States **LOIC** Lack of Institutional Control

MLB Major League Baseball

MLBPA Major League Baseball Players Association **MLS** Major League Soccer

MMA mixed martial arts

MSG Madison Square Garden

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Sports Agency

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NAIA National Association of Intercollegiate Athletics **NBA** National Basketball Association

NBPA National Basketball Players Association

NCAA National Collegiate Athletic Association **NCCUSL** National Conference of Commissioners on Uniform State Laws **NFLPA** National Football League Players Association **NHL** National Hockey League

NHLPA National Hockey League Players Association **NLRA** National Labor Relations Act

OSU Oklahoma State University

SEC Securities and Exchange Commission

SPARTA The Sports Agent Responsibility and Trust Act of 2004

UAA Uniform Arbitration Act

UBC University of British Columbia

UCC Uniform Commercial Code

UPL unauthorized practice of law

URLTA Uniform Residential Landlord and Tenant Act **USC** University of Southern California

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Chapter One

▪ Discussion and Review Questions

1. Should there be a uniform federal law (like SPARTA) that governs all sports agent activities or are they better regulated by the certification process

in the Big Four players associations and the individual states through adoption of the UAAA?

2. Should college athletes be allowed to have sports agents for the particular sport they participate in?

3. Why did the concept of professional athletes having agents gather steam in the 1960s?

4. Should all sports agents be lawyers?

5. Should players' unions be allowed to regulate the fees that agents charge for their services?

6. How has the Internet changed the sports agent business, especially with regard to recruiting potential clients?

7. Do you think that Jeremy Bloom should have been able to keep his endorsements and still remain an amateur under NCAA rules?

8. Do you think that the NCAA should maintain its 501(c)3 non-profit status?

9. Why did the NCAA begin and what are some of its most important principles or themes?

10. What ways do you see the NCAA evolving in the future?

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CHAPTER TWO

Sports Contracts

After reading this chapter you will be able to:

1. Describe the importance of contractual relationships in sports law.

2. Explain what the expression “agreements must be served” means.

3. Define the phrase *personal services contract*.

4. Discuss the various types of remedies and damages available for breach of a contract.

5. Explain the role the sports agents play in contract formation.

6. Discuss the various important and unique clauses in sports contracts.

7. Describe what types of contracts might be valid, void or voidable.

8. Explain the National Letter of Intent program.

9. Discuss the importance of bankruptcy law in sports contracts.

10. Provide examples of how bankruptcy has affected the sports business.

▪ Introduction

This chapter examines the variety and nature of contracts and contract clauses often used in the sports industry. Contracts provide predictability and stability in business relationships, and analyzing specific contract clauses in sports requires an understanding of the sports business. Most professional athletes have signed contracts securing deals for their unique talents, abilities and skills, and sizeable player contracts are often matters of popular discussion. However, amateur athletes also deal with contracts and contract-related issues on a regular basis. Virtually all relationships in the sports business involve a contract. The focus of this chapter, however, will be primarily on professional athletes.

Given the financial incentive to compete as a professional, student-athletes have to make important choices about changing their status from *amateur* to that of *professional* as demonstrated in the cases involving Jeremy Bloom, Andy Oliver and others who forego their amateur status to pursue a professional athletic career. Taking this step often involves agreeing to be represented by a sports agent, which usually involves a contract as well.

Still, much of contract law in the sports business does not involve athletes.

Instead, it might involve leagues and teams who contract for multimedia broadcasting rights, colleges and universities who license the rights to use their logos to manufacturers and suppliers, athletic departments which sign contracts for their athletic teams to compete against each other as part of the normal schedule process, coaches who negotiate bonuses for wins, meeting graduation rates for their student-athletes, and so on. After all, the NCAA signed a 14-year, $10.8 billion **53**

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television contract in 2010, and the Big Four sports thrive on television, media and licensing contracts.

Students should consider how and why the various contracts and clauses in this chapter have been used to reflect the *meeting of the minds*, or common understanding, which is the necessary requirement for forming a contract. Students will also consider the principle ***pacta sunt servanda*** (translated literally, "agreements must be served"); in other words contractual agreements must be respected and enforced. It means that judges and courts are not in the business of un-doing agreements as a general rule. Rather, they are supposed to enforce contracts, as long as they are legal. This principle has remained unchanged for centuries and holds true today.

Sports Agents and Contracts

As discussed in Chapter 1, sports agents serve a valuable role in terms of securing and negotiating contracts for professional athletes. It is essential that lawyers, agents and professionals be familiar with the standard contracts used in their line of work, and this is especially true in the sports industry.

Hiring a lawyer (or sports agent) is not required for an athlete to negotiate a contract. However, if athletes wish to represent themselves in contract negotiations, it may be difficult to maintain an objective approach to negotiation. Also, contract negotiation is complex and nuanced, and those who negotiate on behalf of themselves may not have sufficient knowledge or experience and ultimately be poorly served by their contract. It is almost always preferable to employ an expert.

Analyzing sport-related contracts is one of the most practical areas of sports law, and an essential skill for anyone going into sports business. Many

contracts are available to review online, including collective bargaining agreements, sponsorship agreements, and high-profile college coaching contracts. Players, agents, and unions often freely share salary and endorsement contract information. Popular publications such as the *Sports Business Journal* and *USA Today*, also both available online, often provide in-depth discussion, comparison and analysis of professional and college coaching and athlete contracts. Such contract information and analysis is an invaluable resource for sports professionals. For sports agents and their clients, access to such information is vital to successful contract negotiation.

Personal Services Contracts

Since the athlete has unique talents, abilities, and skills, contracts for professional athletes' services are called ***personal services contracts***. For this reason, such contractual relationships may not be assigned or delegated to another person. That is, the whole nature of the relationship is unique, something no one else can perform in the exact same way.

For example, a professional tennis player sponsored by a shoe, clothing, or racquet company could not assign or delegate her rights or duties to another player since her talents are unique, and that was the impetus for the contract in the first place. Still, the sponsor (or team) cannot force the player to perform.

This would constitute a form of involuntary servitude which is prohibited under

pacta sunt servanda latin expression meaning that agreements must be honored **personal services contract**

special, non-assignable contract providing unique talents, abilities, and skills

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Sports Contracts

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the Thirteenth Amendment to the Constitution of the United States. Good contract drafters take into account such contingencies and provide for them in the contract.

Of course, many contracts in the sports industry do not involve the personal services of the professional athlete. Such contracts may involve stadium naming rights, outsourcing game-day vending (food and beverage) responsibilities, arena security, providing shuttle services, or moving goods from a shipper to the recipient. These agreements are not considered personal and can often be assigned or delegated to others, unless restricted by a contract.

▪ General Contract Law Principles

Before exploring the various contracts and unique contract clauses in this chapter, it is vital to have a fundamental understanding of the basics of contract law.

For those who have studied contract law elsewhere, this initial material will serve as a review, highlighting the necessary knowledge to continue on to sports contracts.

It should be noted from the outset that in the study of law, the word *contract* is abbreviated by the letter "**K**." In sports law, standard player contracts are often abbreviated as "**SPK**" and are often referred to as ***boilerplate*** agreements. That is, the standard player contracts are mass-produced and all the same, for the most part, except for the athlete's name, address, phone, and the negotiated salary and bonuses.

Definition

A **contract** is a legally binding agreement. It consists of five individual elements: 1) offer, 2) acceptance, 3) consideration, 4) legality, and 5) capacity. All of these elements must exist in an agreement in order to have a contract. If any of these elements are missing, then no contract exists.

Meeting of the Minds

A contract also represents the **meeting of the minds** of the parties to the agreement. That is, contract drafters (such as lawyers) must determine the intent of the parties and reduce their intentions to a formal, written agreement. This can sometimes provide a challenge for both the drafters and the courts if called upon after the fact to determine whether there was indeed a meeting of the minds.

When drafting a contract, one word or phrase can change the entire meaning of the agreement. Sometimes disagreements over one word can prevent the parties from coming to a meeting of the minds before the contract is signed. In some other cases, disagreements over the meaning of words and phrases can lead to **K**

contract

standard player contract (SPK)

boilerplate contract between a league and a professional athlete. Sometimes referred to as SPA: standard player agreement **boilerplate**

fixed or standard contract format and terms that generally are not negotiable **contract**

a legally binding agreement

meeting of the minds

phrase used to describe agreement between offeror and offeree Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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litigation. In that case, the parties to the agreement might have to rely on a judge, jury or an arbitrator to decide what the contract terms actually mean. The best contract drafters know this and attempt to deal with potential ambiguities within the contract itself. That is, the contract provides the remedies if there is a disagreement. This discourages the parties from seeking redress in the courts, which can be quite costly.

In the sports business, as in other businesses, managers and other decision-makers prefer financial certainty in business relationships, including knowing in advance the possible penalties for delay in performance or other remedies in the event of a **breach** of the agreement. The best contract drafters include provisions dealing with breaches of contract in the agreement itself.

The 3 V's: Valid, Void, and Voidable

Valid

Contracts can be divided into three general categories: **valid**, **void**, or **voidable**. Most contracts are **valid** meaning that all of the five required elements of a contract are present. In essence, the valid contract is legally binding. It delineates certain rights, and clearly describes the duties and other obligations to the parties to the contract.

Void

On the other hand, some contracts may be considered **void** from their outset.

Void contracts infrequently occur in sports law. A simple example might involve a contract for a loan which charged a rate of interest that exceeds the maximum amount under state law. Since the rate of interest exceeded the state's **usury** law, the contract could be considered invalid or void from the beginning. Athlete contracts that have terms which violate a collective bargaining agreement in the Big Four sports could be considered void also, as could contracts for the sale of illegal performance-enhancing drugs.

Voidable

A **voidable** contract simply means that the contract was valid, but something occurred after forming the agreement which allowed at least one of the parties to exercise the right to terminate or modify the agreement. That is, one of the parties has, at their option, the ability to modify the agreement or enforce an aspect of the contract which would not have otherwise been available until the condition occurred.

Voidable sports contracts are often referred to as **option contracts**, particularly when the athlete reaches certain goals and incentives in terms of their athletic performance. Such incentives and can be an excellent way to reward the coach or athlete for outstanding performance.

breach

the breaking of a promise, duty or obligation by a party to the contract **valid**

term used to describe a legally binding contract

void

contract that is not enforceable

voidable

contract that may be voided by one of the parties

usury

charging an excessive or illegal rate of interest

option contracts

contracts also known as a voidable contract in which one of the parties to the agreement may exercise a right, such as a right to re-work a contract, upon the occurrence of a condition such as reaching certain performance levels
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■ **Contract Elements**

Offer and Acceptance

Contract formation usually starts with the **offer**. An offer is made by the **offeror** to an **offeree**. Being an offeror is quite powerful indeed. After all, the offeror is the

"master of the offer." This means that the offeror can define the parameters —the who, what, when, where, and how—of the proposed contractual relationship.

Once an offer is made, an offeree can respond in one of four ways: 1. **Accept** (a legally binding contract is created).

2. **Reject** (the offer is automatically terminated).

3. **Counteroffer** (in which case the original offeror is now the offeree).

4. **Nothing** (the law will terminate the contract offer after a reasonable time).

Any ambiguities created when making an offer will be construed against the offeror if an **acceptance** is made. Thus, it is important for the offeror, at the outset, to say what they mean, and mean what they say.

Using available technologies such as facsimile (fax), electronic communication (e-mail) and cloud computing, contracts are often agreed-upon via fax machine or over the Internet quite efficiently and effectively. Remember, though, that the offer and the acceptance are only two of the five elements of contract formation.

Consideration

The **consideration** element is often characterized as the "price of the promise."

It is viewed as the third element of the contract formula and is the ***quid pro quo***

("this for that") of the agreement. Consideration is the element of the contract that differentiates a contract from an outright gift.

In sports contracts, the consideration is usually the salary in exchange for their work as a professional athlete or coach. If an athlete endorses a product, the consideration is the fee paid to the athlete to use or wear that product in practice, competition, and in advertisements.

Legality

Courts will not enforce illegal contracts. As mentioned, they are referred to as being

"void" and therefore may be "avoided," so to speak, by a court. This applies even if there is apparently an offer, acceptance, and consideration. Whether a contract is **offer**

element of contract that creates the power of acceptance in the offeree
offeror

one who makes an offer

offeree

one who receives an offer and has the power to accept **rejection**

outright refusal to accept an offer

counteroffer

rejecting an offer yet making a subsequent offer to the same party with the intent to be bound by the offer if an acceptance is made

acceptance

agreement to the terms of an offer that creates a legally binding agreement
consideration

the price, usually in monetary terms, of a promise and the element of a contract that differentiates it from an outright gift

quid pro quo Latin expression literally translated “this for that.”

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legal is not normally an issue in the sports business, but contracts which violate the law do appear from time to time. For example, if parties formed a contract to bet on a game and the losing party did not pay, it is quite possible that a court would not enforce payment if state or federal law declared the betting illegal.

While not illegal *per se*, some courts might declare that a contract is so one-sided that there was no real bargained-for exchange. That is, a court believes that one of the parties took advantage of the other by extortion or another means. These contracts could be declared as contracts of **adhesion** thereby rendering them **unconscionable**.

Some have suggested that the contract that high school seniors sign when they commit to a school for a college athletic scholarship is inherently too one-sided. A court would have to make that decision, however, not the parties themselves.

Capacity

Capacity, the final requisite element of the contract, focuses on whether or not a party was competent, not under any undue influence at the time, and appreciated that they were entering into an agreement. That is, if capacity was called into question, courts would assess whether one of the parties to the agreement actually had the mental capacity to understand that they were voluntarily entering into a contract.

Like legality, the capacity element is not normally an issue in sports contracts.

However, capacity has been an issue from time to time when minors sign an athletic scholarship, or employment or endorsement contract. Historically, the issues concerning minors and contracts have been a special topic in contract law, but primarily in the entertainment business not in the sports industry.

Minors

In U.S. law, those under the age of 18 (called **minors**) hold a special privilege when it comes to contracts. As a general rule, minors may disaffirm

(opt out of) contracts that they entered into before the age of 18. However, this option has to be exercised before they turn 18. Otherwise, most courts recognize that the contract has been ratified. Even if a minor disaffirms the contract, he must put the other party in no worse position than they were prior to the contract itself. This is also known as **restitution**. This means returning the cash, gifts or other products to the offeror, or at least their fair market value.

Sports such as gymnastics, swimming, golf and tennis often involve sponsorship (endorsement) or appearance contracts for highly talented minors. In such cases, proof of legal capacity may require the co-signature of a parent or guardian. Discussed in greater detail later in this chapter, the National Letter of Intent program (**NLI**) provides a contract that commits a student-athlete to a college or university **adhesion**

a take-it-or-leave-it offer

unconscionable

term used to describe a contract whose terms "shock" the consciousness of a reasonably minded person and often used in conjunction with the term adhesion **capacity**

the ability to enter into a contract from a legal perspective and that both parties knew (or should have known) that they were voluntarily entering into a legally binding agreement **minor**

an individual under the age of 18

restitution

the act of restoring a party to a contract to a position had there been no contract at all or no breach

NLI

National Letter of Intent program

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in exchange for a one-year athletic scholarship. However, it remains unclear whether a minor high school senior can unilaterally disaffirm (i.e., escape) the contract if it is not ratified by the time they turn 18 years old.

States including New York, California, Florida have enacted special laws that govern entertainment industry contracts with minors. Minors often perform in commercials and advertising media, and hundreds of famous child actors have benefited from the entertainment industry's use of minors. California has **Coogan's Law** in which 15 percent of a child-actor's money must be put into a trust account until the child becomes an adult at the age of 18. This is designed to protect a minor's financial interest, so that parents or guardians do not spend all their money. Some have suggested states should consider adopting laws which mirror Coogan's Law for underage professional athletes, though none have yet garnered enough support to make it through state legislatures.

Statute of Frauds

As a general rule, contracts may be either oral or written. However, contract law requires a written agreement in specific situations. For example, contracts which last more than a year require written evidence to show what the parties agreed upon. This legal principle is known as the **statute of frauds**. This means that the agreement must be evidenced by some type of

legible document. It was designed to prevent people from lying about what exactly they agreed upon in the contract.

It was also used to assist the parties remember what they actually agreed upon.

After all, memories can fade over time. Though most employees in the United States do not receive a formal written contract from their employer, sports contracts almost always are in writing. It is a part of the nature of the sports business.

Implied and Express Contracts

An implied or ***quasi* contract** might be established by a court. If a court believes that one party to an agreement justifiably relied on another's promise, the court might imply a contract, even if there was no formal agreement. This principle is known as **promissory estoppel** or **detrimental reliance**. An example of detrimental reliance might be if a company offered you a job in another state and you, in reliance upon their promise, quit your job, moved out of your apartment and signed a new lease in the new state. You would be more than disappointed if the company changed their mind. You relied on their promise, and rightfully so! However, in order to receive compensation under an implied contract, you would have to prove that the promise was made. That is why so many people say, "Get it in writing."

Coogan's Law

California law named after child actor Jackie Coogan in which at least 15 percent of a child-actor's income must be placed into a trust account until he or she reaches the age of 18

statute of frauds

fundamental legal principle that certain types of contracts must be in writing in order to be enforced

***quasi* contract** an implied contract established by a court in which it would be unfair or unjust to declare that the actions of the parties did not constitute a contract **promissory estoppel**

a promise was made by the offeror and it was reasonable for the offeree to rely on the promise to their financial (or other) detriment **detrimental reliance**

synonym for promissory estoppel

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There are virtually no more **implied** contracts in the sports industry; today most sports contracts are **express** contracts, that is, they are formally expressed in writing. This is likely because of the immense increase of money generated by the sports industry, requiring professional services provided by lawyers and sports agents. Many athletes, too, are sophisticated enough to require written agreements to further their professional career.

Addendum

When using **standard player contracts (SPK's)**, an athlete will often have a supplemental agreement to the more formal part of the contract. This separate agreement is often referred to a contract **addendum** or **rider**, though the latter term is used more frequently in the entertainment industry.

For professional coaches and athletes, an addendum often includes incentives and bonuses for things such as points-scored, number of victories, number of plays, and so on. For entertainers, the unique requirements for the artists, including types and amounts of food, beverage, lodging, hotel

accommodations, transportation and technical requirements for the production set-up are found in the rider.

- **The Uniform Commercial Code**

The **Uniform Commercial Code (UCC)** is a model act that all states have adopted in whole or in part. It is a pro-commerce codification of common law contract principles that courts use for guidance when buyers and sellers of goods have failed to otherwise address potential breach-of-contract issues and relevant contract remedies on their own. It is intended to encourage buyers and sellers to draft precise agreements to suit their needs. Otherwise, the UCC will fill in the gaps. The UCC was drafted by the National Conference of Commissioners on Uniform State Laws (**NCCUSL**), the same organization which drafted the Uniform Athlete Agents Act (**UAAA**).

Article 2 of the UCC applies to the buying and selling of goods, including sporting goods and fitness equipment. In the sports industry, a buyer might also lease (rent) the goods, and the UCC's Article 2A applies to leases.

The UCC applies, unless otherwise agreed, in interesting ways to equine (horse) sales, warranties made by weight-loss products, and in any other transaction involving the sale of goods. The UCC appears not to apply to the sale of tickets as goods since several courts have opined that tickets do not fit the definition of goods, the **implied contract**

created by the courts as an obligation in the absence of an agreement to prevent unjust enrichment by one of the parties

express contract

a contract that is usually made in writing

standard player contracts (SPK's)

boilerplate contract found in the Big Four sports in which almost all the terms of the contract are the same for everyone except salary, bonuses, etc.

addendum

an attachment to the contract which adds to or amends one or more provisions of the agreement

rider

synonym for Addendum

UCC

Uniform Commercial Code

NCCUSL

National Conference of Commissioners on Uniform State Laws **UAAA**

Uniform Athlete Agents Act

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fundamental aspect of Article 2. Still, few published decisions apply the UCC to sports law issues. Those that do couple UCC claims, such as allegations of the breach of express or implied warranty, with classic tort law claims, such as negligence, strict liability and products liability. Tort law is discussed in detail in the Chapter 3: Sports Torts.

Still, it is important to have a fundamental knowledge of the UCC, the roles that express and implied warranties play in a sales transaction, and why the UCC

is relevant so that sport managers, any buyers or sellers of goods, or any sales contract drafters can understand its role in commercial transactions.

The UCC is inherently favorable to commerce, emphasizing good faith in business transactions and enabling sellers and buyers to maintain enduring business relationships. The UCC focuses on maintaining commercial relationships (as opposed to promoting litigation) by offering the parties various remedies in the event of a breach. It might even encourage a party to waive a *de minimis* breach of contract in some instances.

▪ Contract Categories

Sports contracts can be divided into five general categories: collective bargaining agreements (between leagues and the players' unions), professional services contracts (including standard player contracts), endorsement contracts, appearance contracts, and guaranteed contracts.

Sometimes contracts in one category affect contracts in others. For example, if an individual athlete is a member of a team, the value of the athlete's contract may be limited by other members of that team due to a league or team **salary cap** or other fee cap structure. Of course, there is no dollar limit on the amount that an individual athlete may request for his or her own services when it comes to endorsement and appearance contracts.

Collective Bargaining Agreements

A **collective bargaining agreements** (**CBA**) is a contract that establishes the terms of an employment agreement between a labor union and an employer. This contract addresses minimum wages, permitted hours of work and other terms and conditions of employment. It also includes provisions for grievance and arbitration if there are disputes over the contract. Such uniform player contracts are established through negotiation between the management of the league (usually the owners) and the laborers in the league (the players associations). These agreements serve the same purpose

as that of any other union-negotiated contract in this country and are governed by the rules of the National Labor Relations Act (**NLRA**).

Through collective bargaining agreements, contract terms have become nearly uniformly settled for the player's unions in the NFL, MLB, NBA, and NHL. The only remaining negotiable issues are the term of the agreement (i.e., number of years or seasons) and the salary and bonuses for the athlete.

salary cap

a league-wide ceiling on the amount any particular team may spend on player salaries

collective bargaining agreement (CBA)

contract between a league and players association

CBA

collective bargaining agreement

NLRA

National Labor Relations Act

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Wages, hours, and working conditions are mandatory subjects for collective bargaining agreements, while other aspects of the contract are left up to the management and labor to hash out. In Major League Baseball, for example, arbitration is offered to athletes after a certain number of years of service in the league as part of the negotiation process for their salary. If disagreements arise between players and management and a collective bargaining agreement is in place, the player must file a grievance with the league (see Chapter 9: Antitrust and Labor for further discussion).

Problems have arisen when professional athletes unite, refuse to work, and *strike* due to alleged poor working conditions, unfair revenue-sharing, unfair labor practices, or the natural expiration of the collective bargaining agreement. Additional problems have arisen when certain teams in larger markets can spend more money than teams in smaller markets with smaller television contracts. As a result, owners and players have agreed to a salary cap in the NFL, for example, in order to maintain a competitive balance in that league and control escalating player salaries.

Professional Services (Standard Player) Contract

While all contracts may be negotiated, many agreements use standardized contract forms, such as the standard player contract (SPK). The standard player contract (SPK) is a boilerplate form, usually the written by-product of a history of negotiation between the league and the players in that league, though an SPK may be used regardless of whether the athlete is involved in a league with a players association. This contract is offered to all athletes with the same terms, except for salary and bonuses. Many sports, such as track and field, ice skating, swimming, and gymnastics do not have "league" status, and therefore professional services contracts are usually replaced with an endorsement contract by a sponsor of a special traveling team or group. As a general rule, sports contracts focus on three things: salary, signing bonus, and other performance bonuses.

Newly formed leagues often model their own contracts after one of the already existing Big Four (NFL, MLB, NBA, and NHL) leagues in order to recognize contemporary issues relevant to team owners and athletes. Some start-up leagues, however, have taken a different approach to professional

services contracts by establishing minimal salaries for the athletes and, instead, rewarding the team and athlete on a per game or performance basis.

Endorsement Contracts

Unlike the professional services contracts, an **endorsement contract** does not usually define an employer-employee relationship, but rather a contractor-independent contractor relationship. The underlying assumption is that the sponsor wishes to increase sales or market share of its products by featuring an important athlete in an advertising campaign. Endorsement contracts are vital to survival in motor sports, fitness and bodybuilding, winter sports and any other non-Big Four sports. Unlike an employment contract, tax withholding, insurance, and workers compensation are usually not necessary considerations in the endorsement arrangement.

An endorsement contract is essentially a contract that grants the sponsor or endorser the right to use (i.e., license) the athlete's name, image, or likeness in connection with advertising the endorser's products or services. The endorsement contract's **endorsement contract**

in which a sponsor agrees to pay a fee or provide product to an athlete in exchange for using the athlete's name or image in its promotions Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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terms and conditions have no formalized parameters. That is, there are no set rules for such an agreement, other than that it be for a legal purpose. It is a

generally held principle that the more an endorser feels that the sponsored athlete can assist in the sales of the particular product, the higher the stipend and bonus structure.

Athletes are not the only members of the sports community to receive endorsement contracts. In 2011, ESPN established endorsement guidelines for its journalists under which they can only accept endorsement contracts from organizations which do not create an appearance of a conflict of interest. Many of ESPN's employees were receiving outside income from product sponsors in addition to appearing in television, radio, and magazine advertisements. The purpose of the new policy was to attempt to prevent its popular employees from becoming sport-celebrities, to encourage less biased journalism and commentary, and to be more even-handed and legitimate in sports reporting.

Appearance Contracts

Another popular professional sports contract is the **appearance contract**. Such an arrangement compensates the athlete for appearing at a group function, assembly or instructional session. Sometimes appearances are included in the endorsement contract. Athletes often command high fees for such an appearance, and the sponsor of the event usually compensates the athlete in terms of airfare or other transportation, food, and modest expenses. Only the finest athletes in a particular sport are in demand for such an appearance in exchange for a fee. Of course, many athletes appear at events without a fee on behalf of themselves or their team.

Guaranteed Contracts

A guaranteed contract is an agreement in which a player is paid the full amount of their contract for the specified-time period, regardless of whether they are cut from the team, cannot compete due to injury, or exhibit insufficient skills to compete at the necessary athletic level. Guaranteed contracts are only for the best of the best, though they are not used in all professional sports. MLB and MBA use guaranteed contracts, but the NFL does not as a general rule, though premier players might receive one. The NHL

generally does not offer guaranteed contracts, especially after the 2004–05 players lockout, which resulted in the cancellation of the entire season.

▪ Special Sports Contracts

Though the above contracts are discussed here in relation to their use in professional sports, they are also widely used types of entertainment contracts. However, there are some contracts that are unique to sports.

NHL's "Two-Way" Contract

A **two-way contract** is unique to professional hockey. It involves the relationship between the NHL and the American Hockey League (AHL). A player earns different amounts of money depending on whether he is currently playing for the NHL

appearance contract

agreement that the athlete will appear in person on behalf of a sponsor's promotion

two-way contract

NHL specific type of contract in which the amount a player is paid depends upon whether he is in the NHL or sent down to a minor league team
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team, or one of their minor league farm teams. While playing in one of the lower leagues, the player's salary, though still usually paid by the NHL team, will be a lesser amount than his NHL salary. There is also a **one-way contract** in which a player is paid the same amount regardless of whether he is in the NHL or a minor league affiliate such as in the AHL.

NBA's "Ten-Day" Contract

A **ten-day contract** is just that, a player contract that lasts ten days (or three games, whichever comes later). The origin of the ten-day contract is uncertain, but it has been a part of the league since the 1970s. Teams can sign players to ten-day deals beginning January 5 (or the year's first business day) each season. A team may sign a player to only two ten-day contracts in one season (they may or may not be consecutive). If a team wishes to keep that player after his two ten-day contracts expire, they must sign him for the rest of the season. Ten-day contracts have largely been for undrafted, overlooked youngsters desperate for a roster spot.

▪ Special Sports Clauses

The clauses within many of these contracts impact the sports business significantly. The next section introduces many of the most important clauses found in sports law and the sports business, and it is vital that students become familiar with these clauses. These include termination, hazardous activity, morals, loyalty, force majeure, best efforts, no-trade, and a host of other clauses as well. Such clauses more specifically provide the parties to a contract with certain rights in the event there is a breach of contract, or if a condition occurs that makes the contract difficult—if not impossible—to perform.

It is also vital to remember that just because a clause is in a contract does not mean that it must be enforced. In some instances, parties to a contract will not enforce a clause in a contract in order to maintain goodwill or continue a business relationship. However, the best contract drafters are skilled in the art of foreseeing what circumstances might occur in the future and providing for them in the contract itself. This is a crucial aspect of a sports contract, especially when hundreds of thousands (or millions, or billions) of dollars are in play.

Reserve Clause

One of the first clauses that any student, professor, or practitioner should know is the now outdated **reserve clause**, which was included in all standard player contracts in baseball starting in the late 1880s. Under the *reserve system*, in place for decades, players were required to sign contracts that bound them to their teams permanently. That is, the club retained their rights even at the expiration of the contract, unless the player was traded or released at the team's option. In essence, this reduced players' bargaining power to next to nothing.

one-way contract

NHL specific type of contract in which a player is paid the same salary whether he is in the NHL or sent down to a minor league team **ten-day contract**

NBA specific type of contract in which a player can be signed for ten days with the opportunity to demonstrate skills to make the roster **reserve clause**

outdated clause found in MLB and other professional sports leagues in which a team could own a player's rights in that league for an unlimited amount of time Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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The reserve clause was found in Paragraph 10 (a) of the Uniform Player's Contract, and stated, in part, "… If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms,…" This reserve system was designed, of course, to restrict salaries and give owners greater leverage during contract negotiations.

With the advent of the amateur baseball draft in 1965, players lost even more leverage since, before 1965, if a player did not want to play for a team he could refuse to sign a contract at all and no team held his rights. Occasionally a rival league would appear, temporarily increasing players' bargaining power. Oddly, it took decades for there to be a successful challenge to the ambiguity in the clause found in Paragraph 10 (a). The reserve clause and the reserve system no longer exist in the Big Four sports leagues today like they used to.

Termination Clause

Most contractual relationships end or **terminate** when both parties have met their duties and responsibilities. That is, the contract automatically terminates at the end of the agreement. As many students know, their residential lease automatically terminates at the end of the lease. Another way to terminate an agreement is by contract, where each party agrees to end the contract prematurely. That is, the parties are no longer satisfied with their arrangement and they decide it is best to go their separate ways. This process is **mutual** and represents a contract **rescission**.

If one party breaks (breaches) the contract or unilaterally cancels the contract, litigation or other form of dispute resolution may be necessary to enforce the agreement. The right to end the business or working relationship is a natural consideration for the contract drafters and the parties themselves. Stadium and arena leases, operating and naming rights for such venues, and investment in teams are often long-term, but good contract drafters include provisions that might allow the parties to terminate their relationship early if necessary.

“Cause”

The right to cancel a coach’s contract, a player contract or a sponsorship agreement is usually stipulated in a termination clause provision as part of the contract, indicated by the phrase or phrases ***with cause***, *just cause*, or *for cause*. Employers reserve the right to terminate employees in order to protect the image of a club, sponsor or institution from misconduct by the employee at all levels. However, defining the word “cause,” regardless of how it is stated, can present problems.

In sports employment, termination clauses have garnered national attention in the last decade, especially in the context of college coaches. The termination *for cause* clause has largely appeared in college sports contracts in response to the volume of NCAA bylaws violations by coaches. Athletic directors and university counsel now actively draft contracts that specifically address termination both with cause or without cause.

termination

the right of a party to an agreement to end the contract **mutual**

both parties agree in advance or subsequent to the contract on specific arrangements such as termination or modifying the agreement

rescission

the act or process of ending the contractual agreement entirely or just part of the contract **with cause**

the right to terminate a contract for a specific reason and often referred interchangeably as a “just cause” or “for cause” provision Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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Chapter Two

Coach-employees are not defenseless when the employer alleges a breach of the contract triggering possible "for cause" termination. College coaches have lawyers and agents who provide protection in the event their school wants to exercise its right to terminate the employment contract, and a coach who is fired for cause often receives a settlement or golden-parachute as part of the arrangement. However, some just-cause firings have sparked lawsuits rather than settlements. In 2011, the Iowa Court of Appeals upheld a lower-court (and an arbitrator's) decision that a football coach in Jesup, Iowa was wrongfully terminated from his coaching position because he did not win enough games. However, coaches are hired to win games, right? Some coaches, like former Texas Tech football coach Mike Leach, have law degrees themselves. He did not take kindly to that university's decision to fire him in 2010 and he sued accordingly for wrongful termination.

Termination: Coach Jim O'Brien

In 2004, The Ohio State University (**OSU**) athletic director Andy Geiger fired head basketball coach Jim O'Brien, though there were still three years remaining on his contract, after he admitted to loaning $6,000 to a prospective Serbian recruit six years prior in 1998. O'Brien sued, stating that OSU could not terminate him, even if he allegedly violated NCAA rules, unless he had committed a *material breach* of his contract. The phrase *material breach* was not clearly defined in the contract, however.

An Ohio trial court held that the violation of NCAA rules (and the egregious failure to disclose the violation) was not, in fact, a material breach of the contract and therefore OSU could not use a *for cause* termination on that basis alone. The court noted that OSU could not terminate O'Brien without "cause," which was defined in Section 5.1 of his contract as,

"Termination for Cause - Ohio State may terminate this agreement at any time for cause, which, for the purposes of this agreement, shall be limited to

the occurrence of one or more of the following: (a) a material breach of this agreement by Coach, which Coach fails to remedy to OSU's reasonable satisfaction, within a reasonable time period, not to exceed thirty (30) days, after receipt of a written notice from Ohio [S]tate specifying the act(s), conduct or omission(s) constituting such breach; (b) a violation by Coach * * * of applicable law, policy, rule or regulation of the NCAA or the Big Ten Conference which leads to a 'major' infraction investigation by the NCAA or the Big Ten Conference and which results in a finding by the NCAA or the Big Ten Conference of lack of institutional control over the men's basketball program or which results in Ohio State being sanctioned by the NCAA or the Big Ten Conference * * * ."

The court further noted, however, that OSU could terminate O'Brien without cause, but, if so, it would be obligated to pay O'Brien liquidated damages.

On appeal, OSU was forced to pay O'Brien approximately $2.5 million, which included interest, for their breach of the contract, though the court did not ratify or condone O'Brien's misconduct. In fact, the Court of Appeals of Ohio noted,

"OSU was the drafting party. OSU is not lacking in sophistication, and has only been prejudiced as a result of being held to its own bargain." O'Brien's case set an example for university counsel, athletic directors and contract drafters to consider ways to tighten college coaching contracts. Subsequently, O'Brien's replacement, Thad Matta, has 15 grounds for termination in his agreement.

OSU

Ohio State University

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Sports Contracts

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Termination: Coach Kelvin Sampson

Indiana University (**IU**) paid head men's basketball coach Kelvin Sampson $750,000 to leave Bloomington in 2008. Sampson had just replaced Mike Davis as coach, and Sampson's contract was drafted so that he could be fired for "just cause," which was defined in several ways in 14 subsections, including:

"…(4) A significant, intentional, or repetitive violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Ten Conference or the NCAA, which violation may, in the sole judgment of the University, reflect adversely upon the University or its athletic program, including but not limited to any significant, intentional, or repetitive violation which may result in the University being placed on probation by the Big Ten Conference or the NCAA and including any violation which may have occurred during any prior employment of the Employee at another NCAA member institution and for which the NCAA could hold the Coach responsible."

It also included a *just cause* termination provision for the general "failure to maintain an environment in which the coaching staff complies with NCAA, Big Ten and University rules and regulations …"

Sampson had been directly involved in NCAA violations at the University of Oklahoma, his previous employer, and Indiana was willing to give Sampson a chance, though it clearly wanted to protect itself against Sampson's previous transgressions. Sampson had made nearly 600 phone calls to recruits in violation of NCAA rules while he was the head coach at the

University of Oklahoma, and Indiana's new coach was punished before he even coached his first game at IU.

Shortly after hiring him, IU conducted an investigation which uncovered that Sampson and his IU staff made similar phone calls in violation of NCAA rules, and though Sampson did not make calls himself, he appeared on the three-way calls to recruits. The investigation found that Sampson and his staff committed five major violations, and Sampson was summarily paid to leave and not file a wrongful termination suit against IU. By hiring a coach who left a program under investigation by the NCAA, IU took a risk. In the end, IU paid the price.

Termination: Coach Bruce Pearl

Head basketball coach Bruce Pearl was hired by the University of Tennessee (**UT**) in 2005. After Pearl lied to the NCAA over reports of alleged recruiting violations, athletic director Mike Hamilton sanctioned the charismatic Pearl. However, Pearl's contract protected the coach, even though he admitted to deliberately misleading NCAA investigators while they pursued allegations of Pearl's recruiting violations.

Hamilton terminated the *agreement*, the contract, but he did not fire Pearl, and Pearl agreed to remain the head coach until a new contract could be worked out.

UT could not terminate coach Bruce Pearl *for cause* until there was an NCAA finding. Even if there was a finding, it had to be determined that Pearl knowingly engaged in conduct that was a *significant* NCAA violation. In fact, Pearl continued coaching after his previous contract was terminated, first under a letter of appointment and then under a new contract.

Southeastern Conference (**SEC**) Commissioner Mike Slive, however, suspended Pearl for the first eight games of the 2010–11 conference because of his **IU**

Indiana University

UT

University of Tennessee

SEC

Southeastern Conference

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misconduct during the NCAA investigation. Pearl was eventually terminated after his team was beaten by the University of Michigan in the first round of the NCAA's *March Madness* tournament in 2011. Pearl's situation, in which an athletic director who terminated a contract but did not immediately terminate the employee, is unique.

Non-Termination: Coach Jim Tressel

In April 2010, The Ohio State University head football coach Jim Tressel received an email notifying him that two of his players had violated NCAA bylaws by trading jerseys, rings, trophies and other OSU memorabilia in exchange for tattoos at a parlor in Columbus, Ohio. Tressel, in violation of his contract, did not investigate, and never brought it to the attention of OSU's compliance department. Though he could have been fired "for cause," he was not at first.

Section 4.1(d) of Tressel's contract with Ohio State stipulated that he: supervise and take appropriate steps to ensure … members of the Team

know, recognize and comply with any such laws, University Rules and Governing Athletic Rules and immediately report to the (Athletic) Director and to the (Athletic) Department's Office of Compliance Services in writing if any person or entity, including without limitation, representatives of Ohio State's athletic interests, has violated or is likely to violate any such laws, University Rules and Governing Athletic Rules.

Section 5.1 (m) of his contract stated that failure to promptly report "any violations" could lead to "termination by Ohio State for cause."

OSU had a recent history of trouble with the NCAA. Two former football players—Maurice Clarett, who led the Buckeyes to the 2002 national championship, and Troy Smith, winner of the 2006 Heisman Trophy—had been suspended by the NCAA for receiving money and other benefits from boosters. In May of 2009 *The Columbus Dispatch* reported that since 2000, Ohio State had reported more than 375 violations to the NCAA. Most of the infractions were considered minor and resulted in little or no punishment from the NCAA.

When the "tattoo-gate" scandal was revealed, OSU suspended Coach Tressel for the first two games of the 2011 football season, fined him $250,000 for violating NCAA rules for his failure to notify the school immediately. He was reprimanded and made a public apology as well. However, at only seven percent of his contract, the $250,000 was relatively insignificant, and the NCAA continued to investigate the matter.

The NCAA then suspended OSU quarterback Terrelle Pryor and four teammates for the first five games on the 2011 season. However, the NCAA allowed Pryor and all to participate in the Allstate Sugar Bowl. When OSU President Gordon Gee was asked about whether Tressel's job was in trouble, he stated, "No, are you kidding? Let me be very clear. I'm just hopeful the coach doesn't dismiss me."

However, Tressel's contract stated specifically that he had to report immediately any potential violation of NCAA, Big Ten or Ohio State bylaws and rules. Athletic Director Gene Smith remained firm as well when he said, "Wherever we end up, Jim Tressel is our football coach." After public pressure, OSU changed its position and lengthened Tressel's suspension to

the first five games of 2011, but they still chose not to fire him even though they were entitled to do so under the terms of the contract. Students should consider why Jim Tressel was not immediately terminated, though former OSU basketball Jim O'Brien was. Did the decision to retain Tressel rather than fire him *for cause* send the wrong message to student-athletes and others?

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In April, 2011, the NCAA sent a letter to OSU with a Notice of Allegations which included a list of potential major violations involving the OSU football program. As part of the letter, the NCAA warned OSU that it could be a repeat violator under the NCAA bylaws, since former quarterback Troy Smith received money from a booster in 2006. The NCAA did not use "failure to monitor" or

"lack of institutional control" language in its letter with regard to its concerns, but did refer to Tressel as a person who "failed to deport himself in accordance with honesty and integrity normally associated with the conduct and administration of intercollegiate athletics as required by NCAA legislation …" Tressel, according to the NCAA, knowingly used ineligible players. As public outrage continued to mount against Tressel, he ultimately resigned from OSU. However, he never was fired.

Termination: Coach Ron Prince

Occasionally, the parties to a contract disagree on whether there was a *meeting of the minds* in the first place. For example, in 2008, Kansas State University (**KSU**) terminated the contract of football coach Ron Prince. On May 20, 2009, Kansas State University filed a lawsuit to modify the separation agreement with Prince because KSU alleged that there was a secret agreement between Prince and its former athletic director Bob Krause.

Under the terms of the alleged secret arrangement, KSU was to pay $3.2 million in three payments to a private corporation if KSU terminated Prince before Dec. 31, 2008. Interim KSU president Jon Wefald denied any knowledge of this agreement, though an audit discovered that during Wefald's time as president, undocumented payments were made to former head coach Bill Snyder, former athletic director Tim Weiser and former athletic director Bob Krause. KSU alleged that this deal was made without the knowledge of anyone else in the athletics department. Prince's attorneys disagreed and the case settled out of court in May, 2011 for $1.65 million.

The five employment termination situations above illustrate different methods of termination a contract. The first four address what happens when exercising (or choosing not to) the *for cause* termination provision, while the last one demonstrates an attempt to nullify the contract. When a termination is executed, some coaches, like Jim O'Brien, fight back rather than settle with the university. In the case of Bruce Pearl, his contract was terminated, but he was not (at first). Jim Tressel's case raises questions about the decision whether or not to terminate a coach for breach of contract, even if justified by the stipulations of the contract. Meanwhile, one wonders what really happened in the formation of Ron Prince's contract and whether there was fraud or, at the very least, a breach of fiduciary duties to the taxpayers of the state of Kansas, who were on the hook for his buyout clause.

Students might explore other termination situations involving college coaches and breaches of contract including Clem Haskins (University of Minnesota), Rick Neuheisel (University of Washington), Billy Gillispie (University of Kentucky), Bobby Gonzalez (Seton Hall), Shann Hart (Indiana University-Purdue University Indianapolis), Jim Leavitt (University of South Florida), Mark Mangino (University of Kansas), and Tim Cohane (University at Buffalo), just to name a few.

KSU

Kansas State University

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Chapter Two

▪ **CASE 3**

James J. O'Brien, Plaintiff-Appellee/Cross-Appellant, v. The Ohio State University, Defendant-Appellant/Cross-Appellee

COURT OF APPEALS OF OHIO, TENTH

OSU, the trial court found that reasonable minds

APPELLATE DISTRICT, FRANKLIN COUNTY

could come to but one conclusion—that conclusion

being that O'Brien was entitled to judgment as a matter

2007 Ohio 4833; ***2007 Ohio App. LEXIS 4316***

of law. The trial court granted, in part, O'Brien's

September 20, 2007, Rendered

motion for summary judgment as to damages, and

entered judgment in the amount of $ 2,253,619.45,

OPINION

plus pre-judgment interest of $ 241,353.98, for a total TYACK, J.

judgment of $ 2,494,972.83. *O'Brien v. Ohio State Univ.,* After The Ohio State University ("OSU") fired former *Ct. of Cl. No. 2004-10230, 2006 Ohio 4737*, Final Entry, men's basketball coach James J. O'Brien ("O'Brien"), Aug. 18, 2006, *at P2, 10* (hereafter "Final Entry"). OSU

O'Brien brought suit against OSU alleging it breached and O'Brien, both, have appealed from that judgment

his employment contract, which had three years remain-and decision.

ing on its term. OSU argued that it was O'Brien who

Appellant OSU presents two assignments of error for

breached the contract when he made a loan to a Ser-

our review:

bian basketball recruit in 1998, and failed to disclose it until 2004, which OSU believed was an egregious viola-I. The Court of Claims erred by holding that O'Brien tion of the National Collegiate Athletic Association did not materially breach his employment contract—

("NCAA") rules constituting a material breach of the which clearly and unambiguously required that he

employment contract such that OSU was entitled to ter-run a clean and compliant program and immediately

minate O'Brien's employment immediately.

report any NCAA violations—when he gave an

impermissible $ 6,000 cash inducement to the family

Original jurisdiction over this claim lay with the Ohio of a basketball recruit in 1998 and then failed to

Court of Claims, which held a bench trial to determine report that violation to the University for more than liability. Following the trial, the court determined that five years.

the loan (and failure to disclose) was the sole cause for O'Brien's termination, and that O'Brien's conduct and II. The Court of Claims erred by holding that the

breach were not a material breach of the contract so after-acquired evidence of O'Brien's additional,

that OSU would have cause to terminate the contract

pervasive misconduct, as confirmed by the NCAA

immediately. *O'Brien v. The Ohio State Univ., Ct. of Cl.*

in March of 2006, did not bar O'Brien's claim

No. 2004-10230, 2006 Ohio 1104 (hereafter "Liability").

altogether.

OSU did not dispute that O'Brien's intentions in making the loan were humanitarian, that his conduct was O'Brien also cross-appeals from the trial court's partial not motivated by desire to gain a recruiting advantage grant of his motion for summary judgment, contending in basketball, and, further, that the loan recipient was that the court miscalculated the amount of liquidated not even eligible to participate in intercollegiate athlet-damages. He raises the following assignments of error: ics at the time of the loan because the recipient was a

[I.] The trial court erred as a matter of law in fail-professional athlete. Thus, although O'Brien breached ing to properly calculate the amount of damages

his contract by making the loan, the court determined due to the Plaintiff Jim O'Brien pursuant to the

that the breach was not "material," and that OSU was liquidated damages provisions contained in his

without cause to terminate him on that basis alone.

Employment Agreement.

Following the bench trial, the trial court rendered a verdict for O'Brien, and both parties filed motions for

[II.] The trial court erred as a matter of law in

summary judgment as to damages. *O'Brien v. Ohio State* finding that the Defendant University was entitled

Univ., 139 Ohio Misc.2d 36, 2006 Ohio 4346, at P1-3, 859

to a setoff for certain bonus amounts previously

N.E.2d 607 (hereafter "Damages"). The trial court paid to Plaintiff Jim O'Brien.

found the employment contract clearly and unambigu-

ously contemplated the amount of damages OSU

***

would owe to O'Brien in the event he was terminated

The determination of whether a party's breach of a

without "cause," as defined by the contract; thus, there contract was a "material breach" is generally a question was no dispute as to any material

fact in that regard.

of fact. That has been the law for at least two decades, Construing the evidence in a light most favorable to and it has been upheld by other courts. The reasoning Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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behind this principle is that to determine whether a extended O'Brien's tenure at OSU by five years,

party's breach was material requires, inter alia, an through the 2007 season, and markedly raised his sal-examination of the parties' injuries, whether and how ary, guaranteeing that he receive total compensation in much the injured parties would or could have been

the neighborhood of $ 800,000 per year, plus incen-

compensated, and whether the parties acted in good

tives (1999 Employment Agreement, at Section 3.0

faith. Id. All of these inquiries turn on subjective facts.

[hereafter "contract"]). In addition, the 1999 contract If we accept the facts found in the trial court as true, we put strict limitations on the circumstances

under which must then independently determine—without defer-O'Brien could be terminated prior to the end of the

ence to the trial court's conclusion—whether those

contract's termSpecifically, under the new contract, facts satisfy the trial court's legal conclusion. We must OSU could not terminate O'Brien without "cause,"

not, however, simply re-weigh the evidence, substitut-which was defined in Section 5.1 thereof:

ing our own judgment for that of the trial court.

Termination for Cause - Ohio State may terminate

II.

this agreement at any time for cause, which, for the purposes of this agreement, shall be limited to the

Turning to the evidence, in April 1997, OSU hired

occurrence of one or more of the following:

O'Brien as head men's basketball coach. When

O'Brien arrived at OSU, the men's basketball program (a) a material breach of this agreement by Coach,

was, by his own account, "not in great shape" and, in which Coach fails to remedy to OSU's reasonable

fact, OSU had not been to the Final Four in men's

satisfaction, within a reasonable time period, not

basketball in nearly three decades.

to exceed thirty (30) days, after receipt of a written O'Brien's first season as head coach at OSU was the

notice from Ohio [S]tate specifying the act(s),

1997-1998 season, which O'Brien described as "not very conduct or omission(s) constituting such breach;

bright." Indeed, the team won only eight games that

year. The following year, O'Brien turned the Buckeyes (b) a violation by Coach * * * of applicable law,

around. From winning only]one-fourth of their games policy, rule or regulation of the NCAA or the Big

in 1997-1998, the 1998-1999 team won more games

Ten Conference which leads to a "major" infraction

than any other Buckeye men's basketball team in his-

investigation by the NCAA or the Big Ten Confer-

tory. That year, O'Brien led the Buckeyes to a Big Ten ence and which results in a finding by the NCAA or

conference title, and an NCAA tournament berth cul-

the Big Ten Conference of lack of institutional con-

minating in a trip to the Final Four. O'Brien was

trol over the men's basketball program or which

named 1999 National Coach of the Year, and received

results in Ohio State being sanctioned by the

numerous other coaching awards and accolades. Obvi-

NCAA or the Big Ten Conference * * * .

ously, OSU was pleased with O'Brien, which was evi-

Notwithstanding Section 5.1, OSU could terminate

denced by the fact that Andy Geiger, Ohio State's

O'Brien without cause, but, if so, would be obligated Director of Athletics ("Geiger"), approached O'Brien to pay O'Brien liquidated damages. Collectively, Sec-immediately after the 1998–1999 season to offer him

tions 5.2 and 5.3 provided the formula for the calcula-a new contract, despite the fact that he still had three tion of liquidated damages, in the event OSU decided years remaining on his then-current contract. Id.

to terminate O'Brien for any reason(s) other than

Geiger testified that, after the 1998–1999 season, he those described in Section 5.1:

was extremely "enthusiastic about O'Brien," and

"enthusiastic

about

[OSU's]

basketball

program"

5.2 Termination Other Than For Cause/Partial

because they had just gone to the Final Four. Geiger Liquidated Damages. If Coach's employment here-told the trial court that he initiated talks about a new under is terminated by Ohio State *other than for* contract with O'Brien

because he “was anxious to have *cause* (as delineated in Section 5.1 above), Ohio

[Coach O’Brien] feel good about Ohio State.”

State shall pay and provide to Coach, as *partial liq-The terms of the new contract were negotiated over*

*uidated damages * * * (i) the full amount of Coach’s several months, and the final version of the agreement then-current base salary (see Section 3.0 above)*

was delivered to O’Brien for his approval on or about and (ii) such normal employee benefits as Ohio

October 1, 1999. The new contract took effect just

State then provides generally to its administrative

prior to the 1999-2000 season, and it was the parties’

*and professional employees * * *.*

intent that the new contract supersede the previous

contract for O’Brien in toto. This new contract was sub-5.3 Termination Other than for Cause/Additional

stantially superior to the previous contract because it Liquidated Damages. If Coach’s employment is

(continued)

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Chapter Two

terminated other than for cause (as delineated in the likelihood that the government would force him

Section 5.1 above), in addition to the liquidated

into military service amidst the ongoing war in Yugosla-damages to be paid and provided by Ohio State

via.4 O'Brien was already familiar with Radojevic's plight pursuant to Section 5.2 above, Ohio State shall

because Slobodan "Boban" Savovic, a then-current mem-compensate Coach for the loss of collateral busi-

ber of O'Brien's team, gave almost daily reports of the ness opportunities (whether media, public rela-situation, and Savovic was purportedly from the same tions, camps, clinics, apparel or similar contracts, geographical region as Radojevic. Id.

sponsorships or any other supplemental or collat-

Shortly after his September 1998 recruiting tour,

eral compensation or benefit of any kind) by pay-

O'Brien received information that Radojevic had

*ing Coach as additional liquidated damages * * *[.]*

signed a professional basketball contract with a Yugosla-

* * *

vian team in 1996, that he had played for that team,

b. an amount equal to three and a half (3.5) times

albeit sparsely, and was compensated in consideration the product of (y) the Coach's then current base

*of his service. If true, this meant that Radojevic could salary * * * and (z) the number of years remaining*

not play for OSU (or any college) because signing a

*under the term of this agreement * * *, if Coach's*

professional sports contract instantly strips that player employment is terminated after June 30, 2003.

of his amateur status, a baseline requirement to be eligible to play collegiate sports in the NCAA.5

Such amount shall be paid in a lump sum within

Despite speculation that Radojevic had "professional-thirty (30) days after termination of Coach's

ized" himself, O'Brien and his staff continued their employment hereunder, and shall be in lieu of

recruiting efforts, apparently in the hopes that OSU

*any other obligation of Ohio State * * *.*

could petition the NCAA to have him reinstated. To

The events that gave rise to this case, however, all tran-make a successful case, the school seeking the athlete's spired before the negotiation and execution of the

reinstatement must file an application with the NCAA's 1999 contract.

reinstatement department presenting facts and circumstances that mitigate both the player's professional When O'Brien arrived in Columbus in the spring of

involvement, and the presumed competitive advantage

1997, the OSU men's basketball program was in disar-

that school might gain from having the professionalized ray, and it was his responsibility, as head coach, to player on their roster. If either circumstance is border-change that. Although winning is arguably every head line, a school can, for example, recommend self-imposed coach's first priority, Division-I1 college sports coaches conditions for reinstatement to persuade the NCAA

have a number of responsibilities beyond what they do decision-makers to rule in their favor. Given that O'Brien on the court or at game time. (Contract, Section 4.0 et did not give up recruiting Radojevic, even after learning seq.) O'Brien cited a host of duties for which he was about the professional contract, he was apparently count-responsible as the head coach at OSU: The first

ing on Radojevic's reinstatement, which is evidenced by one—"Win," the second—"Recruit student-athletes."

the fact that, shortly after learning about the contract, Shortly after the close of the dismal 1997–1998 season, OSU accepted what is known as a National Letter of Intent 21-year-old Alex Radojevic arrived at OSU's campus for ("NLI")6 from Radojevic, on November 11, 1998. The

an unofficial recruiting visit. 2 Radojevic hailed from the significance of the NLI is two-fold: it represents Radoje-Republic of Serbia,3 stood seven-feet-three-inches tall, vic's commitment to OSU, to enroll there as a student-and, at the time, played Division-III basketball at a com-athlete and play basketball, and also represents OSU's munity college in Kansas. Radojevic came to visit OSU

commitment to provide Radojevic with one of its coveted because he wanted to transfer to a Division-I school, to basketball scholarships.

get the kind of national exposure that would improve In December 1998, Radojevic came back to OSU for an

his chances for the NBA draft. Given his size alone, official visit. 7 He spent two days on the campus, attended Radojevic was seen as a "difference maker," and he

a basketball game, and was chaperoned to several other was heavily recruited by a number of top schools.

school-sponsored events by fellow Serb, Boban Savovic.

O'Brien and his staff began recruiting Radojevic, and After this visit, an individual associated with the Radoje-visited him in Kansas while on an official recruiting vic family contacted one of O'Brien's staff soliciting tour in early September 1998. While O'Brien was visiting financial assistance from O'Brien, purportedly for Rado-Radojevic, Radojevic received word from Serbia that his jevic's mother back in Yugoslavia. O'Brien testified that father had passed away. O'Brien was sympathetic toward he considered the request, weighing the fact of Radoje-Radojevic, who wanted badly to return home to his

vic's father having recently passed, and also what

mother and family, but could not go back because of

O'Brien had come to know about what life must have

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been like for the Radojevic family, amidst the bombings the University of Oklahoma, Dr. Swank worked in pri-and ongoing military violence. O'Brien also considered vate practice in his hometown of Stillwater, Oklahoma, whether any NCAA rule prevented him from offering

and shortly thereafter became an assistant prosecutor, help to the family of an athlete who was, in all likeli-followed by his election as county prosecutor. He

hood, ineligible to play collegiate sports on account resigned his term as prosecutor to return to his alma that he had already played professional basketball in mater as chief counsel for the university, and assistant Yugoslavia.8 O'Brien resolved that Radojevic was already professor of law. He later became chief compliance

a professional, and would most likely never play for officer there, and at the same time was appointed and OSU, which meant that no NCAA rule could control

served seven years as an NCAA vice president. Dr.

whether it was permissible for him to offer financial Swank later became Dean of the University of Okla-assistance to the Radojevic family in their time of need.

homa College of Law, after which he became the uni-

Thereafter, O'Brien gave then-assistant coach Paul Bian-versity's president. Dr. Swank served as president until cardi an unmarked envelope containing $ 6,000,

1990, when he joined the NCAA Committee on Infrac-

instructing Biancardi to take the envelope to New York tions. Two years later, Dr. Swank was named chair of City and deliver it to a waiter known as Spomenko

that committee, where he served seven more years,

"Semi" Patrovic. There was speculation as to what spe-and was the chair of that committee at the time of

cific role Patrovic played in soliciting the loan, and how the Radojevic loan.

he was related to or affiliated with the Radojevic family.

Dr. Swank testified as an expert on NCAA bylaws and

Although it was not foreseen at that time, Semi Patrovic investigations on behalf of O'Brien, to provide an

ultimately became Radojevic's sports agent.

expert analysis of NCAA rules as applied to the Rado-There were differing accounts as to precisely when the jevic family loan, and whether that conduct constituted loan occurred; in fact, the trial court referred to the a major rules infraction thereof. Further, Dr. Swank details as "sketchy." (Liability, 2006 Ohio 1104, at P9.) gave expert testimony relating to the four-year statute O'Brien testified that part of his consideration of whether of limitations, and whether the limitation period

to make the loan was that he received the request around precluded NCAA sanctions as a result of O'Brien's

Christmas time, which supports his position that he made conduct. Id., quoting NCAA Bylaw 32.6.3. Given the

the loan in late December 1998 or early January 1999.

40-year body of work representing Dr. Swank's experiThe NCAA Committee on Infractions, however, ques-

ence, and the specificity of his expertise relative to tioned O'Brien's recollection of the timing of the loan, the issue upon which he was called to opine, the

and issued a report alleging that the terms of the loan trial court found Dr. Swank's testimony extremely cred-could have been contemplated much earlier, vis-a-vis Sep-ible and reliable. Thus, Dr. Swank's testimony was

tember 1998, during O'Brien's recruiting stop in Kansas. 9

monumentally persuasive, and crucial to determining

The infractions committee's report was not issued until whether O'Brien materially breached his employment

almost a year after O'Brien was fired, thus, it had no bear-agreement.

ing on OSU's decision to terminate him. Regardless, the The trial court adopted O'Brien's version of the timing trial court found the NCAA report and its related testi-of the loan, in part, because the court found O'Brien to mony and evidence to be unreliable; moreover, the trial be a credible witness, but, also, because there was no court correctly held that the report was not binding in evidence to support the contrary viewpoint. The only these legal proceedings. Ultimately, the trial court found evidence supporting the contrary viewpoint was a docu-the testimony of former NCAA Committee on Infractions ment authored by Assistant Director of Enforcement for Chair Dr. David Swank more persuasive and credible as to the NCAA, Steve Duffin, which was prepared using Duf-the NCAA's bylaws and procedures:

fin's personal notes of his purported interview of Radojevic in November 2004. The trial court deemed Duffin's In the court's opinion, Professor Swank's view repre-deposition and its related documents inadmissible

*sents a more practical application of the rules. * * **

because they all contained statements made out of

Ultimately, the determination whether [O'Brien]

court, which were offered for their purported truth, committed a major infraction of NCAA rules and

and that no exception to the hearsay rule was

what sanctions, if any, may be imposed upon

applicable:

[OSU] will be made by the NCAA Committee on

Upon review of the depositions, the court finds

Infractions and not this court.

that the testimony is riddled with inadmissible hearsay Indeed, Dr. Swank's credentials as an expert witness for and lay opinions. Moreover, even if the statements

O'Brien were impressive. After finishing law school at attributed to Radojevic could somehow qualify [as]

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an exception to the hearsay rule, the statements sim-constituted a material breach independent of whether ply lack credibility. The interview was not recorded the loan itself was a violation of NCAA rules. The

by stenographic or other means[,] and Radojevic

strength of that argument, however, turned on

*was not under oath * * *. In addition, the state-*

*O'Brien's subjective belief of whether [**28] he*

ments are contained in documents prepared by

thought the loan could be a violation. Thus, a key

NCAA enforcement personnel who have taken a

determination in the trial court was whether O'Brien position adverse to [O'Brien] in the underlying

could have reasonably believed that the loan did not NCAA proceedings. Finally, even [Andy Geiger]

constitute an NCAA compliance infraction.

defendant's own athletic director testified that

O'Brien testified that, because Radojevic had profession-Radojevic lied to the NCAA reinstatement commit-

alized himself in 1996, he could not have violated NCAA tee in connection with those proceedings.

recruiting rules when he made the loan in 1998. He also maintained that there was no NCAA rule against loaning Id. at P31. (Emphasis added.) We note, especially, that the money to the family of a professional athlete. Dr. Swank trial court did not exclude this evidence solely on account concurred, and opined: "because [Radojevic] was not a of a technicality (a rule of

evidence). To the contrary, the prospective student-athlete at that time, that it was not a trial court thoroughly examined the evidence prior to violation of NCAA rules." To arrive at this conclusion, Dr.

making the determination that its truthfulness simply Swank explained NCAA Bylaw 12.1.1, which sets forth six could not be verified, corroborated, or relied upon.

independent circumstances under which an amateur ath-O'Brien consistently maintains that the $ 6,000 was a loan, lete loses eligibility to participate in NCAA-sanctioned col-nothing more, and that he was compelled to offer assis-legiate sports.10 Dr. Swank explained that, out of the six tance out of sympathy toward Radojevic's mother. In

disqualifying factors enumerated in Bylaw 12.1.1, in 1996, short, O'Brien made the loan because he could—he

Radojevic performed five separate and distinct acts, any had the money, could spare the money, and it was to go one of which sufficiently stripped him of amateur status, to a good cause. O'Brien specifically refuted the idea that and that all these events occurred two years prior to the he might have made the loan to influence Radojevic's loan. Id. In Dr. Swank's expert opinion, the evidence that decision to attend OSU. Id. Accepting the trial court's Radojevic had become a professional athlete in 1996 was finding as to the timing of the loan, the court could rea-unequivocal, which supported his conclusion that it was sonably find that O'Brien was being truthful in this reasonable for O'Brien to believe he could make a loan to regard, because, based on the NLI's date of November the Radojevic family without violating NCAA rules.

11, 1998, Radojevic had already made a final decision to Dr. Swank could not render an opinion as to why OSU

come to OSU. The only possible opposing viewpoint is the would continue to recruit a player, and offer that

one asserted by Steve Duffin: The evidence at trial did not player a scholarship, after learning that the player support Mr. Duffin's view.

had played professionally, or was otherwise ineligible O'Brien's credibility as a witness was also bolstered by evi-to participate in NCAA-sanctioned activities. The only dence that his generosity in this situation was no anomaly.

explanation O'Brien offered for why he continued to

O'Brien testified to making loans to others close to him, recruit Radojevic was that he was planning on reinstate-including former players, friends, and assistant coaches.

ment. Subsequently, O'Brien made the loan. He

These other loans ranged in amounts from $3,500 to

explained that, if Radojevic had been reinstated,

$10,000. Geiger's testimony was consistent with O'Brien's, he would have had to disclose the loan, because he

to the extent that Geiger believed O'Brien's intentions would have then offered financial assistance to the

surrounding the loan to have been pure and humanitar-family of a prospective student-athlete. Dr. Swank did ian and that O'Brien had done a "noble act."

not consider whether Radojevic could have or should

The NCAA requires each member institution to file

have been reinstated, because, in his opinion, reinstate-annual affidavits, which certify that the school, its ment was not even possible, much less plausible. Although teams, student-athletes, etc., have complied with all Dr. Swank's position lends more credibility to O'Brien's applicable NCAA regulations for that year ("compli-justification of the loan, it leaves the door open to ques-ance certification"). As a head coach of a major sport, tions about why O'Brien pursued Radojevic's reinstate-O'Brien was the chief compliance officer for the men's ment so vigorously with the NCAA.

basketball program at OSU. One of O'Brien's primary

Although O'Brien probably learned about Radojevic's pro-duties as chief compliance officer was to file the annual fessional contract in September 1998, it was not commonly compliance certifications for the men's basketball pro-known within OSU until February 1999, which is when Gei-gram. At trial, OSU argued that O'Brien's failure to ger confronted O'Brien with the news. O'Brien and his report the Radojevic loan on the compliance certifica-staff assured Geiger that Radojevic's contract was essen-tion(s) was deceitful, and that O'Brien's deceit

tially propaganda by the Yugoslav government, "a bunch *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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of hooey," and that Radojevic could still be reinstated. As Despite that, O'Brien believed the loan did not violate part of the reinstatement procedure, OSU formally

NCAA rules. Geiger and the attorneys in the OSU com-

announced Radojevic's ineligibility and, on March 24, pliance office12 disagreed. Together, Geiger and his 1999, filed its petition for Radojevic's reinstatement with compliance staff attorneys determined that the loan

the NCAA. The NCAA denied the application, and OSU

should be self-reported to the NCAA, and did so the

appealed. The NCAA affirmed its decision on May 24,

following month. Shortly thereafter, O'Brien met with 1999—Radojevic had professionalized himself by signing Geiger and Julie Vannatta, one of the compliance office a professional basketball contract in 1996, and would staff attorneys on May 26, 2004, to discuss the joint inves-never play basketball at OSU, or any other NCAA institu-tigation of OSU and the NCAA, which was soon to

tion for that matter. Geiger testified that, upon learning ensue. During that meeting, Geiger advised O'Brien

about the committee's final decision, O'Brien appeared that O'Brien should retain independent counsel.

deeply frustrated and disappointed, as if to say that O'Brien The following day, O'Brien called Geiger to ask if he was was expecting a different outcome. At trial, Geiger did not going to be fired. O'Brien testified that Geiger had attempt to reconcile his recollection of O'Brien's reaction replied "no," however, Geiger could not confirm his

in May 1999, with O'Brien's story that he basically knew reply. On cross-examination, when O'Brien's counsel

Radojevic was a professional all along.

asked Geiger whether he had told O'Brien he was not

Radojevic never enrolled at OSU. Shortly after the appeal going to be fired, Geiger stated, "It's possible." Geiger was decided, Radojevic declared himself eligible for the contacted O'Brien a few days later to find out if he 1999 NBA draft. He was selected in the first round, as the had retained counsel, and also asked whether O'Brien twelfth overall pick by the Toronto Raptors. OSU closed intended to resign. O'Brien told Geiger that he had

out its basketball season in March 1999, winning the Big retained attorney James Zestzutec, but they did not

Ten conference title, and going to the Final Four in the fully resolve the issue of O'Brien's resignation. O'Brien's NCAA basketball tournament. OSU did not dwell on hav-attorney then sent a letter to Geiger, stating his client's ing missed out on a promising recruit, because almost intent and willingness to cooperate with the athletics immediately after the season came to a close, Geiger department and the NCAA during the impending inves-began talks with O'Brien about the new contract they tigation. Geiger did not respond to the letter, nor did were about to sign. Other than O'Brien, and probably Geiger or any of his staff meet with O'Brien's attorney Paul Biancardi, no one at OSU knew anything about the before terminating him on June 8, 2004.

Radojevic family loan until five years later.

At approximately 7:30 a.m., on June 8, 2004, Geiger

In 2003, O'Brien learned about a lawsuit, filed locally, called O'Brien at his home, and asked O'Brien to

involving an OSU athletics booster, Kathy Salyers, and meet him at his office as soon as possible. O'Brien

then former player Boban Savovic.11 O'Brien related

arrived at Geiger's office within the hour, and, after news about the lawsuit to Geiger because of the likelihood waiting awhile, Geiger handed him a letter of termina-that sensitive information could become a matter of public tion. (Termination Letter from Geiger to O'Brien

record. Salyers was deposed around April 2, 2004, and dated June 8, 2004, hereafter "termination letter.") O'Brien either knew, or at least suspected, that the subject Geiger told O'Brien that he had the option of resign-matter of Salyers' deposition included information relating in lieu of termination, but that he had already

ing to Radojevic. O'Brien knew that, even though Radoje-scheduled an afternoon press conference to make the

vic never attended OSU and never played Division-I

announcement, one way or the other.

basketball, if the loan were discovered by local media it In the hours that followed, O'Brien's attorney tried would become headline news, which is why he felt com-contacting Geiger and OSU to request a meeting, or

pelled to tell Geiger. O'Brien wanted to be sure Geiger to be given more time for O'Brien to consider his

found out from him personally, rather than learn about options. Although Julie Vannatta spoke briefly with

it from the press.

O'Brien's attorney that day, she declined counsel's

On April 24, 2004, O'Brien approached Geiger at the

requests to meet, or for an extension of time. Id. Gei-Huntington Club inside Ohio Stadium. They were both

ger announced the coach's firing as planned, at the

attending a donor reception on the day of the football afternoon press conference.

team's annual "Scarlet & Gray" spring game. O'Brien told Geiger about the loan, briefly explaining the cir-III.

cumstances, why he had not disclosed it until then, and Nearly one year after O'Brien was fired, the NCAA

the reason for finally coming forward, to which Geiger issued a "notice of allegations"13 to OSU alleging major responded that they would "work through it together"

rules infractions by the men and women's basketball

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programs, and also the football program. Six of the

of the evidence, that (1) he substantially performed alleged violations concerned former basketball player under the contract, and (2) OSU breached the con-Boban Sovovic, and three of them related to Radojevic.

tract by terminating him.

Before and during trial, the trial court ruled in favor of The doctrine of substantial performance provides that, OSU on several motions in limine, and routinely sus-where a contract requires numerous performances by

tained OSU's objections to O'Brien's counsel making

one or more of its parties, a party's breach of a single any reference to persons, facts, or events other than term thereof does not discharge the non-breaching

those specific to the Radojevic loan. As a product of party's obligations under the remainder of the contract these rulings, the record is virtually silent to the circum-unless performance of that single term is essential to the pur-stances surrounding the majority of the violations

pose of the agreement. Stated another way, default by a alleged in the notice issued March 13, 2005. Addition-party who has substantially performed does not relieve ally, the trial was held in December 2005, while the the other party from subsequent performance.

NCAA did not conclude its investigation until March

OSU terminated O'Brien's contract prior to its term.

10, 2006. Thus, at the time of trial, it was unknown The crux of OSU's argument is that, on account of the (1) whether the loan to Radojevic constituted an infrac-loan to Radojevic in 1998 (and subsequent failure to tion of NCAA rules; (2) if the loan was an infraction, disclose), O'Brien did not substantially perform under whether the infraction was major, or only secondary; the contract, which excused OSU from all future perfor-and (3) whether and to what extent OSU could be pun-

mances. Stated more simply, OSU asserts that it was jus-ished as a result of the Radojevic loan. For a number of tified in terminating O'Brien under the terms of his reasons, these undetermined facts were problematic to written contract.

litigation of the claims herein.

Several key witnesses, including OSU's athletics director, Counsel for both parties have submitted motions to

Geiger, testified that O'Brien had done a fine job as head supplement the trial court record, and/or to urge this men's basketball coach, which was evidenced demonstra-court to take judicial notice of certain facts not in evi-tively by the team's winning record, and O'Brien's numer-dence. We previously determined that the record was

ous national coaching awards. Notwithstanding, OSU

sufficient to review the judgment of the trial court, and argued that the loan was such an egregious violation of overruled all motions to supplement. Consequently, we NCAA rules that it constituted a material breach within will not review or give consideration to the subsequent the meaning of

Section 5.1(a) of the contract, and that, determinations made by the NCAA with regards to (1)

because of that material breach, OSU was justified in its whether O'Brien's conduct constituted a major or sec-action terminating O'Brien's employment.

ondary rules' infraction, or (2) to what extent OSU has In its first assignment of error, OSU asserts that the trial been harmed as a direct or proximate result thereof.

court erred by finding that the Radojevic loan did not After thoroughly examining all the evidence in this

materially breach O'Brien's contract. They contend—

case, the trial court made specific findings relating to notwithstanding Section 5.1, which explicitly provides the both of these issues, which, provided they are sup-circumstances under which O'Brien could be fired "for ported by some competent, credible evidence, obviate cause"—that the Radojevic loan also violated Section the need to supplement the record. Further, this court 4.1(d), requiring O'Brien to "run a clean and compliant is not bound by the determination of the NCAA.

program." In Geiger's termination letter to O'Brien, ***IV.***

Geiger justified the decision to terminate him as follows: O'Brien brought a single claim against OSU, alleging that In our discussion on April 24, 2004, you admitted

OSU breached his employment contract when it fired

that you knew your action was a violation of NCAA

him on June 8, 2004. A contract is (1) an agreement, rules, and you are correct. In particular, it is a

(2) with consideration (i.e., quid pro quo), (3) between recruiting inducement in violation of NCAA Bylaw

two or more parties, and (4) to do or not to do a particular 13.2.1. Despite the fact that the University was no

*thing. Under Ohio law, to prevail on a claim for breach of longer actively recruiting Mr. Radojevic * * *. Fur-contract, a plaintiff must prove: (1) the existence of, and thermore, for each of the past five years, you vio-terms of, a contract; (2) performance by the plaintiff; (3) lated NCAA Bylaw 30.3.5 which, by your signature*

non-performance by the defendant; and (4) damages

on the annual NCAA Certification of Compliance

caused by defendant's breach.

form, requires you to confirm that you have self-

There is no dispute, here, as to the existence of a con-reported your knowledge of any NCAA violations.

tract. (Liability, 2006 Ohio 1104, at P34.) O'Brien's We have self-reported this matter and other allega-claim turned on demonstrating, by a preponderance

tions related to the program to the NCAA.

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*Section 4.1(d) * * * requires you to "know, recog-*

Geiger's letter to O'Brien gave the explicit reason(s) for nize and comply" with all applicable rules and reg-his termination as: (1) violation of NCAA Bylaw 13.2.1; ulations of the NCAA and to "immediately report

and (2) violation of NCAA Bylaw 30.3.5, which, together, to the Director [of Athletics] and to the Depart-constituted a material breach of the contract— cause for ment of Athletics Compliance Office" if you have

termination under Section 5.1(a). However, this reason-

"reasonable cause to believe that any person … has ing is suspect on account of subsection (b), for two rea-violated

…

such

laws,

policies,

rules

or

sons: First, it violates basic principles of contract regulations." You have materially breached this

interpretation, by rendering subsection (b) useless. Con-important term of your contract.

tracts must be interpreted in a way that gives meaning to each term. Secondly, its reasoning creates a "bootstrap-Unfortunately, your admitted wrongdoings leave

ping" effect by allowing OSU to substitute its own judg-the University no choice. Pursuant to Section

ment for that of the NCAA. Doing so expressly violates 5.1(a) of your employment agreement, we intend

*the agreed-upon terms in Section 5.1(b), which require to terminate such agreement for cause, effective at an NCAA determination (and sanctions resulting there-5:00 p.m. today, June 8, 2004. * * **

from) of whether the coach committed a violation.

Although Geiger cited to specific NCAA bylaws in the The parties to the contract at issue—i.e., the coach and letter, he offered only his own interpretations thereof.

OSU—negotiated the terms and circumstances under

Thus, Geiger's assertion was that O'Brien violated

which OSU could terminate the contract prior to its

what amounted to Geiger's own—or OSU's own—

term. The parties agreed that OSU could not fire O'Brien interpretation of the NCAA's rules, and, based on

unless a specific condition occurred and, as of June 8, that interpretation, he concluded that O'Brien materi-2004, that condition had not occurred. In fact, the evi-ally breached his contract. Accepting that analysis as dence does not conclusively show that that condition has apposite, Section 5.1(a) provides that OSU could termi-occurred to date. Thus, we cannot say whether O'Brien nate the coach, on the basis that he committed a mate-could have been terminated pursuant to the NCAA's

rial breach of the agreement. This was the basis Geiger determination in 2006; however, even if it would have cited for O'Brien's termination. No other basis for

been proper to terminate him at that time, much of the O'Brien's termination was set forth at that time.

liquidated damages awarded to O'Brien in the judgment Section 5.1 of the contract provides that OSU could

of the trial court would have been earned as salary.

fire O'Brien for either, or both, of the following:

*Job security is not the first item on the lists of most high-profile coach's perks of employment, and when Geiger (a) a material breach * * *; [or]*

came to O'Brien in 1999 to renegotiate his contract, O'Brien bargained to have a contract that provided

(b) a violation by Coach (or a violation by a men's

more certainty in that regard. O'Brien knew in 1999

basketball program staff member about which

that NCAA investigations happen all the time-–or, in Coach knew or should have known and did not

the words of OSU's Law Professor and Vice President

report to appropriate Ohio State personnel) of

of Student Affairs, David Williams: It's just the nature of applicable law, policy, rule or regulation of the

the beast. O'Brien wanted to insulate himself from some NCAA or the Big Ten Conference which leads to

of the uncertainty that goes with being a high-profile a "major" infraction investigation by the NCAA or

coach in Division-I college sports, which is why he

the Big Ten Conference and which results in a

sought the guarantee from OSU that he would not be

finding by the NCAA or the Big Ten Conference

fired prematurely, at the outset of a rumor, or specula-of lack of institutional control over the men's bas-

tion that, in the future, the NCAA might impose some ketball program or which results in Ohio State

sanction against OSU for some reason. OSU agreed with being sanctioned by the NCAA or the Big Ten

this term, and reduced it to writing. In doing so, OSU

*Conference * * *.*

bargained away its unfettered discretion to terminate When both subsections of 5.1 are read in pari materia, O'Brien, especially as it related to any conduct or subject it becomes abundantly clear that subsection (b) pro-matter arising in the context of NCAA rules.

vides the circumstances under which OSU could termi-

Even if, however, OSU had not bargained away this

nate O'Brien for conduct relating to NCAA rules or

right—its own discretion or self-determination of what violations thereof. But OSU did not fire O'Brien

constitutes an NCAA major infraction—this court can-

under the authority of Section 5.1(b). In fact, there is not say that independently of being an alleged NCAA

no mention or reference to Section 5.1(b) in the entire recruiting violation, O'Brien materially breached his body of the termination letter.

contract with OSU by loaning $ 6,000 to the family of (continued)

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a player who was never eligible to play college basket-violation of NCAA rules. We cannot agree. If the NCAA ball in the first place.

did not prohibit a school's providing a cash incentive to At common law, a "material breach" of contract is a

prospective student-athletes, it does not seem logical that party's failure to perform an element of the contract O'Brien's conduct would have been objectionable.

that is "so fundamental to the contract" that the single The act of giving money to an athlete or prospective failure to perform "defeats the essential purpose of the athlete is a common practice outside of the NCAA—

contract or makes it impossible for the other party to professional

franchises

offer

multi-million

dollar

perform." 23 Williston on Contracts, Section 63:3. As signing bonuses to prospective athletes all the time, to applied to the facts here, based on our review of the encourage them to sign a contract with that respective contract itself, and the relevant testimony, we agree team. Therefore, OSU's argument in that regard is

with the trial court's determination that NCAA compli-unpersuasive,

and

we

must

determine

whether

ance was but one of O'Brien's many duties. (Liability, O'Brien's conduct constituted a material breach within 2006 Ohio 1104, at P38.) That said, failure to strictly the meaning of the contract.

comply with NCAA rules does not entirely frustrate

Restatement of the Law 2d, Contracts, sets forth a more the purpose of the contract, unless it were true that precise analysis for determining whether a party's breach every time a coach or player within the NCAA's juris-of a contract was material, by using a five-prong test, diction commits a violation of its rules, that athlete or which this court adopted in Kersh, at 62-63 (citing Restate-coach (or the member school) is barred from competi-

ment of the Law 2d, Section 241; see, also, Klaus, at 730-731; tion. In other words, at common law, the Radojevic

Shanker v. Cols. Warehouse Ltd., Partnership (June 6, 2000), loan could have constituted a material breach if the Franklin App. No. 99AP-772, 2000 Ohio App. LEXIS 2391.

NCAA had determined that the loan was a major

The Restatement test is prevailing law, and it was used infraction warranting a lengthy suspension from

by the Ohio Court of Claims in deciding this case:

NCAA competition. For the purposes of this inquiry,

however, the common law material-breach analysis is

(a) the extent to which the injured party will be

circuitous, because it cannot be determined indepen-

deprived of the benefit which he reasonably

dent of the NCAA's findings. Again, OSU did not wait expected;

for the NCAA to make such a determination, and,

essentially, OSU substituted its own judgment for that (b) the extent to which the injured party can be

of the NCAA to make its own determination, which

adequately compensated for the part of that bene-

tends to controvert the very heart of the parties' agree-fit of which he will be deprived;

ment vis-a-vis Section 5.1(b).

Amici argue on behalf of OSU that the above interpre-

(c) the extent to which the party failing to perform tation of Section 5.1(b) "undermines the institution's

** * * will suffer forfeiture;*

ability to self-monitor its programs, and to speedily put an end to any improper circumstances, self-report and (d) the likelihood that the party failing to perform self-sanction in an effective manner." (Amici Curiae

** * * will cure his failure, taking account of all the brief, at 20.) Although amici do not cite to any case or circumstances including any reasonable [adequate]*

authority for this proposition, we find it a persuasive one assurances;

indeed. However, amici's policy argument, regardless of how logical or persuasive, fails to take the actual agree-

(e) the extent to which the behavior of the party

ment between O'Brien and OSU into account. The spe-

*failing to perform * * * comports with standards of*

cific problem we face is that, on these facts, in Section good faith and fair dealing.

5.1(b) of the contract, the parties specifically contem-Under the first prong, Restatement of the Law, Section 241

plated the consequences that would follow if an NCAA (a), OSU argues that the Radojevic loan deprived OSU

violation was alleged or believed to have occurred.

of the benefit it reasonably expected from O'Brien's Those consequences did not include termination of

contract, because O'Brien's conduct: (1) subjected

the contract prior to an NCAA determination. Thus,

OSU to NCAA sanctions; (2) adversely affected OSU's

under the terms in Section 5.1(b), OSU acted prema-

reputation; and (3) breached the trust between O'Brien turely by firing O'Brien on June 8, 2004.

and Geiger, the athletics director. The trial court made In turn, at oral argument, OSU attempted to circumvent factual findings with regard to each of the three injuries the meaning of Section 5.1(b) by asserting that O'Brien's claimed by OSU, and ultimately determined that, in and conduct (i.e., the loan, and failure to disclose) had signif-of itself, the Radojevic loan did not substantially harm icance independent of whether the conduct was a

OSU. We accept the trial court's findings provided

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they are supported by some competent, credible evidence. C.E.

conversely, was much more damaging to OSU's reputa-

Morris Co.; Columbus Homes Ltd., supra.

tion, because Savovic was enrolled as a student-athlete As a preliminary matter, we note that "breach of trust"

at OSU for four years.

was not mentioned in the termination letter and,

NCAA investigations are not uncommon at Division-I insti-although there is an implied duty of good faith in

tutions, such as OSU. The fact of the matter is, NCAA vio-every contract, trust was not specifically mentioned in lations happen all the time, "[it's] the nature of the beast."

the parties' agreement, nor was "breach of trust" cited (Williams Depo., at 52.) Also relevant to the issue of OSU's as possible grounds for cause to terminate the contract.

allegedly-damaged reputation is the fact that almost OSU's first claimed injury was NCAA sanctions. The trial immediately after firing O'Brien, OSU was able to lure court found that, because the NCAA's allegations related one of the nation's top coaching prospects to assume to matter(s) other than the Radojevic loan, the extent of O'Brien's former position. (Thad Matta Depo., Aug. 25, harm caused to OSU "that can be fairly attributed to the Rado-2005, at 5-8.) Shortly thereafter, Matta successfully jevic matter is difficult to predict." (Liability, 2006 Ohio recruited possibly the best recruiting class ever. Based on 1104, at P110.) (Emphasis added.) Geiger and Julie Van-this evidence, the trial court could reasonably find the natta even acknowledged that the Radojevic matter was Radojevic loan did not cause serious harm to OSU.

barred by the four-year limitation period in NCAA Bylaw As noted earlier, the parties did not mention trust in the 32.6.3. Thus, because the loan occurred in 1998 (or, at agreement, and OSU did not cite to such a proposition the latest, January 1999), the statute of limitations had until after this litigation ensued. Regardless of whether already expired when OSU reported the matter to the

OSU "manufactured" the trust issue for the purposes of NCAA on May 18, 2004. Dr. Swank concurred. Further,

litigation, the issue should not be ignored altogether. The the trial court made a specific finding that the NCAA did trial court found the breach-of-trust issue as most probative not seek any sanctions arising out of O'Brien's failure to of a material breach. (Liability, 2006 Ohio 1104, at P135.) report the loan on the annual compliance forms.

The trial court also concluded, however, trust was not The only sanctions suffered by OSU were self-imposed, contemplated in the written employment agreement as

with hopes the NCAA would view the institution's self-a requirement. "At best, the issue of trust is an implied determined punishment as reasonable, and decline to

term of the parties' agreement." Id. at P141. Because impose further sanctions. (Miechelle Willis Depo., Aug.

OSU did not place enough value on the parties' trust 18, 2005, at 101-102.) OSU argued that it was substantially to incorporate it into the words of the contract,

injured by the self-imposed sanctions, which included a O'Brien's alleged failure to provide or perform this ele-ban from post-season and NCAA tournament play for the ment cannot give rise to a material breach.

2004–2005 season, and relinquishing two basketball scholarships from the 2005 recruiting class. Contrary to OSU's When weighing Geiger's testimony concerning his rela-argument, however, the trial court found these sanctions tionship and friendship with O'Brien, the trial court to be insubstantial. Geiger announced the one-year post-found that O'Brien's conduct put a strain on the parties'

season ban in December 2004, and it appears from the relationship. However, the trial court found this mistake timing of that announcement that Geiger made the deci-was not a fatal error, and "was not as profound and debil-sion based on the fact that the team was unlikely to be itating" as OSU

contended. Id. Based on our thorough invited to a post-season tournament in the first place.

examination of Geiger's testimony, it appears that Geiger Despite the fact that the 2004–2005 team finished by and O'Brien were, at one time, very close. Given their upsetting the nation's top-ranked team, prior to that close and meaningful friendship, it was reasonable for game, the Buckeyes had played rather poorly throughout Geiger to at least engage O'Brien in discussions about the year. Thus, the likelihood that OSU would have been O'Brien's future after the Radojevic loan was revealed.

invited to the 2005 NCAA tournament was slim, at best, The testimony of OSU President Karen Holbrook, and

and the post-season ban was illusory. As to the relin-athletics department compliance attorneys Julie Vannatta quished scholarships, the trial court found that the 2005

and Heather Lyke confirm the fact that O'Brien was not recruiting class was one of the best ever.

given an opportunity to cure his mistake. Vannatta testi-The second alleged harm was harm to OSU's reputa-

fied emphatically that some infractions are just so egre-tion. The trial court found that any reputational harm gious that they cannot be cured. Vannatta's statement was similarly exaggerated, at least as it specifically was hyperbolic, given the actual injury OSU suffered as a related to the Radojevic matter. Radojevic never

direct result of O'Brien's conduct. The trial court ulti-enrolled at OSU, "and never played a single second

mately found the Radojevic loan was not nearly as egre-for [OSU]'s basketball team." (Liability, 2006 Ohio gious as OSU contends. And based on our review, that 1104, at P124.) The matter involving Boban Savovic, finding is supported by competent, credible evidence.

(continued)

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Chapter Two

The second prong of the test, Restatement of the Law, Section As to a good-faith analysis, under Restatement of the Law, 241(b), looks to whether the plaintiff can compensate the Section 241(e), it appears from the record that O'Brien defendant for failing to perform under the contract. The demonstrated good faith on more than one occasion

trial court correctly found this determination troubling, subsequent to April 24, 2004. He stayed in contact

because OSU's injury was "largely non-economic." (Lia-with Geiger, complied with each of Geiger's requests, bility, 2006 Ohio 1104, at P142.) Logically, because continued to do his job, and he offered to fully cooper-OSU's injuries were mostly non-economic, it was not pos-ate with the impending NCAA investigation. OSU on

sible to fully compensate them. Although this factor the other hand, did not reciprocate O'Brien's good-weighs in favor of OSU, the fact that the actual injuries faith efforts, and, despite Geiger's words on April 24, attributed to O'Brien's conduct were insubstantial de-2004, neither Geiger nor anyone else from OSU

emphasizes the need to be fully compensated.

attempted to work anything out with O'Brien.

Restatement of the Law, Section 241(c) requires the court Even the language in Section 5.1(a)–the provision

to examine the extent to which the breaching party will under which O'Brien was purportedly fired–-stated

suffer forfeiture if the defendant's nonperformance is that prior to termination for a "material breach,"

excused. Here, based on the liquidated damages for-

OSU had to put O'Brien on notice that he was in

mulae in Sections 5.2 and 5.3, and the fact that O'Brien breach, and to give O'Brien an opportunity to cure.

had roughly three years remaining on his contract,

OSU made no attempt to comply with this contractual

excusing OSU from all future performance would

term. OSU drafted the contract, therefore its terms

impose a substantial hardship on O'Brien, because he must be resolved in favor of O'Brien. Under the

would forfeit millions of dollars in guaranteed salary.

terms of the agreement, OSU should have given

OSU has persistently argued that O'Brien's failure under O'Brien an opportunity to cure what OSU apparently

the contract could not be cured. The trial court deter-believed to have been a material breach.

mined that, because of the non-economic nature of

It is clear from the record that the underlying nuances to OSU's injuries, "there is no meaningful cure with respect the trial court's findings of fact were heavily influenced by to those sanctions." (Liability, 2006 Ohio 1104, at P144.) the credibility of the witnesses in the proceedings.

Further, to the extent the court of public opinion formed O'Brien, himself, was a credible witness because, with any negative perceptions about OSU based on the Rado-one exception, nearly every material fact to which he tes-jevic matter, that injury, also, could not be negated.

tified was independently corroborated by another wit-As we stated above, the parties' good faith is implied ness. Dr. Swank's testimony was also very influential on in every contract, and the Restatement specifically

the trial court's determination. Indeed, a very brief sum-incorporates it into the final prong of the test. Restate-mary of Dr. Swank's credentials took nearly an entire ment of the Law, Section 241(e). OSU argues that page of this text above. The trial court found Dr. Swank's O'Brien acted in bad faith by covering up his miscon-expert opinion to be the more credible, reasonable, and duct for several years. In the words of OSU's counsel ultimately persuasive opinion as to the issues at bar. The at oral argument: "If lying to your employer for four years is key portions of Dr. Swank's testimony included a well-not a material breach, it's hard to imagine what would be!"

reasoned opinion that O'Brien's conduct did not consti-Although the premise for counsel's argument is

tute a violation, and the fact that the four-year limitation sound, it is unsound in application because it assumes period ultimately precluded OSU from being sanctioned facts not in evidence. Counsel for OSU assumes for the even if the NCAA did find that a violation occurred. As a purposes of the argument that, between December 1998

law professor, former law school dean, former university and April 24, 2004, O'Brien systematically either denied president, and perhaps most importantly, as the former allegations about the Radojevic loan, or took affirmative Chair of the NCAA Committee on Infractions, Dr.

steps to conceal it from OSU. The evidence does not sup-Swank's testimony could not be ignored.

port such a conclusion. After O'Brien made the loan in In sum, even though in our view Section 5.1(a) did not 1998, and Radojevic was drafted by the NBA in the spring give OSU the right to terminate the contract pursuant of 1999, there is not a single inference that can be drawn to allegations of an NCAA violation, after examining from the record to suggest that O'Brien even thought the material breach factors applied by the trial court, about the loan from the time it occurred until he learned its determination is not against the manifest weight of about Kathy Salyers' lawsuit. Again, in O'Brien's own the evidence.

mind, he did not believe he had done anything wrong, thus, he would not have had a motive to conceal what OSU's first assignment of error is overruled.

he had done. In his mind, he came forward to Geiger

In its second assignment of error, OSU argues that the on April 24, 2004, as a matter of courtesy. The fact that after-acquired evidence doctrine should have barred

he came forward, of itself, was not an admission of guilt.

O'Brien's claim altogether pursuant to the NCAA's OSU

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Public Infractions Report issued March 10, 2006. We

of the Big Ten Conference, and on March 31, 2002,

disagree.

OSU paid O'Brien $ 18,109 in recognition of the

* * *

team's outright Big Ten Championship. Id. The trial

court found, however, that the events triggering the Clearly, the after-acquired evidence doctrine has no incentives to become payable to O'Brien did not actu-application in this case. First of all, OSU does not point ally occur; thus, that OSU overpaid O'Brien. Id. at P11.

to a specific piece of evidence that was later-acquired, which would have been an independent basis for

Section 3.4 of O'Brien's contract stated the following: O'Brien's termination. OSU does point to the March

Coach shall also receive the following sums within

2006 NCAA infractions report, however, the facts therein sixty (60) days of the achievement, as supplemen-were already known to OSU prior to terminating O'Brien.

tal compensation, in consideration of his efforts

Therefore, that report does not satisfy the requirement of in contributing to the exceptional achievements

the after-evidence doctrine. Furthermore, OSU's argu-listed below:

ment that the NCAA report is after-acquired evidence is counterintuitive because it tends to suggest that OSU

* * *

acknowledges the lack of a legal basis for O'Brien's termination on June 8, 2004. Secondly, the after-acquired evi-Awarded title of Big Ten Conference Champions

dence doctrine does not serve as a complete bar to a or Co-Champions[:] 10% of then-current base sal-former employee's claims.

ary plus one (1) additional year added to term of

this agreement[.]

OSU's second assignment of error is overruled.

V.

O'Brien argued to the trial court that, under that contrac-In his cross-appeal, O'Brien argues that the trial court tual provision, and in light of the occurrence(s) of the miscalculated the damages owed on the contract by

aforementioned achievements, that there were five years failing to include years allegedly added to the contract plus 22 days remaining on his contract as of June 8, 2004.

term as earned incentives, and also by deducting cash OSU argued, however, that O'Brien did not earn the afore-incentives paid by OSU from the final judgment ("set-mentioned incentives in light of the NCAA's determina-offs"). We disagree.

tion vacating the OSU men's basketball team's records On cross-appeal, O'Brien's first assignment of error asserts from both purported championship years. (OSU's Motion that the trial court's calculation of liquidated damages was for Summary Judgment on Damages, at 6; Damages, 2006

flawed because it concluded only three years were remain-Ohio 4346, at P46.) The trial court found that the evidence ing on the contract at the time O'Brien was fired. O'Brien better supported OSU's argument. This court agrees.

claims that, under Section 3.4, he earned two additional In this appeal, O'Brien urges this court to take judicial years by winning Big Ten Conference Championships in notice that the NCAA did not vacate OSU's conference 2000 and 2002, which vested simultaneously with the

championships from the years in question, only that

occurrence of events serving as conditions precedent OSU's NCAA tournament records were vacated. Despite

thereto, and that the two additional years should have counsel's persuasively-briefed arguments to this court, been aggregated to the three-year base term found by the result desired tends to defy common sense. Coun-the trial court. Also, in the second assignment of error, sel's argument, in effect, is a jurisdictional one—that O'Brien argues that the trial court erred by reducing the NCAA and the Big Ten Conference are separate

the final damages award by $ 35,609, the amount OSU

and sovereign entities, and that what the Big Ten giveth, paid O'Brien in cash incentives during the 2000 and

the NCAA cannot taketh away. Although the argument

2002 seasons. Both assignments of error turn on interpre-is sound, it lacks evidentiary support.

tation of the same contractual terms as applied to the A judicially-noticed fact is that which is not subject to rea-same facts and reasonable inferences drawn therefrom; sonable dispute because either: (1) it is generally known thus, we will address both assignments of error together.

within the territorial jurisdiction of the trial court; or (2)

* * *

capable of accurate and ready determination. See Evid.R.

In this case, during the damages phase of the litigation, 201. Counsel urges this court to take notice of a fact pub-both parties stipulated that OSU paid O'Brien cash

lished by the Big Ten Conference itself, in what is known incentives totaling $ 35,609. (Final Entry, 2006 Ohio as the official records book, which is available to down-4737, at P9.) In accordance with Section 3.4 of load from their website http://bigten.cstv.com/trads/big10-O'Brien's employment agreement, on April 30, 2000,

cordbook.html. (Cross-Appellant's brief, at 10, fn.3.) The OSU paid O'Brien $ 17,500 in recognition of the

records book lists the number of championships held by men's basketball team's achievement of co-champion

each respective school in each respective sport, for all of (continued)

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the schools comprising the Big Ten. See 2006-2007 Big party. Invariably, an unconscionable contract will have Ten Records Book 24, available at Big

Ten Conference terms favoring the drafting party. There is no evidence Official Site, supra (last visited June 4, 2007). Therein, to suggest OSU lacked a meaningful choice or oppor-the OSU men's basketball school record is specially

tunity to negotiate the contract with O'Brien; more-

denoted by a footnote, which states: "Due to NCAA sanc-over, OSU was the drafting party. OSU is not lacking tions, Ohio State has vacated the men's basketball records of 34

in sophistication, and has only been prejudiced as a games in 1998–99, 16 games in '99–00 and the entire '00–01

result of being held to its own bargain. OSU entered and '01–02 seasons (including two shared Big Ten Men's Bas-into this agreement with O'Brien having more-

ketball Championships (2000 and 2002 titles)." Id. (Emphasis than-adequate knowledge and awareness of the risks

sic.) We cannot see how this fact, if judicially noticed, and liabilities appurtenant to competing in NCAA

supports counsel's argument.

Division-I collegiate sports. The Radojevic matter was That said, we believe the trial court correctly calculated not the first problem to hit the OSU campus. The tra-the contract's liquidated damages in accordance with dition and legacy of OSU and its sports team, however, Sections 5.2 and 5.3. The trial court correctly con-has survived, and will continue to do so. The judgment cluded the period remaining on the contract's term,

of the Ohio Court of Claims is hereby affirmed.

and the trial court correctly deducted amounts OSU

Judgment affirmed.

paid to O'Brien pursuant to events that never

BOWMAN, J., concurs.

occurred. O'Brien's first and second cross-assignments FRENCH, J., dissents.

of error are overruled.

The trial court found O'Brien's contract was "extremely ***FOOTNOTES***

favorable" to himself, but "not unreasonable." The court's 1. The NCAA's member institutions are divided

analysis included a proper examination of the contract's into three divisions (I, II, and III), by size.

terms to determine that all relevant provisions were valid Division-I schools are the larger universities, while and enforceable, and that no provision was contrary to Division-III institutions are the smaller colleges,

law or public policy. Further, the trial court found: community colleges, etc. OSU, being one of the

largest institutions in the United States, belongs to The stipulated damages were clearly reasonable in

Division-I.

light of the anticipated salary and collateral

income [Coach O'Brien] could have earned had

*2. An "unofficial visit" is a recruiting visit initiated he remained in defendant's employ. * * **

by the player or prospective student-athlete, and is not solicited or sponsored by the university; thus,

* * *

the athletics department does not pay for or reim-

*burse the athlete for travel or expenses relating to The court recognizes that * * * it may seem unrea-the trip.*

*sonable for a party to recover * * * damages with-*

out any reduction arising from his own breach of

3. Formerly part of Yugoslavia.

*contract. However * * * it is clear that this seem-*

4. See, generally, Jane Perlez, U.S. Finds No One to ingly unfair result arises from the extremely favor-Back Among Milosevic's Foes, N.Y. TIMES (July 12, able provisions of the contract as it relates to

1999), at A8. Although Serbia remained relatively

[Coach O'Brien] in respect to termination and

peaceful throughout the Yugoslav-Bosnia-Croatia

not from any lack of proportionality with respect

conflict that erupted during President Clinton's

to the amount of liquidated damages.

first term, beginning in 1998, tension worsened

Again, the decision of this court does not ratify or con-in Kosovo where the Serbs were battling Yugoslav

done the conduct of O'Brien. Under different facts, or security forces and the Kosovo Liberation Army.

even more likely, broader contractual terms not favorThe Serbian attacks in Kosovo prompted a

ing the employee to such a degree, the result here

NATO aerial bombardment lasting 78 days.

would not be the same. When two parties agree to do

5. See NCAA Bylaw 12.1.1, Amateur Status, in 2006-a particular thing, and the parties precisely and delib-2007 NCAA Division-I Manual (Aug. 1, 2006),

erately contract for every foreseeable circumstance that available at www.ncaa.org, at Membership Publica-could arise in the performance thereunder, a court

tions. An individual loses amateur status and thus

must honor the parties' agreement absent unconscio-

shall not be eligible for intercollegiate competition nability. Unconscionability is typically characterized by in a particular sport if the individual:

absence of one party's "meaningful choice" or opportunity to negotiate the terms of a contract, which invari-

*"(a) Uses his * * * athletics skill * * * for pay in ably results in terms substantially favoring the other any form in that sport;*

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“(b) Accepts a promise of pay even if such pay is

judice; however, we note that the matter involved

to be received following completion of intercol-

the men’s basketball program at OSU, namely

legiate athletics participation;

Boban Savovic, the former OSU player who had

“(c) Signs a contract or commitment of any

chaperoned Radojevic during his official visit in

kind to play professional athletics, regardless of

the fall of 1998. In May 2004, attorneys in the

its legal enforceability or any consideration

OSU athletic department were able to review

received;

deposition transcripts from the Salyers trial,

“(d) Receives, directly or indirectly, a salary,

which revealed Salyers’ claims that she provided

reimbursement of expenses or any other form

improper benefits to Savovic while he played bas-

of financial assistance from a professional sports

ketball at OSU.

organization based upon athletics skill or partic-

12. Given that the NCAA is not a law-enforcement

*ipation, except as permitted * * *;*

body with presence on each campus nationwide, it

"(e) Competes on any professional athletics

relies heavily on the member institutions monitor-

team and knows (or had reason to know) that

ing and "self-reporting" all conduct relating to

*the team is a professional athletics team * * *,*

the rules promulgated by the organization. For

even if no pay or remuneration for expenses was

that reason, inter alia, member institutions, like

received; or

OSU, have entire offices or departments dedicated

"(f) Enters into a professional draft or an agree-

solely to overseeing university athletics and all

*ment with an agent * * *.*

compliance-related matters. Like OSU, compli-

Id.; see, also, The Online Resource for the

ance officers are staffed, at least in part, by attor-NCAA, About the NCAA, available at www.ncaa.

neys trained to understand NCAA bylaws and how

org, at Membership Publications (last visited

to keep their respective programs in compliance

May 29, 2007); Amateur Certification Process

therewith. See, e.g., OSU Compliance Office,

("In response to the NCAA membership's con-

http://ohiostate buckeyes.cstv.com/compliance/

cerns about amateurism issues related to both

osu-compliance.html (last visited May 22, 2007).

international and domestic prospective student-

Presently, half of the eight paid senior staff in

athletes, President Myles Brand has authorized

OSU's compliance office are lawyers. The com-

the creation of a centralized amateurism certifi-

pliance office's mission statement is also posted

cation process.").

on its website:

6. The NLI acts as a contract between a school and

"The Athletic Compliance Office is committed to

a prospective student-athlete, and also serves as a

a comprehensive compliance program that edu-

notice provision to all of the other schools

cates its constituents about the importance of

attempting to recruit the same athlete–-so they

adhering to NCAA, Big Ten, and institutional

are apprised of the athlete's commitment to

rules. Our goal is to create a 'compliance con-

attend the school designated in the NLI.

science' within the University and throughout

7. See NCAA Bylaw 13.02.11.1(a) (Recruited Pro-

the community. Maintaining a commitment to

spective Student-Athlete). Generally speaking, the

compliance ensures institutional control over

bylaws set strict guidelines as to the amount of

the Department of Athletics and furthers the

time a recruit can spend at the school, what kinds

mission of The Ohio State University.

of activities they can participate in, and how much

"To ensure institutional control and uphold the

money the school is allowed to spend on such activi-

integrity of the Department, the Athletic Compli-

ties. All details of an official visit are documented ance Office is charged with the following tasks:

and reported to the NCAA. (Tr. 652-654.)

Education, Monitoring, Enforcement, Institu-

tional Control."

8. OSU contended that the loan was a blatant or

egregious violation of "Recruiting 101." (Tr. 608,

13. See, supra, fn. 9. A notice of allegations func-

762); NCAA Bylaw 13.2.1.

tions similarly to an indictment or a bill of infor-

mation. (Tr. 410–418.) Dr. Swank testified that the

9. See Notice of Allegations from the NCAA Com-

notice of allegations is a preliminary document

mittee on Infractions to OSU (May 13, 2005).

that is written by the NCAA department acting as

(Defendant's Exhibit No. O.)

the "prosecutor" of the charges against a school.

10. See NCAA Bylaw 12.1.1, at fn. 5.

Thus, the notice of allegations is not a final judg-

11. The trial court held that the subject matter of

ment or verdict, and does not carry the imposition

the Salyers lawsuit was not relevant to the trial sub of sanctions.

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Hazardous Activity Clause

Big Four league teams undoubtedly want to protect their in their multi-million dollar players as they would any investment. Player injuries can impact everyone: players, owners, coaches, teammates, and fans. One of the contractual ways to attempt to mitigate the chances of an injury outside of the scope of their game has been to employ what are known as ***hazardous activity clauses****. In essence, the clause allows the team, at its option, to modify its financial obligation to a player if a player is involved hazardous activity outside the context of their sport and is injured as a direct result. Hazardous activity clauses are increasingly common and appear to be designed to be both deterrent and punitive in nature.*

For example, paragraph 12 ("Prohibited Activities") of the NBA's Uniform Player Contract prohibited a player from engaging in many things including "any activity that a reasonable person would recognize as involving or exposing the participant to a substantial risk of bodily injury," including "driving or riding a motorcycle or moped." While there is no specific language in the NHL's standard player contract that prohibits riding a motorcycle, paragraph 7 of its Standard Player's Contract provides:

The Player and the Club recognize and agree that the Player's participation in other sports may impair or destroy his ability and skill as a hockey player. Accordingly the Player agrees that he will not during the period of this Contract or during any period when he is obligated under this Contract to enter into a further contract with the Club engage or participate in football, baseball, softball, hockey, lacrosse, boxing, wrestling or other athletic sport without the written consent of the Club, which consent will not be unreasonably withheld.

However, unless it is clearly defined in an agreement, what exactly is a hazardous activity? Is celebrating a great play hazardous? Are engaging in practical jokes hazardous? Consider that in 2010, Los Angeles Angels of Anaheim first baseman Kendry Morales hit a walk-off grand slam homerun, but as he jumped in the air to touch home plate, he fractured his leg. Similarly, the Arizona Cardinals' placekicker Bill Gramatica tore his anterior cruciate ligament (ACL) in 2001 in a game against the New York Giants after kicking a 42-yard field goal and jumping in jubi-lation. Are these types of celebratory activities what contract drafters might predict to happen and subsequently provide for it in a contract in order to protect a client? Probably not, but it certainly proves the point: defining what a hazardous activity is can be a curious challenge.

Hazardous activity clauses reached new extremes in recent years, instigated by how the Detroit Tigers lost relief pitcher Joel Zumaya in 2006 for three games of the American League Championship Series: while playing the video game Guitar Hero (not normally a "hazardous" activity) his right (throwing) wrist and forearm became inflamed. In 2008, two-time Olympic volleyball gold medalist Misty May-Treanor ruptured her left Achilles tendon while rehearsing for the popular television show "Dancing with the Stars." In 2010, Florida Marlins player Chris Coghlan tore a meniscus in

his left knee when delivering a shaving cream pie to the face of a teammate who hit a walk-off single to win the game.

Comparing and analyzing the Big Four hazardous activity clauses is an excellent opportunity to query why such provisions are included in standard player contracts.

hazardous activity clause

provision in a contract which expressly outlines certain activities to be avoided due to their propensity to result in a serious physical injury
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Students might also consider sports other than the Big Four, and how such standard player agreements (or sponsorship agreements) might address the concerns. Certainly, hazardous activity clauses are meant to serve as a deterrent so that players do not put themselves in position of physical harm outside the scope of their game.

Morals Clause

*The **morals clause**, sometimes referred to as the moral turpitude or morality clause, has generated considerable discussion in sports and the law, though it has its roots in the entertainment industry. In the NFL, NBA, MLB, and NHL, morals clauses are found not only in the respective league constitutions, where they relate to the power granted to the league*

Commissioner, but also in the standard individual player contracts, where they apply to the players and their individual teams. For example, Article 35

of the NBA Constitution allows the Commissioner to suspend or fine a player who,

"…in his opinion ... shall have been guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association."

It is important to recognize that just because a morals clause exists does not mean that it must be exercised by the non-breaching party. Often, of course, the determination of what is immoral is a subjective matter. University of Louisville head basketball coach Rick Pitino, for example, had a provision in his contract that allowed Louisville to terminate his contract "if such publicity is caused by Employee's willful misconduct that could objectively be anticipated to bring Employee into public disrepute or scandal, or which tends to greatly offend the public." His involvement with a woman who later attempted to extort him and was sent to prison was not enough, in Louisville's eyes, to terminate his contract (or they were simply not willing to exercise that right). Thus, like the hazardous activity clause, the morals clause may merely serve as a deterrent to misconduct.

Students might examine and compare the scope of the relevant Big Four provisions in the league constitutions or collective bargaining agreements, and how immoral conduct is defined in both on-the-field and off-the-field behavior.

Numerous prominent athletes have lost endorsements and sponsorships as a result of the exercise of a morals clause. This list includes, among others, golfers Fuzzy Zoeller, Tiger Woods, and John Daly, football player Michael Vick, basketball star Kobe Bryant, and even swimmer Michael Phelps. The specific reasons and circumstances behind these and similar terminations provide useful context for examining morals clauses.

The Heisman Trust Mission Statement includes "integrity" as a condition of eligibility for the Heisman Trophy in a way that may be comparable to a

morals clause in a contract. However, their definition of integrity was called into question in 2010 when Auburn University quarterback Cam Newton won the award despite being previously involved in scandalous activity, not to mention his father's pay-for-play scheme for the recruitment of his son.

Ultimately, morals clauses are usually quite subjective. That is, what is and is not immoral is usually a matter of opinion. Even if conduct by a player, coach or broadcaster is considered immoral, the clause does not have to be exercised. Interestingly, some have suggested that morals clauses work both ways. That is, athletes, coaches, broadcasters, and others should have the right to terminate their ***morals clause***

provision in contract which allows termination of the contractual relationship in the event of an act of misdeed by an athlete or coach

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relationship with their employer or sponsor under a ***reverse-morals clause****. That is, such clauses should allow athletes, coaches, entertainers, and other talent the ability to save their own reputation in our era of corporate scandals and crimes.*

Loyalty Clause

The ***loyalty clause*** *is a newer, somewhat subjective way to terminate an agreement in the event the employee or endorsee fails to keep his promise to remain loyal to the employer or endorser. In essence, this clause requires the*

player-employee or athlete-endorsee to use or wear a particular brand of product during competition and practice. It also might be used to prevent the athlete from "bad-mouthing" the league, coach, or organization. Some refer to loyalty clauses as the "Carl Pickens clause" for his public, negative comments about his employer, the Cincinnati Bengals.

Loyalty clauses are not uncommon in professional sports. Major League Baseball has a loyalty clause in the Uniform Player Contract: The Player agrees to perform his services hereunder diligently and faithfully, to keep himself in first-class physical condition and to obey the Club's training rules, and pledges himself to the American public and to the Club to conform to high standards of personal conduct, fair play and good sportsmanship. (Section 3(a)).

Indiana University's contract with current head basketball coach Tom Crean addresses loyalty at the beginning of the contract.

A loyalty clause requires the employee-endorsee to refrain from wearing or using a competitor's brand or from bad-mouthing the employer-endorser publicly.

For example, in 2005 Atlanta Falcons cornerback DeAngelo Hall (sponsored by Reebok) wore Nike shoes during a Monday Night Football game. Reebok immediately terminated Hall as an endorsee. Similarly, during the gold medal presentation at the 1992 Olympic Games in Barcelona, Spain, NBA star Michael Jordan draped an American flag over the Reebok logo on his uniform to avoid a loyalty clause controversy with his individual sponsor Nike. In sum, loyalty clauses are designed to serve both as a deterrent to behavior and as a remedy for a violation of the contract if the sponsor chooses to exercise its rights under a termination clause.

Force Majeure Clause

Force majeure is a French phrase that literally means, "major force." Also known as

*"acts of God" or "weather clauses," **force majeure clauses** address contractual obligations when a triggering event inhibits the fulfillment of*

duties by one or both of the parties. Good contract drafters must consider various issues which could trigger force majeure provisions.

Force majeure clauses are often thrown in as standard boilerplate language related to the rescheduling or delaying of events, yet are rarely implemented in sports contracts. This may be due to frequency with which sports contests have to reschedule.

reverse-morals clause

clause in a contract which allows the athlete or coach to terminate the contract in the event the sponsor commits a particular act or is found guilty of a misdeed ***loyalty clause***

provision which requires sponsored athlete or coach to wear or utilize certain products during performance or competition

force majeure clause

French for "major force" or "act of God" and used in contracts to provide remedies for unexpected events such as weather-related events which postpone performance of an event

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Students might explore other situations in which a force majeure clause might excuse or suspend performance of a contractual obligation, terminate an agreement, permit a credit or rebate of some sort, or allow for an equitable adjustment of the contract itself. Things as wild and varied as snowstorms, meteor strikes, labor strikes (i.e., "work stoppages"), flooding, hurricanes, tornadoes, bee swarms, jelly-fish attacks, and tsunamis have delayed sporting events. Even the spread of bacterial infections has caused delays in addition to air or water pollution.

Recently, the Minnesota Vikings football team was the beneficiary of two snow--

*related incidents in the 2010 season, beginning with the collapse of the Minneapolis Metrodome roof after a huge snowstorm. Other prominent force majeure incidents have included the Southeastern Conference (SEC) basketball tournament having to suspend a game on March 14, 2008, at the Georgia Dome in Atlanta, from a downtown tornado strike. Bee swarms delayed the MLB game between the San Diego Padres and Houston Astros in 2009. Hurricanes have suspended many amateur, college and professional sporting events notably hurricanes Gustav (2008), Ike (2008), Katrina (2005), Rita (2005), Wilma (2005), and Ivan (2004). A major earthquake shook Candlestick Park before the start of Game 3 of the 1989 World Series. The International Skating Union (**ISU**) had to cancel its 2011 world skating championships in Tokyo due to a devastating tsunami that rocked that region and affected the world.*

Despite all this, there are very few cases involving force majeure clauses in sports law. Nonetheless, in Bouchard Transp. Co. v. N.Y. Islanders Hockey Club, a transportation company attempted to sue the NHL team for breach of contract during the 2004–05

season in which the NHL owners instituted a lockout. Ultimately, the court of appeals decided in favor of the Islanders, because there was a clause in a lease agreement which absolved the hockey club from liability for non-performance caused by a force beyond the club's control (a force majeure), such as a labor dispute. The NHL lockout made it impossible for the Islanders to fulfill their contract, since there were no games.

Best Efforts Clause

*A **"best efforts" clause** is one that mandates general good faith by each party to an agreement. There is no specific formula as to what constitutes best efforts: it depends upon the nature of the facts, industry or sport and relevant field of law.*

Nevada has actually addressed the issue of best efforts in its statutes, perhaps because many boxing, mixed martial arts (MMA) and combat sports contests occur in the state. Nevada law states that the Nevada Commission may suspend, revoke or discipline contestants or participants if in its judgment the athlete is "… guilty of a failure to give his best efforts, a failure to compete honestly or a failure to give an honest exhibition of his skills in a contest or exhibition of unarmed combat;…."

The Big Four sports leagues have examples of best efforts or best services clauses in their contracts, collective bargaining agreements and league constitutions as well.

No-Trade Clause

*The no-trade clause allows a player the right to reject a trade under certain conditions. No-trade clauses are rarely used in the NBA or NFL, but are often used in MLB where veterans with 10 years of service-and 5 with their current team can **ISU***

International Skating Union

"best efforts" clause

provision in a contract in which player or coach must objectively act diligently in the performance of the agreement

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Chapter Two

veto trades. These clauses also are found in NHL contracts, and can be referred to as ***no-trade*** *or* ***no-move*** *clauses.*

*No-trade clauses reflect the nature of the bargaining relationship between a team and a player at the time of signing a contract, in particular the individual's leverage in the negotiation process. In the case of the Big Four leagues, such considerations can also be instituted in the respective collective bargaining agreements. For example, in the 2005–2011 NHL collective bargaining agreement, there are both no-trade (****NTC****) and no-move clauses (****NMC****).*

In many cases, no-trade clauses also limit where and how a club may trade the athlete. Some clauses permit trades only at certain times, or only to a certain team or geographical area, though they are often waived by players in order to play for a championship-contending team. For example, in 2001 Tampa Bay Devil Rays first baseman Fred McGriff waived his no-trade clause in order to accept a deal which sent him to the Chicago Cubs. In 2010, Cy Young Award winner Zack Greinke of the Kansas City Royals was traded to the Milwaukee Brewers though his unique no-trade clause, under which he could submit 15 teams that he could block a trade to.

Discussion of the no-trade clause should give the student pause as to how far sports contracts and particular clauses have come since the days of the reserve system.

"Best Interests of Baseball" Clause

*One specific power found in the MLB Constitution (****MLC****) involves a clause known as the* ***"best interests of baseball" clause****. Baseball's first Commissioner, Judge Kenesaw Mountain Landis, reluctantly took the job on*

the condition that the he be given broad powers to discipline players in the "best interests" of the game.

Article II ("The Commissioner"), Section 2 (b) states that the functions of the Commissioner shall include the right to "…investigate, either upon complaint or upon the Commissioner's own initiative, any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball…". Commissioners have used this best interests clause to take various punitive measures, for both on and off-the-field conduct.

Current MLB Commissioner Allan "Bud" Selig used the best interests clause in an ownership transition in 2001 when MLB purchased the Montreal Expos as part of a complicated series of deals involving three teams. He also invoked the clause when he appointed a trustee to oversee the operations of the Los Angeles Dodgers in 2011 after a bitter divorce action between the team's owners, Jamie and Frank McCourt, interfered with the day-to-day operation of the team.

Some have suggested that Selig missed an opportunity to invoke the best interests of baseball clause to override an erroneous call made by MLB first-base umpire Jim Joyce which forfeited the chance for Detroit Tigers pitcher Armando Galarraga to become the 21st pitcher in MLB history to pitch a perfect game.

no-trade clause

provision in a contract in which a player retains the right to approve or disapprove of a trade to another team in order to complete the deal ***no-move clause***

provision in a contract in which a player retains the right to approve or disapprove of a demotion to a minor league prior to the transfer ***NTC***

no-trade clause

NMC

no-move clause

MLC

MLB Constitution

"best interests of baseball" clause

specific clause found in Major League Baseball Constitution which grants the MLB Commissioner with extremely broad powers to make decisions which affect the league, teams and players

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Other Sports Clauses

There are simply too many specific sports-related clauses to analyze individually.

They come in all different shapes and sizes. Some are quite creative. Others apt and fair. For example, head women's basketball coach Dawn Staley at the University of South Carolina receives a bonus payment of one percent of her salary for any year in which she brings in a top 10 recruiting class as determined by reputable recruiting services. Other clauses worth exploring include:

Attendance clause*: The athlete can get a financial bonus in the event that spectator attendance at events meets a minimum standard or average.*

***Charity clause**: As part of a large contract, player must donate a certain amount to a specified charity usually named by the club.*

***Escalator clause**: A coach or administrator receives annual raises if they stay with the team or school for a minimum time period.*

***Freedom clause**: Roger Clemens' baseball contract with the New York Yankees allowed him to show up only on days when he was scheduled to pitch.*

***Lifetime achievement/Longevity clause**: If an employee (usually a coach) stays with the same employer (usually a school) long enough, they get additional consideration.*

This is similar to an escalator clause.

***Most favored nation clause**: University of Michigan has a clause in their contract with Adidas which says that while under contract, they must be the highest paid college of all the Adidas-sponsored schools.*

***Official Clause**: The "Official Oil" of NASCAR, and so on.*

***Right of First Refusal clause**: Can be written by sponsors and others. It allows a sponsor to match another sponsor's offer at the end of the term of the agreement. This is a very powerful tool to keep the athlete with the product or endorser.*

***Reduction clause**: coach or executive salary is reduced in the event there is a strike or lockout by the league, and possible termination of contract if strike or lockout lasts longer then a number of weeks or days. This is similar to a force majeure clause but is not normally weather-related.*

***Weight clause**: An overweight player gets a financial bonus for reporting to training camp under a certain weight. Examples have included NBA players Glenn "Big Baby" Davis and Derrick Caracter.*

- ***Drafting the Sports Contract***

All professional services contracts address key common clauses. For players belonging to the NFLPA, MLBPA, NBPA, and NHLPA, all individual contract provisions have been established by collective bargaining, except for salary and bonuses. Additionally, the players associations have group licensing arrangements in which players are compensated for licensing their names and likenesses in group package deals, for example, for trading cards and video games. Good contract drafters are aware of fundamental contract drafting techniques and realize that it is acceptable and useful to borrow clauses from one contract that may suit the needs of their own agreement.

3 P's: Predict, Provide, Protect

It is important to remember that when drafting a contract, it is often useful to be a pessimist: think about what can go wrong. Though most contracts begin as a beneficial relationship between the parties, over time attitudes and behaviors can change. Therefore, contract drafters should use exceptional care to ensure that Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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policies and procedures are provided to address situations and legal issues that might arise when something goes wrong. Good contract drafters protect their client in the event such a situation might occur. Thus:

***Predict**: Predict what might happen to the parties and their relationship as time goes on.*

***Provide**: Provide for such potential changes in the business relationship by establishing rules for dealing with termination, etc., in the contract itself.*

***Protect**: Build specific provisions that protect your client in the event of a worst case scenario.*

The following sections are standard in most agreements. Contract drafters should explore these items and consider how to use them in their own contract.

*1. **Title**: It is always important to name the agreement. Keep the description to a minimum, but the title identifies the type of contractual agreement. Phrases such as "Sponsorship Agreement," "Sports Contract," "Agreement for Athletic Services," or "Representation Agreement" are simple suggestions. Giving sub-headings their own title proves useful for all relevant parties as well.*

*2. **Describe the Parties**: Establish the name and address of the parties to the contract. Sports contracts often paraphrase the athlete's name. For example, an athlete named "Sabrina Jameson" may be abbreviated as "the athlete" or "Sabrina" throughout the contract rather than continuing to repeat the full name.*

Important information, such as mailing address, phone numbers, dates of birth, and social security numbers, might be included here as well.

*3. **Term**: It is always important to establish the duration of the agreement from the beginning date to the end date. Since many contracts last more than one year, the writing requirement of the statute of frauds is satisfied.*

*4. **Purpose**: Traditional contract drafters became enamored with providing numerous "Whereas" clauses to establish the purpose of an agreement. Modern-day drafters still use this technique to demonstrate the intent of the parties, but it is no longer necessary to use Whereas. Contemporary drafters no longer use such formal terminology, and instead simply give each paragraph a name or heading to assist the parties and other readers in the interpretation of the agreement and the purpose of each paragraph. Usually*

the purpose paragraph delineates why or how the athlete will endorse the company's products or services.

5. ***Duties and Obligations****: Once the parties, term of the agreement, and purpose have been established, it is important to outline the rights, duties, and responsibilities of each party. This can include compensation, but usually compensation has its own paragraph for clarification purposes.*

6. ***Compensation****: This is often referred to as legal consideration. An exhibit or an addendum attached to the contract is often helpful, specifically delineating salary, bonuses, and other incentives. Outlining in-kind compensation is important, as is including provision of a reasonable amount of product, or*

"capping" the amount of product that the athlete may use and require.

7. ***Exclusivity****: Due to the personal and unique nature of a sports contract, most employers and sponsors (including agents) require an exclusive arrangement with the athlete in order to most effectively promote their product or talent during the term of the agreement. Additionally, it is common for a sponsor in this paragraph to require the athlete to use the products or services exclusively at all times, especially in public, or the endorser may have the right to terminate the agreement as a breach of good faith or failure to use "best efforts."*

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*8. **Confidentiality**: Though a confidentiality clause is often considered valuable to both the team and the athlete, players unions have somewhat undermined such clauses by making salaries public. In non-union contracts, confidentiality is an important consideration for the sponsor and the athlete, to prevent similarly situated athletes from comparing their agreements.*

*9. **Termination**: Though discussion of termination seems awkward to address at the beginning of the contractual relationship, it is vitally important to include such a clause. If one party does not live up to its end of the bargain, it is essential to have agreed-upon methods of resolving the issue. Topics covered in many termination clauses include one party's refusal to keep the terms of the agreement confidential, the athlete's voluntary discontinuation of participation in the sport, buy-out provisions in coaching contracts, and cases in which the athlete is found guilty of a crime or is found to have been a part of unethical or immoral conduct (sometimes called a "morals clause"). Additionally, termination may occur if the athlete is unable to compete. For example, if a swimmer signs a contract to promote a swim product and then injures himself while waterskiing (and is unable to compete in swimming again), the sponsor may wish to terminate the agreement because the sponsor can no longer promote that swimmer's unique talents.*

*10. **Covenants Not to Compete**: Sometimes referred to as "no-compete clauses," such clauses prevent an employee from leaving one company and working for another for a specified time period or within a particular geographic location.*

Such clauses are used frequently in coaching contracts and other contracts where privileged information may be vital to the success of the former employer. Most covenants not to compete will be upheld in court unless they are clearly unreasonable or too restrictive.

*11. **Waivers**: A waiver may limit liability to the team or sponsor in the event of an accident. For example, an athletic sponsor does not normally maintain an insurance policy on the athlete during the participation of a sporting event.*

The waiver clause may release or limit liability of the sponsor if the athlete is injured while competing.

12. ***Modification****: Flexibility is a good thing to provide in any contract. One method is to allow both parties to amend their agreement by addendum in the event circumstances change during the term of the contract. Though it is not oblig-atory for either party to agree to a modification, most parties who enter into good faith agreements will agree to consider reasonable addendums.*

13. ***Governing Law****: Since many sports contracts affect parties from different states, agreeing upon controlling law ahead of time can save jurisdictional questions from becoming an issue.*

14. ***Merger****: Merger is a legal term meaning that any prior oral or written agreements or statements are null and void, and that this contract constitutes the final and complete agreement between the parties. This is vital to include, because though the parol evidence rule excludes prior oral or written statements that contradict the terms of the agreement, it will allow evidence of previous agreements that may help the court understand or explain the meaning of peculiar terms.*

15. ***Non-assignment****: It is important to establish that the contract is a personal services contract and therefore is non-assignable and non-delegable.*

16. ***Alternative Dispute Resolution (ADR)****: Alternative dispute resolution attempts to resolve disputes via mediation or arbitration, though the traditional method of resolving a breach of contract issue is through litigation. Collective bargaining* *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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▪

Chapter Two

agreements address issues related to arbitration and/or mediation, and giving consideration to ADR is always important.

17. ***Signature Line****: The signature is of great importance, of course. Since a party may require possession of an original copy of the contract, signing in blue ink might prevent issues over which contract is the original. Modern photocopy quality is so good that it can virtually be impossible to determine the original if it is signed in black ink.*

18. ***Exhibits and Other Addenda****: This section makes the contract unique relative to other similar contracts. Bonuses, schedules, amount of product, outside sources of income for coaches (such as shoe, radio and television contracts) and other incentives may be listed here. From the endorser's point of view, this allows similar contracts to be produced in mass quantities with only the final clause or page to differentiate between major terms in the agreement.*

▪ *EXHIBIT 2-1*

Example of Endorsement Agreement

SPONSORSHIP AGREEMENT

competes, in any capacity other than as a member

This Sponsorship Agreement ("Agreement") is made

of the 2012 United States Olympic Team, during

and entered into as of the—day of—2011, by and

the Term (as such term is hereinafter defined) of

*between **MARISA BENDER**, of 3900 Lake Lansing this Agreement upon the terms and conditions set*

Street, East Lansing, Michigan 48823 ("Bender"), and forth herein.

HEART RATE MONITORS, INCORPORATED ("HRM,

2. Term. This Agreement will commence as of January

***Inc.")**, a Michigan corporation with a principal place 1, 2010, and will continue through and including*

of business at 337 Chips Ave., Mount Pleasant, Michi-December 31, 2014 (the "Term"), unless termi-

gan 48858.

nated sooner pursuant to the terms of this Agree-

ment. For the purpose of this Agreement, each

WITNESSETH

January 1 – December 31 shall be deemed to be a

WHEREAS, Bender is a professional athlete who com-

separate "Sponsorship Year".

petes regularly in competitive triathlon events;

3. Promotional Obligations of Bender. Bender agrees to WHEREAS, Bender desires to have HRM, Inc. sponsor

cooperate with and provide assistance to HRM,

Bender's participation in all of the triathlon events in Inc. in all matters relating to its promotional activi-which Bender competes during the term of this Agree-

ties. Bender's obligations hereunder (referred to

ment (referred to hereinafter individually as a "Triath-hereinafter as "Promotional Obligations"), shall

lon" and collectively as the "Triathlons"); and

include, but are not limited to, the following:

WHEREAS, HRM, Inc. desires to sponsor Bender's par-

(a) Personal Apparel. Bender shall prominently dis-ticipation in all of the Triathlons in which Bender com-play the HRM, Inc. name and logo (which

petes during the term of this Agreement; and

name and logo, together with the names and

logos of any affiliates of HRM, Inc. are sometimes

WHEREAS, Bender and HRM, Inc. desire to enter into

referred to hereinafter as the "HRM, Inc. Name

an Agreement whereby HRM, Inc. will be a secondary

and Logo" or as the "HRM, Inc. Name" or the

sponsor of Bender and, as such secondary sponsor,

"HRM, Inc. Logo"), in the locations shown or

HRM, Inc. will receive certain other promotional rights described on Exhibit A, attached hereto and

(referred to hereinafter collectively as the "Promo-

made a part hereof (as the same may be

tional Rights").

amended and supplemented from time to time

NOW, THEREFORE, for and in consideration of the

by the agreement of the parties) on the front

covenants and promises contained herein, and for

chest and lower back of all race and training uni-

other good and valuable consideration, the receipt

forms and uniform changes, including, without

and sufficiency of which is hereby acknowledged, the limitation, all swim wear, bicycle racing uniforms

parties mutually agree as follows:

and running apparel and on all casual wear worn

to and from race events and at all other appropri-

1. Sponsorship. HRM, Inc. shall sponsor Bender's parate times, including, but not limited to, all

ticipation in every Triathlon in which Bender

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interviews and media and other publicity sessions

7. Ownership and Protection of Intellectual Properties.

(referred to hereinafter collectively as "Promo-

Bender and HRM, Inc. acknowledge that HRM,

tional Appearances" and individually as a "Pro-

Inc. owns the HRM, Inc. Name and Logo whether

motional Appearance").

or not registered on the federal principal register

(b) Triathlons and Promotional Appearances. Bender by HRM, Inc. and all goodwill associated with or

shall compete in no fewer than eight (8) Triath-

symbolized by the HRM, Inc. Name and Logo and

lons during each Sponsorship Year. HRM, Inc.

any and all trade names/trademarks associated

and Bender shall agree upon a calendar of

therewith.

Triathlons in which Bender will participate dur-

8. Limitations on Rights Granted and Rights Reserved to ing the applicable Sponsorship Year (which

HRM, Inc. Bender has no right to grant any sublicense, Triathlons are sometimes referred to hereinaf-concession, right or privilege relating to the

HRM, Inc.

ter as the "Required Triathlons"), a copy of

Name and Logo. Any right to use the HRM, Inc. Name

which shall be attached hereto as Exhibit B and and Logo granted hereunder is not transferable or

made a part hereof (as the same may be

assignable by Bender, either directly, indirectly or by amended and supplemented from time to time

operation of law for any reason.

by the agreement of the parties), on or before

9. Third Party Infringement. Bender shall immediately March 10, 2012 (for Triathlons to be held dur-give notice to HRM, Inc., by telephone and in writ-

ing Sponsorship Year 2012) and on or before

ing, of any infringement or misuse of the HRM,

December 31, 2014. In addition to competing

Inc. Name and Logo by any other party of which

in the Required Triathlons, Bender shall make

Bender becomes aware. HRM, Inc. shall have the

not less than three (3) Promotional Appear-

right, but not the obligation, to commence legal

ances on behalf of HRM, Inc. during the Term

action regarding any infringement or misuse.

of this Agreement, which Promotional Appear-

10. Non-Disparagement. During the term of this Agree-ances shall take place at such times and in such

ment other parties, including members of the gen-

places as the parties may agree. HRM, Inc. shall

eral public, may come to associate Bender with

have no obligation to pay Bender for the Promo-

HRM, Inc. In recognition thereof Bender agrees

tional Appearances referenced herein; how-

that Bender shall conduct herself in a professional

ever, it shall pay all of Bender's reasonable

manner that is in keeping with HRM, Inc.'s reputa-

expenses, including but not limited to reason-

tion and shall act in the best interests of HRM, Inc.

able travel, food and housing expenses (up to a

at all times during the term of this Agreement,

maximum of $3,500 per Promotional Appear-

including, without limitation, when dealing with

ance) that pertain to or are caused by HRM,

members of the general public and representatives

Inc.'s requiring that Bender make a particular

of the mass media.

Personal Appearance other than in connection

with a Triathlon.

11. Confidential Information. During the term of this Agreement, and for three (3) years thereafter,

4. Compensation. Bender shall be paid a fee of $10,000

Bender agrees that she will not disclose to any

as compensation for this endorsement agreement.

third party any of the procedures, technical data,

In consideration of and in payment for the Promo-

confidential or proprietary information or trade

tional Rights and as compensation for the right to

secrets of HRM, Inc. or of any of its affiliates with-sponsor Bender's participation in the Required

out the prior written permission of the applicable

Triathlons and to serve as Bender's exclusive heart

party. The foregoing obligations of confidentiality

rate monitor, HRM, Inc. shall pay to Bender this fee shall not apply to information that:

(referred to hereinafter as the "Sponsorship Fee")

by January 15, 2012 in a lump-sum check.

(i) is, or subsequently may become, available to

the public through no fault of Bender;

5. Additional Rights of HRM, Inc. HRM, Inc. has the right to use Bender's photograph, with no addi-

(ii) Bender can show was previously known to it at

tional payment to Bender in advertising, promo-

the time of disclosure;

tional

and

other

sales-related

undertakings,

(iii)is required to be disclosed by Bender pursuant to including, without limitation on the HRM, Inc.

a requirement, order or directive of a court or

Internet website;

government agency or by operation of law, pro-

6. Other Sponsors. Bender shall not enter into any agree-vided that Bender notifies HRM, Inc. in advance

ment with any other manufacturer, supplier, whole-

of any such disclosure and takes steps to maintain

saler and/or distributor of heart rate monitors.

the confidentiality of such information that are

(continued)

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no less rigorous than those that Bender would

legal capacity to enter into and perform this Agree-

take to protect her own confidential and proprie-

ment in accordance with all its provisions.

tary information, including, without limitation

16. Relationship of Parties. The parties to this Agreement and in consultation with HRM, Inc.'s legal coun-are independent contractors under this Agree-

sel, obtaining a protective order with respect to

ment. Except as may be provided for in this Agree-

such disclosure; or

ment, neither party will have any right or authority (iv) is otherwise approved in writing by HRM, Inc.

and will not attempt to enter into any contract,

12. Termination. HRM, Inc. shall have the right to ter-commitment or agreement, or incur any debt or

minate this Agreement if:

obligation of any nature in the name of or on

behalf of the other party.

(a) Bender ceases to be ranked within the top ten

(10) professional female triathletes as deter-

17. Assignment. Neither this Agreement, nor any intermined by the World Triathlon Corporation;

est herein, nor any rights hereunder shall be

assigned by Bender.

(b) Bender fails to perform any term or condition of this Agreement and such failure is not cured

18. Notices. All notices, requests, demands and other within thirty (30) days after Bender receives writ-communications hereunder shall be in writing

ten notice from HRM, Inc. thereof; or

and shall be deemed to have been given (i) when

hand-delivered, including delivery by messenger or

(c) Bender suffers an injury that prevents her from

carrier service (or if delivery is refused, at the time competing in any additional Required Triathlons

of refusal), addressed as set forth below; (ii) when during the Sponsorship Year in question or from

received or refused as evidenced by the postal

fulfilling Bender's Promotional Obligations.

receipt if sent by United States mail as certified

13. No Liability. Upon the expiration or termination of mail, return receipt requested, with proper postage

this Agreement, Bender shall not be entitled to ter-

prepaid, addressed as set forth below; or (iii) when mination payments, compensation, reimbursement

received as evidenced by the transmission report of

or damages on account of any loss of prospective

the facsimile machine of the transmitting party

profits on anticipated sales or on account of expen-

acknowledging a good transmission if sent by fac-

ditures for advertising or promotional activities or simile to the number set forth below:

other commitments relating to the business or

If to Bender:

goodwill of Bender or Bender's reliance upon fur-

Marisa Bender

ther continuance of this Agreement.

3900 Lake Lansing Street

14. Indemnification. Bender shall indemnify and hold East Lansing, MI 48823

harmless HRM, Inc., its affiliates, their directors, If to HRM, Inc. :

officers, employees and agents, and their respective HRM, Inc. Corporation

successors and assigns, against any losses, claims,

337 Chips Ave.

damages, liabilities, costs or expenses, including,

Mount Pleasant, MI 48858

without limitation, attorneys' fees and court costs, that HRM, Inc. may incur as the result of any claim, 19. Governing Law and Consent to Jurisdiction. This suit or other proceeding made or brought by or

agreement is made in the State of Michigan and

against HRM, Inc. or Bender (excluding, however,

shall be governed by and construed and interpreted

costs and expenses that HRM, Inc. may incur in

in accordance with the laws of the State of Michigan, connection with any claim, suit or other proceed-excluding, however, its choice of law provisions. Any ing brought by Bender against HRM, Inc. to

arbitration or other legal proceedings shall have

enforce this Agreement, unless such costs or

venue in the State of Michigan and, in connection

expenses are awarded to HRM, Inc. by the body

therewith, each of the parties hereto hereby irrevo-

having jurisdiction over such claim, suit or other

cably submits to the jurisdiction of and agrees that proceeding), based upon, relating to or arising

any action, suit or other proceeding may be brought

out of: (i) Bender's participation in a Triathlon;

in the courts of the State of Michigan or in the

(ii) Bender's performance or non-performance of

United States District Courts for the District of Michi-this Agreement; and/or (iii) HRM, Inc.'s having to

gan for the purpose of the resolution of any claim,

bring a suit, action or other proceeding against

controversy or dispute arising between the parties

Bender to enforce this Agreement.

regarding this Agreement or the transactions con-

templated hereby. HRM, Inc. and Bender each fur-

15. Warranties. Each party warrants and represents that ther agree that any final judgment rendered in

it has the full corporate right and authority or the connection with any such suit, action or other

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proceeding shall be conclusive and may be enforced

and this Agreement shall be construed as if

against such party in any other jurisdiction by suit on the invalid or unenforceable provisions had

a judgment or in any other manner permitted by

not been contained herein and the parties

applicable law.

shall negotiate in good faith to replace the

20. Additional Terms.

invalid or unenforceable provisions with such

enforceable provisions which has the effect

(a) Binding Effect. The terms and conditions herein nearest

to

that

of

the

provisions

being

contained will apply to and bind the successors

replaced.

and permitted assigns of the parties hereto.

(e) Entire Agreement. This Agreement constitutes the (b) Modification. This agreement may not be

final expression of the agreement of the parties;

amended or modified in any respect unless in

is intended as a complete and exclusive state-

writing signed by Bender and by a duly autho-

ment of the terms of their agreement, and

rized officer or representative of HRM, Inc.

supersedes all prior and concurrent proposals,

(c) Waiver. Failure or delay on the part of either promises, representations, negotiations, discus-party to exercise any right, remedy, power or

sions and agreements that may have been

privilege hereunder shall not operate or be con-

made in connection with the subject matter

strued to operate as a waiver hereof. A waiver, to

hereof.

be affective, must be in writing and be signed by

the party making the waiver. No written waiver

IN WITNESS WHEREOF, the parties hereto by

of any term or condition of this Agreement shall

their duly authorized officers have executed this

operate or be construed to operate as a waiver

Agreement as of the date first above written.

of any other term or condition, nor shall any

written waiver of any breach or default operate

or be construed to operate as a waiver of any

Marisa Bender

other breach of default or of the same type of

breach or default on a subsequent occasion.

(d) Severability. If any one or more of the provisions of this Agreement is held to be invalid or unen-BY:

forceable under the laws of any jurisdiction,

Vice-President for Sponsorships

such invalidity or unenforceability shall not

HRM, Inc.

affect any other provision of this Agreement,

▪ ***Damages and Remedies for***

Breach of Contract

Generally speaking, when there is a breach of contract, contract law provides a variety of methods to repair the ***damages****. In some cases, courts are asked to enforce the remedies if the parties themselves cannot settle their differences privately.*

Types of Remedies

Several kinds ***remedies*** *are available to the non-breaching party when a breach of contract occurs. Good contract drafters can provide for remedies in the contract.*

Otherwise, courts attempt to place the injured party in the position that he or she ***damages***

amount of money recoverable by a person for a loss or injury, usually due to negligence or a breach of contract

remedies

one of various methods to enforce a contract if a breach or default occurs
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*would have been in had the contract been fully performed (**actual damages**). These damages or remedies include:*

- *liquidated damages*
- *compensatory damages*
- *consequential damages*
- *treble damages*
- *nominal damages*
- *specific performance*

These terms are used throughout the text and the student should become familiar with them in the context of contract law and elsewhere.

Liquidated Damages

***Liquidated damages** are damages specified in the contract itself and are often referred to as "agreed-upon" damages. That is, liquidated damages are a sum of money agreed upon by both parties to the contract prior to signing as a substitute for actual damages for breach of contract. Liquidated damages clauses are wise considerations for contract drafters of any contract.*

A typical liquidated damages clause allows the parties to privately agree what the

"penalty" will be for a breach of the agreement. These clauses also provide a measure of financial certainty at the outset for the parties, where calculating damages without a liquidated damages provision could prove to be extremely difficult, such as the loss of a coach to another institution or the cancellation of a contest.

For example, a contract between an apparel manufacturer and a club or organization might have a clause that if the ordered merchandise is late the manufacturer will be fined $100 per day. Liquidated damages provisions are

often found in multi-year coaching contracts. They are also found in contracts between colleges and universities with regard to scheduling athletic events as a means of escape from an agreed-upon contest. For example, in 2010 University of Tennessee Athletic Director Mike Hamilton decided to exercise rights under a liquidated damages clause which required a payment to the University of North Carolina in the amount of $1.5 million to cancel a home and away series which was to begin in 2011–2012.

Football: Louisville and Duke Universities

In 2008, a liquidated damages provision was the focus of litigation when the University of Louisville sued Duke University for breach of their Athletic Competition Agreement signed in 1999. Following a 2002 game, Duke cancelled football games that had been scheduled for 2007, 2008, and 2009. Under paragraph 13 of their contract, a liquidated damages sum of $150,000 per game was to be paid to the non-breaching party.

However, the contract excused the breaching party from paying if the non-breaching party scheduled a replacement game "with a team of similar stature."

Louisville did fill its schedule with replacements for 2007 and 2008, and the Kentucky court excused Duke from paying the liquidated damages. The court recognized that Duke, having won only one football game in 2007, was the worst team in Division I football, and Louisville made no additional attempt to demonstrate that the replacements were inferior. The state court granted Duke's motion for ***actual damages***

out-of-pocket monetary damages often measurable based upon contract terms ***liquidated damages***

agreed-upon remedy for breach of contract found within the contract itself
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summary judgment with prejudice against Louisville for the 2007 and 2008 seasons, and without prejudice for 2009. An exploration of this decision demonstrates the value that such provisions have for the parties involved and how vitally important defining terms and phrases in a contract can be.

Compensatory Damages

Compensatory damages *can be defined as the amount of money necessary to make up for the economic loss caused by breach of contract. General (compensatory) damages or non-economic damages include compensation for pain, suffering, mental anguish, disability, and disfigurement. Special (compensatory) damages or economic losses consist of medical expenses, loss of income and other direct economic losses.*

Consequential Damages

Consequential damages *describes measurable economic loss caused indirectly by a breach of contract. For example, if a party to a contract refused to perform and ticket sales decreased accordingly, such monetary damages may be recoverable if it can be shown that the damages resulted from (i.e., as a consequence of) the breach and not from a force majeure.*

Specific Performance

Specific performance *is an order by a court requiring the party that breached the contract to perform its obligation. That is, the breaching party must do what it agreed to do in the contract. Most professional sports contracts are not subject to specific performance as a remedy, however. Professional athletes are considered to have unique talents, abilities, and skills, and to force an athlete to perform under a personal services contract*

would constitute an illegal, modern-day form of enslave-ment. However, sales of goods and products could fall within the scope of specific performance as a remedy. Like an injunction, which requires or prohibits certain acts, specific performance orders performance.

Mitigation of Damages

The duty to ***mitigate*** *damages means that the victim of a breach of contract cannot simply let economic losses accumulate and later sue the breaching party to pay all of those subsequent losses as well. There must be an attempt to reduce the amount of economic loss. Failing to reduce one's damages when possible can damage the non-breaching party's case, because such exploitative conduct is not favored by courts.*

Additional Damages

The following types of damages are discussed in more detail in Chapter 3: Sports Torts. However, they are worth noting at this point since we are discussing ***compensatory damages***

remedy to compensate a plaintiff for actual loss or expense due to negligence or breach of contract

consequential damages

for an injury arising from special circumstances that were not ordinarily foreseeable but result from the consequences of an act by a defendant
specific performance

remedy as ordered by a court to enforce a contract in its exact form where money damages would be an inadequate form of compensation for a breach
mitigation of damages

reducing or keeping one's damages to a minimum

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damages in general, and on many occasions a breach of contract claim is coupled with a tort-related lawsuit.

Nominal Damages

*Nominal damages are very small monetary sums (usually $1) awarded by the court when a party demonstrates they have been wronged, but cannot demonstrate financial loss. A kind of Pyrrhic victory, nominal damages are usually not sought for by the parties to a lawsuit. For example, the United States Football League (**USFL**) sued the NFL and showed that the NFL violated federal antitrust laws.*

The USFL was unable to show its damages, though, and was awarded just $1.

Treble Damages

In certain instances, a party may be entitled to recover three times the amount of damages. This is known as treble or "triple" damages. This is not a contractual agreement and only occurs under certain federal statues, most frequently under federal anti-monopoly laws (antitrust laws). In the USFL case mentioned above, the $1

was tripled to $3 automatically under federal law. See Chapter 9: Antitrust and Labor Issues for further discussion. for further discussion of these kinds of suits.

Punitive Damages

***Punitive damages**, sometimes called exemplary damages, are damages that punish the wrongdoer in a civil action (not a contract action). Unlike compensatory damages, punitive damages are not based only on actual economic loss. They are designed to make an example out of the party and punish them for their wrongful conduct, sending a message that their conduct is unacceptable. Punitive damages are not recoverable in a contract action, since the goal of contract law is to make "whole"*

rather than to punish, which is the goal of criminal law (Chapter 4). A breach of contract alone is never entitled to punitive damages, so plaintiffs will usually couple a breach of contract claim with a tort claim for recklessness, fraud, and the like, in order to attempt to obtain punitive damages in a civil action.

- ***National Letter of Intent***

*Student-athletes are the beneficiaries of athletic scholarships ("grants-in-aid"). These individuals sign of a **letter of intent** (**LOI**) as part of the National Letter of Intent (NLI) program, which is a binding agreement between the student-athlete and the institution. This agreement provides that in exchange for the student-athlete's services in their sport, the student shall have tuition, room and board, and books paid for by the institution.*

USFL

United States Football League

punitive damages

designed to punish the misconduct of a civil defendant; not available for breach of contract

letter of intent

form prospective student-athletes sign committing to attend a college or university

LOI

letter of intent

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*Since 2007 the NLI has been managed by the NCAA through its Eligibility Center in conjunction with the Collegiate Commissioners Association (**CCA**) and the Southeastern Conference (SEC) office. Over 36,000 students sign a LOI every year, voluntarily committing themselves, in writing, to an institution for one year's worth of athletic scholarship funding. No financial compensation may be given to student-athletes in exchange for their athletic talents in that particular sport. Neither the Ivy League schools (also known as the Ivy Group) nor the United States military academies offer athletic scholarships or participate in the NLI program.*

NLI Criticism

It is not clear whether such an agreement is a prerequisite to participation in NCAA-governed sports, though the NCAA Manual does refer to the letter of intent program. Still, thousands of students sign a LOI every year, and the fairness and legitimacy of both the NLI program and the promises made during the recruiting process have been criticized. The NLI might unfairly limit student-athletes despite changes in circumstance, such as coaches leaving a school. Students who sign an NLI and wish to transfer must wait a year before being eligible to receive financial aid from a new school. Additionally, once committed to the institution, student-athletes are

sometimes asked to sign consent forms to use their name, image and likeness without limits. Some consider this to be an unconscionable act of adhesion. This might be especially significant in light of the deep chasm between the ideals of amateurism and high-stakes commercial reality of intercollegiate sport in the United States.

Significant issues appear when a student-athlete signs an NLI and the coach that recruited them is no longer employed at the university when the student arrives. Even in this case, student-athletes who then wish to transfer to another school would have to sit out a year before being eligible to do so. Though the student-athlete signs with the school, not the coach, often it is the prospect of working with a particular coach that most entices a student to join a particular program, and many consider this limit to be unfair. In 2008, the University of Memphis added a clause allowing two players to opt out of their LOI if Coach John Calipari left before they enrolled. As a result, the NLI was amended to prevent

"establishing any additional conditions." In 2009, Kelsey Evans sued Western Carolina University after the basketball coach who recruited her left and took a job at North Carolina State University. Kelsey was a minor when she signed the LOI and the university settled rather than create precedent that the NLI might be invalid.

Do you think it would be binding to minors in your state?

NCAA Contract Issues

It is generally held that the basic legal relationship between a student and a private university or college is contractual in nature. However, claims by student-athletes that their institution or the NCAA breached their athletic scholarship contract have consistently failed. Student-athletes have sued claiming that not being permitted to play in a game or on a team constituted a breach of contract.

Student-athletes have also sued claiming that their ineligibility due to lack of passing a minimum number of courses or meeting other requirements constituted a breach of contract by the athletic department or academic advisor. When a ***CCA***

Collegiate Commissioners Association

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student-athlete alleges that the contract represents an interest or property right, it has been consistently viewed without merit, because the NCAA is not considered a state actor and is not an arm of state or federal government.

Educational Malpractice/Breach of Contract

Along with claims for breach of contract, some plaintiffs attempt to tie in a tort claim of educational malpractice. However, claims for this tort consistently fail.

This is consistent with the principle that attending college and participation in college sports is a privilege rather than a right. Courts often dismiss such educational malpractice and breach of contract cases, sometimes referred to by plaintiffs as negligent advising. The following cases illustrate claims made by student-athletes that their college or university breached their contract to them in some way.

Ross v. Creighton University

Kevin Ross, a star basketball player, left Creighton University allegedly possessing the language skills of a fourth grader and the reading skills of a seventh grader.

Ross then sued the school for failing to give him a meaningful education, including the failure to provide tutoring. The court held that his claim was an illegitimate "educational malpractice claim" re-packaged as a contract claim. It stated that Ross needed to show a specific promise and the failure to deliver on that promise. It also reminded the parties that the basic relationship between a student and, in this case, a private university is contractual in nature. Still, the court dismissed on the grounds that educational malpractice is not a valid cause of action.

The case settled out of court for $30,000.

Hart v. NCAA

Jeremy Hart was a student-athlete wrestler at Appalachian State University and he alleged that he could not fulfill his scholarship contract when NCAA did not grant him a waiver to compete in another weight class. Hart was denied a waiver to compete in a lower weight classification for the 1997–98 season due to rule changes implemented by the NCAA after the tragic deaths of three collegiate wrestlers who tried to lose too much weight. Hart alleged that such denial constituted unreasonable, arbitrary and capricious conduct by the NCAA.

The NCAA argued that the wrestling weight regulations are in place to promote and protect the health and safety of student-athletes. The West Virginia Supreme Court vacated the lower court injunction and ruled that a student-athlete does not have a constitutional right to play intercollegiate athletics, period. The West Virginia Supreme Court held that participation in intercollegiate athletics is a privilege, not a right. This is important because the NCAA and its member schools have consistently stated that participation is a privilege, and thus can be regulated as the membership finds appropriate. The court also ruled that there is no contractual relationship between the NCAA and a student-athlete, therefore the student-athlete cannot sue for breach of contract if he or she does not get to compete.

Hendricks v. Clemson University

Hendricks sued Clemson University for breach of contract for failure to maintain eligibility after transferring from the smaller Florida school, St.

Leo. On March 17, 2003, the Supreme Court of South Carolina reversed the Court of Appeals and declined to recognize the relationship between an academic advisor at Clemson *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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University and a student-athlete as a fiduciary relationship. As such, the student-athlete's claim that Clemson University owed him a duty of care when it came to advising him on compliance with NCAA eligibility standards failed, as did his breach of contract claim. This decision reflected the general refusal by courts to hold academic advisors responsible for negligence or any other legal responsibility when it comes to academic advisement.

▪ ***Waivers***

A ***waiver*** *(sometimes called a release, disclaimer, or exculpatory clause) is the voluntary relinquishment of a privilege or a right. Good contract drafters often include waivers in an express agreement. A waiver or release of liability is a clause in a contract, or a separate document, designed to protect a party from legal liability for injuries that may occur to others. Waivers may be used as protection from liability for accidents, activities carrying certain inherent risks, and even ordinary negligence or other unintentional conduct in certain circumstances. Waivers must be conspicuous.*

Often players are required to waive their right to sue other players or a league for negligence as a condition of participation. This is prevalent in Little League sports, recreational activities such as skydiving, and even through in professional sports. Waivers are also used by the NCAA as part of the various consent forms that student-athletes sign on an annual basis. Waivers are discussed further in Chapter 3: Sports Torts.

Waivers are also used to avoid liability for defamation and invasion of privacy claims (discussed in greater detail in Chapter 4). A common waiver/disclaimer for fictitious works—based more on tort law than contract law—found in motion pictures, television and publishing industries is: "The characters and events depicted in this motion picture are fictional. Any similarity to any actual person, living or dead, or to any actual events, firms, and institutions or other entities, is coinciden-tal and unintentional."

Tickets and Waivers

In arenas, stadiums, theatres, concert halls, arenas and elsewhere, ticket holders are entitled to observe an event. However, ticket holders always risk getting injured when so many people gather together. Often printed on tickets are waivers, also known as disclaimers or exculpatory clauses. They are written to avoid liability if someone should be injured during an event. Disclaimers are sometimes short and simple, while other times the waiver might be long and complex. A ticket might display the following waiver, for example:

Holder voluntarily assumes all risks and danger incidental to the event for which the ticket is issued, whether occurring prior to, during or after the event, including, but not limited to, the danger of being injured by thrown, batted, kicked, shot, struck, by objects such as instru-ments, equipment, and flying objects, or by other spectators or performers. Holder voluntarily agrees that the management, facility, venue, participants, clubs, and all of their respective agents, officers, directors, owners and employees are expressly released by holder from any claims arising from such activity.

Courts generally do not uphold ticket stub waivers as a matter of public policy.

Plaintiffs can challenge the enforceability of express assumption-of-risk language ***waiver***

the voluntary relinquishment of a privilege or a right *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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on the back of tickets on several grounds: the disclaimer was not clear or conspicuous, the spectator was not notified of the language on the ticket and therefore there was no agreement, there was no signature by the ticket holder, and the conduct that caused injury was grossly negligent or reckless which cannot be waived. Waivers on the back of ticket stubs might serve as a deterrent to a plaintiff suing, but are not usually an effective complete defense to a claim of negligence.

▪ ***Tampering with a Contract***

*Claims for breach of contract might also include tampering (intentional interference with contractual relations (****I.I.C.R.*** *)), which is more of a tort. Tampering is defined by the NFL's league office as: "Any interference by a member club with the employer-employee relationship of another club or any attempt by a club to impermissibly induce a person to seek employment with that club or with the NFL." For example, the Detroit Lions were found "guilty" by NFL league commissioner Roger Goodell of tampering with Kansas City Chiefs players in 2010 and lost a draft pick as a result.*

▪ ***Bankruptcy***

A contract could end up being meaningless if one party files for bankruptcy, so it is important to have a fundamental understanding of it. The bankruptcy system operates strictly under federal law, and bankruptcy disputes and litigation must be in federal courts under the auspices of a bankruptcy trustee. The one who asks for help from the bankruptcy court is known as the ***petitioner*** *and they must provide a list all of their financial debts and obligations to the trustee, who administers he the bankruptcy estate. Trustees have the power to disaffirm (void) contracts.*

Voluntarily petitioning the bankruptcy court for financial relief is an option of last resort for debtors who cannot live up to their contractual obligations for various reasons. Generally speaking, individuals file chapters 7 (liquidation) or 13

(reorganization) while businesses file chapter 11 (reorganization). Whether filing under chapter 7, 11, or 13, the trustee has the ultimate say about discharging contractual obligations owed to creditors. Once a petition for bankruptcy has been made, all creditors must immediately stop pursuing collection of their debts under an automatic stay (11 U.S.C. §362).

BAPCPA

*The last major modification to the Bankruptcy Code was in 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (****BAPCPA****). Prior to that, the bankruptcy law had not been modified since the Bankruptcy Reform Act of 1978. BAPCPA went into effect on October 17, 2005. While U.S. bankruptcy* ***I.I.C.R.***

intentional interference with contractual relations

petitioner

the name of the party who files for bankruptcy

BAPCPA

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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law used to look at debtors as victims of financial difficulty, now bankruptcy courts ask petitioners to prove why they cannot pay their debts. The following tables represent some of the more prominent or recognizable league, organization and individual bankruptcies in the sports business over the years.

Selected Defunct Professional Sports Leagues

League

Years in Existence

Football

▪ *XFL*

2001

▪ *United States tball League (USFL)*

1983–1985

▪ *World Football League (WFL)*

1974–1975

▪ *American Football League (AFL)*

*1960–1969**

Basketball

▪ *American Basketball League (ABL)*

1996–1998

▪ *American Basketball Association (ABA)*

1967–1976

Hockey

▪ *World Hockey Association (WHA)*

1972–1979

Soccer

▪ *North American Soccer League (NASL)*

1967–1984

▪ *Major Indoor Soccer League (MISL)*

1978–1992

**Merged with NFL in 1970*

Women's basketball league

Selected Sport Industry and Individual Related Bankruptcies
Organization/Individual

League or Product

▪ *The Los Angeles Dodgers (2011)*

MLB team

▪ *British Ski and Snowboard Federation (2010)*

National Olympic Federation

▪ *XP Events (2010)*

Concessions/Merchandising

▪ *Derrick Coleman (2010)*

Former NBA player

▪ *Rick Mahorn (2010)*

Former NBA player

▪ *Texas Rangers (2010)*

MLB team

▪ *Antoine Walker (2010)*

Former NBA player

▪ *Mark Brunell (2010)*

NFL player

▪ *Dermontti Dawson (2010)*

Former NFL player

▪ *Assoc. Volleyball Prof's (AVP) (2010)*

Outdoor volleyball league

- *Arena Football League (2009)*

Indoor football league

- *Chicago Cubs (2009)*

MLB team

- *Lenny Dykstra (2009)*

Former MLB player

- *Bernie Kosar (2009)*

Former NFL player

- *Phoenix Coyotes (2009)*

NHL team

- *Sportsmen's Warehouse*

Outdoor hunting/fishing retailer

- *Forward Foods, LLC (2009)*

Protein bars manufacturer

(continued)

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Organization/Individual

League or Product

▪ *Nashville Predators (2008)*

NHL team

▪ *Victor Ortiz (2008)*

Boxer

▪ *EliteXC (2008)*

MMA organization

▪ *Michael Vick (2008)*

NFL player

▪ *Bally Total Fitness (2007)*

Health club

▪ *New York Racing Association (2006)*

Horse racing

▪ *Darren McCarty (2006)*

NHL hockey player

▪ *Riddick Bowe (2005)*

Professional boxer

- *Atkins Nutritionals, Inc. (2005)*

Supplement manufacturer

- *Antonio Tarver (2004)*

Professional boxer

- *SRI Sports (2004)*

Artificial turf manufacturer

- *CART (2003)*

Auto racing organization

- *Mike Tyson (2003)*

Professional boxer

- *David Dunn (2003)*

Sports agent

- *World Boxing Council (2003)*

Boxing sanctioning organization

- *Cannondale Corp. (2003)*

Bicycle and motor sports

- *Ottawa Senators (2003)*

NHL club

- *Buffalo Sabres (2003)*

NHL club

- *Bike Athletic Co. (2002)*

Sporting goods manufacturer

- *Roanoke Steam (2002)*

Arenafootball2

- *Quokka Sports (2001)*

Digital and internet entertainment

- *Schwinn (2001 and 1992)*

Bicycle manufacturer

- *Authentic Fitness/Speedo (2001)*

Sporting goods retail

- *Jumbo Sports (1999)*

Sporting goods retail

- *Just for Feet, Inc. (1999)*

Shoes/Apparel retail

- *Starter Corp. (1999)*

Apparel manufacturer

- *Pittsburgh Penguins (1998 and 1975)*

NHL club

- *Pinnacle Brands, Inc. (1998)*

Trading cards manufacturer

- *Koenig Sporting Goods, Inc. (1997)*

Sporting goods retail

- *Calgary Stampeders (1996)*

Canadian Football League (CFL)

- *Dorothy Hamill (1996)*

Olympic gold medalist

- *Los Angeles Kings (1995)*

NHL club

- *Baltimore Orioles (1993)*

MLB club

- *Billy Sims (1990)*

NFL player

- *New England Patriots (1988)*

NFL club

- *Super Turf (1985)*

Sporting goods manufacturer

- *Montreal Alouettes (1981)*

CFL club

- *Cleveland Barons (1978)*

NHL

The Bankruptcy Code Changes in 1978

▪ *Seattle Pilots (1970)*

MLB club

▪ *Philadelphia Eagles (1969)*

NFL club

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▪ ***Summary***

Contracts are an essential part of the sports business. A contract is a legally binding agreement that expresses the meeting of the minds of the parties involved. While many contracts in sports are between an individual coach or athlete and a team, league, or sponsor, many also involve television and sporting goods manufacturers.

The fundamental elements of any contract must include an offer, acceptance of the offer, and consideration. Contracts are only enforceable if they are formed for a legal purpose. All contracts are either valid, void, or voidable.

Minors may enter into contracts. Waivers are often necessary to prevent legal liability.

Many professional sports contracts are boilerplate standard player contracts and governed by that sport's collective bargaining agreement. However, endorsement and appearance contracts may take a variety of form. Contract drafters are wise to predict what might happen in the future, provide for it in the contract, and protect their client accordingly.

When a contract is breached, the non-breaching party has numerous options, or remedies. Though a lawsuit may be used to enforce obligations, other remedies such as liquidated damages may serve to resolve breach of contract disputes. Individuals may also pursue alternative forms of dispute resolution such as mediation and arbitration.

The advent of no-trade clauses, freedom clauses and the right to free agency has given players more power in the contractual relationship than they have ever had. Still, as demonstrated by loyalty and best efforts clauses, owners, teams and sponsors place personal conduct, loyalty and responsibility on the shoulders of players as never before either. Meanwhile, morals clauses, hazardous activity clauses, and best efforts clauses have gained considerable importance. Others, such as the most favored nation and freedom clauses, demonstrate and reflect the creativity and foresight of one or both of the parties to the agreement. The role of baseball Commissioner appears to be as important as ever, especially with regard to the "best interests" of baseball clause.

An exploration termination clauses in coaching contracts demonstrates how important it is for the parties to consider the manner in which an employee can be fired and how "cause" provisions can be defined. It also offers an opportunity to consider why some athletic directors might decide to hire a coach who appears to have an inconsistent employment resume coupled with a history of violation of NCAA rules.

Finally, students must appreciate the fundamentals of bankruptcy law and the impact it can have on contracts in general. Exploration of various clauses and contracts and in the context of sports and the law can provide

professors and students with an exciting and comprehensive pedagogical journey.

▪ ***Key Terms***

acceptance *agreement to the terms of an offer that creates a legally binding agreement*

actual damages *out-of-pocket monetary damages often measurable based upon contract terms*

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addendum *an attachment to the contract which adds to or amends one or more provisions of the agreement*

adhesion *a take-it-or-leave-it offer*

appearance contract *agreement that the athlete will appear in person on behalf of a sponsor's promotion*

"best efforts" clause *provision in a contract in which player or coach must objectively act diligently in the performance of the agreement* ***boilerplate*** *fixed or standard contract format and terms that generally are not negotiable*

breach *the breaking of a promise, duty or obligation by a party to the contract* ***capacity*** *the ability to enter into a contract from a legal perspective and that both parties knew (or should have known) that they were voluntarily entering into a legally binding agreement*

collective bargaining agreement (CBA) *contract between a league and players association*

compensatory damages *remedy to compensate a plaintiff for actual loss or expense due to negligence or breach of contract*

consequential damages *for an injury arising from special circumstances that were not ordinarily foreseeable but result from the consequences of an act by a defendant*

consideration *the price, usually in monetary terms, of a promise and the element of a contract that differentiates it from an outright gift* ***contract*** *a legally binding agreement*

Coogan's Law *California law named after child actor Jackie Coogan in which at least 15 percent of a child-actor's income must be placed into a trust account until he or she reaches the age of 18*

counteroffer *rejecting an offer yet making a subsequent offer to the same party with the intent to be bound by the offer if an acceptance is made* ***damages*** *amount of money recoverable by a person for a loss or injury, usually due to negligence or a breach of contract*

detrimental reliance *synonym for promissory estoppel* ***endorsement contract*** *in which a sponsor agrees to pay a fee or provide product to an athlete in exchange for using the athlete's name or image in its promotions* ***express contract*** *a contract that is usually made in writing* ***force majeure clause*** *French for "major force" or "act of God" and used in contracts to provide remedies for unexpected events such as weather-related events which postpone performance of an event*

hazardous activity clause *provision in a contract which expressly outlines certain activities to be avoided due to their propensity to result in a serious physical injury*

implied contract *created by the courts as an obligation in the absence of an agreement to prevent unjust enrichment by one of the parties* ***letter of intent*** *form prospective student-athletes sign committing to attend a college or university*

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liquidated damages *agreed-upon remedy for breach of contract found within the contract itself*

loyalty clause *provision which requires sponsored athlete or coach to wear or utilize certain products during performance or competition* ***meeting of the minds*** *phrase used to describe agreement between offeror and offeree*

minor *an individual under the age of 18*

mitigation of damages *reducing or keeping one's damages to a minimum* ***morals clause*** *provision in contract which allows termination of the contractual relationship in the event of an act of misdeed by an athlete or coach* ***mutual*** *both parties agree in advance or subsequent to the contract on specific arrangements such as termination or modifying the agreement* ***no-move clause*** *provision in a contract in which a player retains the right to approve or disapprove of a demotion to a minor league prior to the transfer* ***no-trade clause*** *provision in a contract in which a player retains the right to approve or disapprove of a trade to another team in order to complete the deal* ***offeree*** *one who receives an offer and has the power to accept* ***offer***

element of contract that creates the power of acceptance in the offeree ***offeror*** *one who makes an offer*

one-way contract *NHL specific type of contract in which a player is paid the same salary whether he is in the NHL or sent down to a minor league team* ***option contracts*** *contracts also known as a voidable contract in which one of the parties to the agreement may exercise a right, such as a right to re-work a contract, upon the occurrence of a condition such as reaching certain performance levels*

pacta sunt servanda *latin expression meaning that agreements must be honored* ***personal services contract*** *special, non-assignable contract providing unique talents, abilities, and skills*

petitioner *the name of the party who files for bankruptcy* ***promissory estoppel*** *a promise was made by the offeror and it was reasonable for the offeree to rely on the promise to their financial (or other) detriment* ***punitive damages*** *designed to punish the misconduct of a civil defendant; not available for breach of contract*

quasi contract *an implied contract established by a court in which it would be unfair or unjust to declare that the actions of the parties did not constitute a contract*

quid pro quo *Latin expression literally translated "this for that."*

rejection *outright refusal to accept an offer* ***remedies*** *one of various methods to enforce a contract if a breach or default occurs*

rescission *the act or process of ending the contractual agreement entirely or just part of the contract*

reserve clause *outdated clause found in MLB and other professional sports leagues in which a team could own a player's rights in that league for an unlimited amount of time*

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restitution *the act of restoring a party to a contract to a position had there been no contract at all or no breach*

reverse-morals clause *clause in a contract which allows the athlete or coach to terminate the contract in the event the sponsor commits a particular act or is found guilty of a misdeed*

rider *synonym for Addendum*

salary cap *a league-wide ceiling on the amount any particular team may spend on player salaries*

specific performance *remedy as ordered by a court to enforce a contract in its exact form where money damages would be an inadequate form of compensation for a breach*

standard player contract (SPK) *boilerplate contract between a league and a professional athlete. Sometimes referred to as SPA: standard player agreement* ***standard player contracts (SPK's)*** *boilerplate contract found in the Big Four sports in which almost all the terms of the contract are the same for everyone except salary, bonuses, etc.*

statute of frauds *fundamental legal principle that certain types of contracts must be in writing in order to be enforced*

ten-day contract *NBA specific type of contract in which a player can be signed for ten days with the opportunity to demonstrate skills to make the roster* ***termination*** *the right of a party to an agreement to end the contract*

two-way contract *NHL specific type of contract in which the amount a player is paid depends upon whether he is in the NHL or sent down to a minor league team*

unconscionable *term used to describe a contract whose terms "shock" the consciousness of a reasonably minded person and often used in conjunction with the term adhesion*

usury *charging an excessive or illegal rate of interest* ***valid*** *term used to describe a legally binding contract* ***voidable*** *contract that may be voided by one of the parties* ***void*** *contract that is not enforceable*

waiver *the voluntary relinquishment of a privilege or a right* ***with cause*** *the right to terminate a contract for a specific reason and often referred interchangeably as a "just cause" or "for cause" provision*

- ***Acronyms***

ADR *Alternative Dispute Resolution such as mediation or arbitration* ***BAPCPA*** *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*

CBA *collective bargaining agreement*

CCA *Collegiate Commissioners Association*

I.I.C.R. *intentional interference with contractual relations* ***ISU*** *International Skating Union*

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***IU** Indiana University*

***KSU** Kansas State University*

***K** contract*

***LOI** letter of intent*

***MLC** MLB Constitution*

***NCCUSL** National Conference of Commissioners on Uniform State Laws*
***NLI** National Letter of Intent program*

***NLRA** National Labor Relations Act*

***NMC** no-move clause*

***NTC** no-trade clause*

***OSU** Ohio State University*

***SEC** Southeastern Conference*

***UAAA** Uniform Athlete Agents Act*

***UCC** Uniform Commercial Code*

***USFL** United States Football League*

***UT** University of Tennessee*

▪ ***Cases***

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▪ *Discussion and Review Questions*

1. *Why is having a written contract so important in the sport industry?*

2. *What are the five fundamental elements required to form a contract?*

3. *Describe the various remedies to a breach of contract.*

4. *Why do most agents charge their clients a higher fee for an endorsement contract than a contract with a league or team?*

5. *Why are punitive damages not allowed for breaches of contracts?*

6. *What are contract riders?*

7. *What are the differences between termination, morals, force majeure, hazardous activity and liquidated damages clauses?*

8. *What is the National Letter of Intent program and what legal issues have come up lately involving its use?*

9. *What is Coogan's law and how might it apply in sports law?*

10. *How has bankruptcy affected the sports business and contracts?*

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CHAPTER THREE

Sports Torts

After reading this chapter you will be able to:

1. Define the terms tort and tortfeasor.

2. Describe the differences among the various theories of tort law including negligence, intentional torts, product liability, and strict liability.

3. Explain the difference between the English and American rules related to tort law.

4. Consider the role of risk management and reducing liability for injury to persons who attend sporting events.

5. Discuss the importance and legality of waivers in sports law.

6. Provide various examples of misrepresentation (fraud) in sports law.

7. Describe what worker's compensation is and its relationship to tort law.

8. Discuss whether waivers on ticket stubs are legally enforceable.

9. Discuss the issues related to product liability, including issues related to warranties and labeling of products.

10. Explain how strict liability might be relevant in sports law.

▪ *Introduction*

*Injuries involving a person or property fall under **tort law**. Tort law focuses on lawsuits involving claims that a defendant committed an act or omission which caused the plaintiff's injury. Individuals who commit torts are known as **tortfeasors**. Tort law cases are often some of the most interesting for the law student. It is also is one of the most prevalent areas of litigation in the sports business.*

The purpose of tort law is to compensate the plaintiff monetarily for the tortfeasor's misdeeds, whereas the purpose of criminal law, the focus of the next chapter, is to punish the perpetrator-defendant. Tort law and criminal law are directly related, but tort law focuses on civil litigation as opposed to criminal prosecution.

*While the government must prove its case beyond a reasonable doubt in a criminal case, a private plaintiff in tort litigation must prove its case by a **preponderance of the evidence**. Put differently, a plaintiff in a tort case must demonstrate that it is more likely than not that the defendant was responsible for the injury to the plaintiff.*

tort law

civil injury or wrong that violates a legal duty owed to another ***tortfeasor***

one who allegedly commits a tort

preponderance of the evidence

test in a civil case that plaintiff must prove the defendant is

"more likely than not" responsible for the injuries sustained ***113***

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Chapter Three

Risk Management

Understanding tort law is particularly important for those involved in facility management, especially athletic training facilities. In the sports business, concern over potential legal liability is commonly referred to as ***risk management****. Reducing risk requires employing preventative precautions, maintenance, and damage control in the event of an injury or during a crisis. It also includes establishing safety checklists, evacuation plans, purchasing insurance, providing proper medical resources on-site, and managing food and beverage vendors, especially in venues that serve alcohol.*

▪ ***Tort Theories***

When an individual is injured and believes that the injury is the fault of another, he may sue under four major tort theories, which are not mutually exclusive. In other words, the injured party, the plaintiff, may sue under one or more of the legal theories with the hope that a judge or jury will award some sort of monetary damages to compensate them for the injury.

Negligence *is the hallmark of tort law, and claims of negligence are common in sports law. When a defendant is found to be negligent, the plaintiff may be compensated with damages as described in the previous chapter. Ultimately, judges or juries must determine if the defendant acted as a* ***reasonable person*** *would have in similar circumstances. This can be difficult to determine and it requires the parties' memories of the events on that day.*

More closely related to criminal law than negligence are ***intentional torts****. Any voluntary action which is intended to cause injury is considered as an intentional tort.* ***Intent*** *is considered as a factor in determining the amount of damages as well.*

Often punitive damages are awarded for intentional torts. Intentional torts include a wide variety of claims, some of which are also crimes, such as assault and battery.

Intentional torts might also involve claims of defamation and fraud.

Another category of tort is ***products liability****. Manufacturers are liable for the proper functioning of the goods they sell, and under products liability torts can be held responsible for injuries related to defects in their products. This certainly has its place in sports law, since the sports industry relies on a wide variety of sport-related equipment.*

The final major category of tort is ***strict (absolute) liability****, which means that legal responsibility for an injury is assigned to the tortfeasor without a finding of fault. In other words, even if he did nothing wrong, he is still responsible legally for the injury. This theory is not often applied in sports torts or the sports business. However, it might certainly be considered, especially if an extremely hazardous activity* ***risk management***

expression used to describe manner and method of reducing the likelihood of an injury in the context of sport.

negligence

failure to act as an ordinary, reasonably prudent person ***reasonable person***

test used to determine whether, in hindsight, a person acted reasonably
intentional tort

tort closely related with crimes in which the tortfeasor intended to commit an injury to another

intent

desire to bring about a particular result

products liability

tort law focusing on a defect in design, manufacture, or warning ***strict (absolute) liability***

liability for an activity that involves an ultra-hazardous activity *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Sports Torts

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was involved. This might include fireworks displays, demolition of stadiums and other venues, and maintaining wild animals which serve as team mascots, for example.

Consent

Sports torts sometimes involve personal injuries that occur during a sports contest, and competitors are quite aware of the risk of injury. In fact, the risk

of injury is widely considered an inherent part of sports competition. Violent sports such as boxing, football, and hockey involve physical confrontation that outside of the sports contest would likely be considered torts or even criminal behavior. Though most injuries are thought of as being physical, one may sue in tort law for emotional, psychological, and reputational damages as well. Still, lawsuits are infrequent among sports competitors.

*Courts too view injury in sports competition as part of the game, and often refuse to award damages because of the participants' **consent** to contact. In other words, the participants themselves agree that what otherwise might be considered a harmful or offensive physical contact with another is acceptable within the ring, on the court or the field of play. Consent can be either **implied** or **express**, the latter usually meaning that a waiver has been signed.*

The following section addresses a variety of areas in sports law in which negligence has been alleged. Some claims involve athlete participants; in others, spectators and fans have attempted to demonstrate negligence. This comprehensive section also addresses possible claims involving injuries to referees and coaches, negligent supervision issues and possible negligence in hiring or training staff. In some cases, a claim of negligence involves not just injury but loss of life.

- ***Negligence***

*The majority of sports-related litigation under the major classes of torts listed above falls under negligence. Important to the analysis of a negligence claim is whether or not the defendant acted as a reasonable person would have acted in that same situation. Sometimes negligence is referred to as **ordinary negligence** because the plaintiff attempts to demonstrate that the defendant failed to use the ordinary care of a reasonable person. The reasonable person might refer to an individual such as a parent, fan, trainer, coach or player, or it might refer to a corporation or other type of business organization.*

If the defendant acted as a reasonable person in the mind of the judge or jury, then no liability is imposed on the defendant. If the defendant did not act as a reasonable person, then the defendant may be completely or

partially liable for damages. But who is the reasonable person? No one really knows for sure, but unless a case is settled privately, it is up to the judge or jury to decide.

During a negligence claim, the plaintiff carries the burden of proof. He must demonstrate that:

1. the defendant owed a duty of care to the plaintiff; 2. the defendant breached that duty to the plaintiff in the form of unreasonable conduct;

consent

*defense to negligence in which participants voluntarily assume known risks by participation (**implied**) or by signing a waiver (**express**).*

ordinary negligence

the failure to use the ordinary care that a reasonable person would use in similar circumstances.

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3. the defendant was the proximate cause of the breach of duty (i.e., "causation"); and 4. there is evidence of damages.

If the plaintiff fails in proving any of these requisite elements, the plaintiff's claim will not succeed. Indeed, negligence can be an act of commission or an act of omission, the latter being the failure to act when there was a duty to act.

Contributory Negligence

***Contributory negligence** means that if the plaintiff is found to have contributed to his or her own injuries in any way, the plaintiff's legal claim will fail. This is a harsh result, especially if the plaintiff's contribution is slight, and only a handful of remaining jurisdictions still recognize this theory.*

Comparative Negligence (Comparative Fault)

*Most states now use **comparative negligence**, also referred to as **comparative fault**.*

*Under the doctrine of comparative fault, plaintiffs may be partially to blame for their own injuries, but as long as they are not more at fault than the defendant, they can still recover damages, minus their percentage of fault, of course. In essence, the plaintiff's negligence (if there is any) is compared to that of the defendant's in terms of percentages. Some states subscribe to the **49 percent rule**, in which the plaintiff must be less at fault than the defendant to recover damages.*

*However, some jurisdictions use the **50 percent rule**, in which recovery by the plaintiff is possible even if the plaintiff is equally at fault.*

Proving negligence between sports contestants can be difficult. Many states only allow recovery for sports injuries only when the defendant's conduct far exceeds the ordinary rules of the game, sometimes characterized as reckless disregard of the rules of the game. This encourages vigorous participation even in the most trivial community softball games, 3-on-3 basketball tournaments and youth soccer matches without fear of a lawsuit. Allowing recovery for injury during normal conduct in a sports contest would open the floodgates to litigation.

Assumption of the Risk

One of the strongest defenses to negligence is that the plaintiff "assumed the risks"

of the activity from which his or her injury resulted. ***Assumption of risk (AOR)*** *often renders the defendant not liable for the plaintiff's injuries. Assumption of the risk can be seperated into* ***express assumption of the risk****, in which someone signed a* ***contributory negligence***

failure of plaintiffs to take reasonable precautions for their own safety
comparative negligence (fault)

standard in which damages are rewarded based on the degree of fault among plaintiff and defendant; typically, plaintiff's degree of fault must be 49 percent or less to recover damages in many states (49 percent rule) while no more than equal to (50 percent rule) in other states

49 percent rule

in a comparative negligence jurisdiction, recovery may be made by plaintiff only if the percentage of fault is less than that of the defendant ***50 percent rule***

in a comparative negligence jurisdiction, recovery may be made by the plaintiff if the percentage of fault is equal to or less than that of the defendant ***assumption of risk (AOR)***

voluntarily assuming a known risk

AOR

assumption of risk

express assumption of the risk

agreeing, normally in writing, that one understands that certain risks of participation may result in an injury

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waiver or release, and ***implied assumption of the risk****, in which no waiver was signed but the injured plaintiff knew of the danger and still proceeded voluntarily.*

Gross Negligence and Recklessness

What happens when sports participants act so outside the scope of the rules of the game that it appears the sole purpose of the play was to injure another player intentionally? In such instances, defendants may be so lacking in their care to the injured party that the plaintiff attempts to show that defendant with ***gross negligence*** *or, put differently,* ***recklessness****. In other words, the defendant allegedly used so little care when dealing with the plaintiff that the defendant intended to injure the plaintiff.*

A claim of recklessness can be difficult to prove successfully. It requires the plaintiff to prove willful, wanton or intentional acts by the defendant. However, if the plaintiff is successful, they are likely to recover punitive damages for the outrageous conduct of the defendant in addition to general damages (pain and suffering) and special damages (medical bills).

Whether characterized as negligence, gross negligence or recklessness, what is and what is not negligence involves a subjective analysis. It requires going attempting to measure whether there was fault and, if so, to what degree. Many negligence claims are settled out of court, both assuring a measure of certainty with regard to financial damages for the plaintiff and avoiding ridicule in the court of public opinion for the defendant.

Personal Responsibility

Regardless of which theory or tort category involved, the key question in sports law is to what degree—if at all—should civil law be applied to the situation, attributing liability to the civil defendant, the tortfeasor. When someone is injured, is it always due to someone else's negligence? Could the plaintiff to be partially to blame for their own injuries? Unfortunately, the blame-game is a substantial part of the U.S.

legal system in tort law. In fact, many believe that the concept of personal responsibility no longer has a place in the United States. Throughout this chapter consider the differences or similarities between on-field torts which are most likely not actionable and those which cross the line.

Tort Reform

The court system can be, and is, abused by plaintiffs and their lawyers bringing illegitimate claims. Runaway juries (as they are sometimes called) have awarded millions (and billions) in damage to plaintiffs and their attorneys for a variety of claims. This seems to encourage litigation and, generally speaking, there is no penalty or deterrent in the U.S. legal system for bringing a claim, as long as it has a minimal measure of merit. Because of the propensity of illegitimate claims, the U.S. has been referred to as litigation nation and its court system as having jackpot justice by critics.

As a result, many scholars, lawyers and citizens have encouraged adoption of the ***English Rule*** *principle in tort law, also known as "loser pays." Under the English* ***implied assumption of the risk***

voluntarily assuming the risk of being injured in an activity likely to cause an injury but without formally agreeing orally or in writing ***gross negligence***

failure to use a small amount of care to avoid harm to a plaintiff
recklessness

such a high degree of carelessness that most courts view the harm to the plaintiff as intentional, making punitive damage awards likely ***English Rule***

principle in many countries in which the prevailing party in a lawsuit has their legal fees paid for by the losing party, also known as "loser pays."

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Rule, if a plaintiff fails in her claim then she must pay the defendant's attorney fees and court costs. This is designed to discourage filing frivolous lawsuits.

Others suggest a modified approach in which non-economic damages (pain and suffering) are capped at a certain dollar amount or percentage above the actual damages. However, U.S. plaintiff-lawyers are generally opposed to such changes and prefer to continue under the current system, the ***American Rule****.*

▪ *Classic Sports Participant Cases*

Many of the earliest U.S. sports law cases involved potential liability between participants. That is, courts dealt with questions of whether certain types of physical conduct that might otherwise (i.e., outside the scope of competition) be considered assaults and batteries should remain part of the game. Sports law cases have developed significantly since the early years of lawsuits between sport participants.

Contact Sports Exception

*The following cases established the **contact sports exception** to lawsuits between sports participants. That is, if the sport involves contact, then there is no liability to another participant unless the injury occurred due to a grossly negligent, reckless or intentional act by the other participant. Courts must look to objective, not subjective, factors to make this decision. These considerations include the nature of the sport and whether contact is an inherent part of the game; if so, then participants owe each other no duty of care for ordinary negligence. Courts are generally reluctant to award damages for normal, expected physical contact during the course of a game, while they will for contact so outside the scope of the game that it is considered reckless misconduct.*

In Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975), a soccer goalie was kicked in the head while in possession of the ball in the goal crease. This Illinois case recognized a "contact sports" exception to the general rule that a person is responsible for his negligent acts or omissions. It established precedence for a contact sports exception of liability for negligence in Illinois, while allowing that intentional or reckless misconduct was still actionable. The reckless disregard for the safety of others rationale from this case is the standard used nationwide. In other words, voluntary participants in contact sports may be held liable for injuries to co-participants resulting from willful and wanton or intentional misconduct, but they are not liable for injuries caused by ordinary negligence. Similarly, in Bourque v. Duplechin, 331 So.

2d 40 (La. 1976), the Louisiana court affirmed a lower court judgment holding that during a softball game a slide four to five feet outside the base path creates an unexpected, unsportsmanlike and reckless disregard for others' safety.

In Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979), defensive back Dale Hackbart (Denver Broncos) was hit by running back Charles "Booby"

Clark (Cincinnati Bengals) behind the play and in the back of the head during a 1973 game. As a result of the hit, Hackbart unknowingly suffered a neck fracture during the game. The Tenth Circuit Court of Appeals held that

such intentional hits were not an intended part of the game, and that such conduct by Clark ***American Rule***

principle that parties to a lawsuit pay their own attorney fees rather than shifting such fees to the losing party

contact sports exception

fundamental principle which holds that during competition which naturally involves physical contact, there will be no liability for negligent conduct but rather only for gross negligence or recklessness

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constituted a "reckless disregard" of the rules of football. The court reversed and remanded the case for a new trial (the jury had sided with defendant). This case eventually settled out of court for $200,000.

Finally, in Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989), an ice hockey player (Clark) was accused of shoving his stick into another player's abdomen (Gauvin) during a college game. The hit resulted in the player's spleen being removed and him missing seven weeks of school. The jury found that Clark had violated a safety rule of the game. Still, the jury also felt that Clark's conduct was not "wilful, wanton or reckless." Gauvin was awarded $30,000 in damages. However, the trial judge overturned the jury's decision after weighing the evidence. He did not believe that there was enough proof

that the conduct was reckless and, in fact, he believed it was actually unclear whether Clark butt-ended Gauvin at all. He entered a judgment in Clark's favor instead.

On appeal, the Massachusetts Supreme Court supported the judge's determination that the evidence was not clear that the player acted "with reckless disregard of safety" even though the defendant used his stick's butt-end to cause the injury. The court, however, did support the legal principle that sports participants in Massachusetts owe each other a duty of care to avoid reckless disregard of the safety of others while competing, and recognized the Illinois decision in Nabozny v.

Barnhill decision from 1975.

The contact sports analysis was also used in Pfister v. Shusta, 657 N.E.2d 1013

(Ill. 1995), in which an injury occurred during an informal game of kick-the-can between college students in a dormitory. The Illinois Supreme Court held that participants will be held liable for deliberate intent to harm, an utter indifference to, or a conscious disregard for the safety of others. That is, a participant breaches a duty of care to a co-participant only for intentional misconduct or for conduct

"totally outside the range of the ordinary activity involved in the sport."

- ***Spectator Injuries***

There are a variety of causes of spectator injuries with varying degrees of tort liability associated with each. This section examines injury due to poor facility maintenance, ineffective employee training, and flying objects. How much liability does a stadium, arena, venue or team owner have when a spectator is injured during the course of attending a game? Does the owner of a stadium have a duty to warn or protect spectators from foreseeable injuries? Different states have different rules, many of which apply in different situations.

The venue can take action to reduce its potential liability. For example, it is wise to post signs that warn of potential dangers, but warning against all possible danger is clearly not possible. When signs are involved, the adequacy of the posting of the sign is usually the focus of the analysis. Many stadiums use their large, electronic scoreboards to provide conspicuous warnings or announcements to spectators about the potential for danger of objects flying from the field of play, by far the most common spectator injury. The next sections discuss varied approaches to flying object claims.

Flying Objects

The majority of spectator injuries result from projectiles such as foul balls, broken bats, deflected hockey pucks, and debris from race cars flying into the stands. For example, three spectators were killed and eight injured when a tire flew into the stands during a 1999 race at Charlotte Motor Speedway. As a result, the track *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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later raised the fences from 15 to 21 feet high. In such an event, who is responsible for the spectator's injuries, if anyone? Should spectators know that sitting in the stands in many sports voluntarily exposes them to a known risk of being hit? Does an owner of a stadium owe a duty to spectators to prevent all foreseeable injuries, or does common sense impose some duties on the spectators themselves? These are the questions that often have to be answered by jurors and judges.

U.S. courts generally disallow recovery for injuries to spectators caused by the open and obvious rules of the game, particularly when it comes to foul balls, bats, and hockey pucks. Many courts, but not all, accept that injuries are part of the known risk of watching certain types of sporting events. For those who are hit, this can seem disconcerting and unfair, especially when children are involved.

States have adopted a variety of approaches to cases involving flying objects that hit spectators. These legal principles are the ***Limited Duty Rule****, the* ***No Duty Rule****, and the* ***Just Negligence Rule****. Regardless of the approach, courts focus on whether a duty of care was owed to the spectator (or other) and whether that duty was breached.*

Limited Duty Rule

Jurisdictions which use this rule for flying objects, also known as the ***universal rule*** *and the baseball rule, assume certain knowledge of potential dangers of being hit.*

That is, as members of the community, spectators must know from "neighborhood knowledge" that fans assume certain risks by attending games. In fact, many spectators attend baseball games, for example, specifically for the chance to catch a foul ball or home run ball, and bring gloves accordingly.

This analysis (or rule) has been around since the early days of baseball and has protected owners and operators of stadiums frequently. It has been adopted by at least 12

states and others continue to consider it. Michigan adopted it in Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219 (Mich. App. 2001). In essence, the court stated that as long as screening is provided for the most dangerous part of the stadium, including home plate extending to the first and third baselines, the defendant will prevail. Put differently, this court held that the owner or operator of the stadium, and the respective clubs, has satisfied that duty of care owed to its patrons for flying objects when screening is provided which is "sufficient to meet ordinary demand for protected seating."

Defendants almost always win in states which use the limited duty rule, but plaintiffs might be able to overcome a motion for ***summary judgment*** *if they can show a defect in design of the stadium, netting or construction of the facility.*

Some critics of the limited duty rule claim that it is unfair to impose such duty on spectators. It has been compared to ***caveat emptor*** *("let the buyer beware"), the* ***Limited Duty Rule***

states which adhere to the legal principle that as long as the owner or operator of a stadium provides enough protected screening for reasonably expected demand by spectators then there is no liability for injury due to flying objects emanating from the field of play ***No Duty Rule***

states which adhere to the legal principle that fans assume all risks of being hit by flying objects that are a natural part of the game

Just Negligence Rule

states which analyze injuries due to flying objects such as foul balls in no special, sport-related way but rather in a typical negligence analysis
universal (baseball) rule

concept whereby courts expect that all spectators who watch baseball or softball games have a reasonable expectation that foul balls are part of the risk of watching a game, sometimes referred to as the limited duty rule
summary judgment

a decision by a court that essentially dismisses a case at the outset of the litigation ***caveat emptor***

Latin expression meaning "let the buyer beware."

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principle that buyers of goods or services purchased goods at their own risk, which held dominance until the advent of consumer protection laws in the 1970s. The principle is now better viewed as ***caveat venditor****, or "let the seller beware."*

Just Negligence Rule

Another approach to dealing with flying objects, projectiles, and debris in sports torts is the just negligence rule that holds that the tort analysis should be no different than other negligent claim. States that use this rule do not afford sports or sporting events any special analysis under the law. Cases are tried under the state's traditional comparative fault or contributory negligence common law tradition.

Since the events normally occur at a ballpark, stadium or arena, the analysis is often compared to premises liability.

However, does the just negligence rule promote litigation? Is it appropriate that judges or juries should decide each and every legal claim involving flying debris?

No Duty Rule

The no duty rule states that spectators assume all risks that are common, expected, and frequent risks of the game, including, for example, errant throws into the stands by baseball players. States that have adopted this legal theory essentially bar a plaintiff's negligence claim for flying objects at baseball games. Like the other legal theories, this is a common law, judge-made rule and not statutory. There are almost no exceptions to liability for this rule other than willful misconduct.

In Loughran v. Phillies, 888 A.2d 872 (Pa. 2005), the Pennsylvania court addressed whether spectators in Philadelphia (the city of Brotherly Love) and elsewhere in that state should know that the tossing of a ball by an outfielder into the stands in between innings is a common occurrence. Marlon Byrd, an outfielder for the Philadelphia Phillies, threw a ball into the stands after catching the last out of the inning against the Florida Marlins on July 5, 2003. A spectator, Jeremy Loughran, was hit by the ball and claimed that, as of a result, he was treated for "severe headaches, vomiting, confusion, incoherence, hallucinations, loss of balance, head and neck pain, photophobia, eye spasms, sleep disruption, and depression." The Phillies organization and Marlon Byrd were granted summary judgment by the trial court which held that "the applicable law clearly states that recovery is not granted to those who voluntarily expose themselves to risks by participating in or viewing an activity." Explore the Loughran case and see if you agree with the decision.

- ***CASE 4***

Jeremy Loughran, Appellant v. The Phillies and Marlon Byrd, Appellees ***Superior Court of Pennsylvania***

a duty by either the team or individual player to protect ***September 14, 2005, Argued***

against a ball thrown into the stands; and that the trial ***November 23, 2005, Filed***

court incorrectly found that his injury was an inherent risk of attending the game. We disagree with appellant, ***OPINION BY OLSZEWSKI, J.:***

and affirm the order of the trial court.

This is an appeal from an order granting summary

On July 5, 2003, Jeremy Loughran (appellant)

judgment in favor of appellees.1 Appellant claims the attended a baseball game between the Philadelphia

trial court misapplied the "no duty" rule in finding that Phillies (Phillies) and the Florida Marlins. Appellant's a spectator at a major league baseball game is not owed (continued)

caveat venditor

Latin expression meaning "let the seller beware."

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Brief, at 5. At the end of the top half of the seventh

"the operator of a place of amusement is 'not an

inning, appellant was injured when Philadelphia cen-

insurer of his patrons,' and therefore, patrons will terfielder, Marlon Byrd, after catching a ball for the only be able to recover for injuries caused by the opera-last out, threw the ball into the stands. Appellant was tor's failure to exercise 'reasonable care in the con-treated twice at the Veterans Stadium Infirmary and

struction, maintenance, and management of the

later at St. Mary's Medical Center. Appellant's immedi-facility.'" ***Romeo v. The Pittsburgh Associates****, 2001 PA ate injuries included bleeding around*

his left eye, a Super 343, 787 A. 2d 1027 (Pa.Super. 2001) (quoting concussion, facial contusions, and abrasions.2 Appel-

***Jones v. Three Rivers Management Corp.** , 483 Pa. 75, 394*

lant has since been treated for severe headaches, vomit-A.2d 546 (Pa. 1978)). The "no duty" rule applies to bar ing, confusion, incoherence, hallucinations, loss of a plaintiff's claims for injuries suffered as a result of balance, head and neck pain, photophobia, eye spasms, common, frequent and expected risks inherent during

sleep disruption, and depression.

*the activity in question. **Jones v. Three Rivers Management***

Appellant filed the current negligence action against

***Corp.** , 483 Pa. 75, 394 A.2d 546 (Pa. 1978). "Only when Byrd and the Phillies on March 8, 2004 and on March*

the plaintiff introduces adequate evidence that the

8, 2005, the trial court granted summary judgment in amusement facility in which he was injured deviated in favor of appellees, holding that "the applicable law some relevant respect from established custom will it be clearly states that recovery is not granted to those who proper for an 'inherent-risk' case to go to the jury."

voluntarily expose themselves to risks by participating

***Id**. at 550. It can be said that the "no duty" rule has in or viewing an activity." Trial Court Opinion,*

evolved into a modified version of the assumption of 5/3/2005, at 1. This timely appeal follows.

*the risk doctrine, which has been largely abolished in Pennsylvania. **Romeo v. The Pittsburgh Associates**, 2001*

On appeal, appellant lists five separate "questions

PA Super 343, 787 A. 2d 1027 (Pa.Super. 2001).

involved." For purposes of our review, however, they can be combined into one issue: whether the trial court's Appellant first challenges the trial court's finding that his application of the "no duty" rule to this case was proper.3

being hit by a ball thrown by the centerfielder is an inherent risk. Appellant argues that his injuries were not the We must first note that appellant's claim was brought result of "a throw that could in any way be construed as a under a negligence theory. It is axiomatic to say that in common, frequent or expected part of the game."

*order to succeed on a negligence claim, the four basic Appellant's Brief, at 13. In support of this argument, elements of duty, breach, causation, and damages must appellant offers that "he had never seen an outfielder be established. Appellees moved for summary judg-throw a ball into the seats; that he had never seen a player ment on the grounds that "as a matter of law, [appel-throw a ball overhand into the seats from any location on lees] did not owe a duty to [appellant] to protect him the field; and that he was completely surprised by Byrd's from the risk of being struck by a thrown baseball while throw into the stands, and was not expecting an out-sitting in the stands, [and that] [appellant] assumed fielder to throw a ball into the crowded outfield seats the risk of being struck by a thrown ball by sitting in after play had ended." **Id**. at 13.*

an area where he knew balls could be thrown." Defen-

dant's Motion for Summary Judgment, 1/4/2005, at

Appellant correctly surmises that the application of the PP22, 23 (Docket Entry 24).

"no duty" rule hinges on whether the activity in question is a "common, frequent, or expected part of the game." He In explaining its application of the "no duty" rule, the argues that because the third out had been made, the trial court noted that appellant failed to show that inning was over, and therefore Byrd's throw can neither appellees "deviated from an established

custom in the be expected, nor even part of the game. When determin-game of baseball" in tossing a ball to the fans, and ing what is "customary" part of the game, it is our opinion therefore appellant could not escape its application.

that we cannot not be limited to the rigid standards of the Trial Court Opinion, 5/3/2005, at 5. The trial court Major League Baseball rule book; we must instead con-further explained that regardless of appellant's claimed sider the actual everyday goings on that occur both on ignorance as to the possibility of a ball reaching the and off the baseball diamond; we must consider as "cus-seats via a player's throw, he still could be said to have tomary" those activities that although not specifically sanc-assumed that risk because it was an inherent risk in tioned by baseball authorities, have become as integral a attending a baseball game. ***Id****. at 4 (citing* ***Schentzel v.***

part of attending a game as hot dogs, cracker jack, and

Philadelphia National League Club, *173 Pa. Super. 179, 96*

seventh inning stretches. Fans routinely arrive early for A.2d 181 (Pa.Super. 1953).

batting practice in hopes of retrieving an errant baseball We think it necessary to first examine the nature of as a souvenir, and fans routinely clamor to retrieve balls the "no duty" rule and specifically, its application on landing in the stands via home runs or foul balls. Although the baseball diamond. We have previously stated that not technically part of the game of baseball, those activities *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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have become inextricably intertwined with a fan's baseball injury to a spectator). Even a casual baseball spectator experience, and must be considered a customary part of would concede it was not uncommon for a player to

the game. Similarly, both outfielders and infielders rou-toss a memento from the game to nearby fans. While

tinely toss caught balls to fans at the end of an inning.

appellant makes much of the manner in which the ball We note that during the particular game in question, was thrown,4 and warns of the slippery slope the trial there were at least twenty (20) occasions of a ball enter- court's decision could result in, he fails to establish that ing the stands. Defendant's Motion for Summary Judg-Byrd or the Phillies deviated from the common and ment, 1/4/2005, at P13 (Docket Entry 24). At least two expected practices of the game of baseball or acted in a of those balls were thrown to fans near appellant by manner which would take them out of the purview of

players. ***Id****. at PP13(f), 13(i). Appellant admits to hav-the "no duty" rule.*

ing attended numerous baseball games in the past, and Because we find that the trial court did not err in apply-to having witnessed balls tossed into the stands on pre-ing the "no duty" rule to the case at bar, we must affirm vious occasions. N.T., 10/29/2004, Oral Deposition of its grant of summary judgment.

Jeremy Loughran, at 57-60. Regardless of appellant's Order AFFIRMED.

current contention that he did not directly see the

Dissenting Opinion by BENDER, J.

balls thrown into the stands by the players, our courts have held that even a first-time spectator at a baseball ***FOOTNOTES***

game is imputed with the common or "neighborhood

1. Because the summary judgment motion and all

knowledge" of the risks of the game. ***Schentzel v. Phila-***

corresponding filings were made by both Marlon

delphia National League Club*, 96 A.2d at 186.*

Byrd and the Philadelphia Phillies, we will refer to Appellant also argues that if the trial court's decision them collectively as "appellees."

stands, baseball fans could be said to have assumed the 2. The bleeding was immediately treated at the infir-risk of injuries from "a resin bag, baseball glove, base-mary. Appellant refused ambulance transport to a

ball bat, spiked shoe, catcher's mask, or some other local hospital, and instead was driven to St. Mary's object that may be intentionally thrown into the stands Medical Center by his girlfriend. It was at St. Mary's by a player." Appellant's Brief, at 14. We cannot agree that appellant was diagnosed with a concussion and

with appellant's contention that the analysis of a spiked facial contusions. Appellant's Brief, at 6.

shoe or catcher's mask thrown into the stands would be the same as the current situation, as players are not 3. Specifically, appellant posits the questions:

regularly booed for failing to throw their shoes or

1) Whether a spectator at a baseball game assumes

equipment into the stands, nor are fans routinely

the risk of being struck in the face by a ball;

seen clamoring or jockeying for position to retrieve a 2) Whether being struck in the face by a ball is

thrown shoe or mask. Likewise, as previously stated, the an inherent risk of attending a game; 3) Whether

"no duty" rule applies only to "common, expected, and the "no duty" defense is available to appellees;

frequent" risks of the game; players do not commonly 4) Whether the "no duty" rule was properly

throw their spiked shoes into the stands following an applied; and 5) Whether summary judgment was

out.

appropriate. Appellant's Brief, at 4.

We agree with the trial court that the injuries received 4. Throughout his brief to this Court, appellant

by appellant from actions taken by Phillies center-

uses the words "forcefully," "with sufficient force,"

fielder Byrd constituted an inherent risk of the game.

"overhand," "arbitrarily," "unexpectedly," "inten-

Countless Pennsylvania court cases have held that a

tionally," and "carelessly" to describe the manner

spectator at a baseball game assumes the risk of being in which Byrd threw the ball into the stands.

hit by batted balls, wildly thrown balls, foul balls, and in There was no testimony regarding the force at

some cases bats. ***See Schentzel v. Philadelphia National***

which the ball injuring appellant was thrown, nor

League Club*, 173 Pa. Super. 179, 96 A.2d 181 (Pa.Super.*

how it compared to the other balls reaching the

1953); ***Ierovlino v. Pittsburgh Athletic Co.,*** *212 Pa. Super.*

stands; and it does not appear that Byrd's intent to 330, 243 A. 2d 490 (Pa.Super. 1968). ***See also, Dalton v.***

throw the ball as a souvenir was ever questioned.

Jones, et al. *, 260 Ga. App. 791, 581 S.E.2d 360 (Ga.Ct.App.*

Additionally, appellant admittedly did not see the

2003) (holding that the doctrine of assumption of risk ball as it was thrown, and could not testify as to it precluded recovery from the Atlanta Braves and their being thrown overhand or underhand. N.T.,

centerfielder when the centerfielder tossed a ball to 10/29/2004, Oral Deposition of Jeremy Loughran,

fans in between innings, resulting in a permanent eye at 57-60.

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Across the river in New Jersey, in the same year as the Loughran decision, a case involving a spectator created a battle between branches of government. In Maisonave v. Newark Bears Prof'l Baseball Club, Inc., 881 A.2d 700 (N.J. 2005), the Supreme Court of New Jersey opined that the standard of care involving flying objects in the state of New Jersey is actually different when the spectator purchases concessions and is hit by a foul ball. In a 5-2 decision which overruled the trial court's decision, this court created an exception to the limited duty rule for those patrons who were not really "spectators" at the time of the accident and might, instead, be purchasing food or be in the concourses and playground areas.

In this case, the court held that Louis Maisonave was not actually a spectator because he was buying a beer when he was hit by the baseball. Thus, the New Jersey court created two distinct duties of care with regard to flying objects leaving the field of play:

1. the limited duty of care for those spectators in the stands and 2. a broader duty of care traditionally owed to business invitees, depending on the location of a spectator when he or she was injured such as in the concourse or mezzanine area.

For those in the stands, the court held that there is a limited duty owed to spectators. However, for concourses and playgrounds, the court held that the analysis is ordinary negligence.

Many were critical of this decision and asked whether it was no appropriate to carve up the stadium and assign different duties of care around venues in New Jersey. Others viewed the decision as an example of the oft-maligned judicial activism, or another opportunity for trial lawyers to litigate more claims.

In response to the Maisonave decision, the state of New Jersey enacted the Baseball Spectator Safety Act of 2006 (N.J. Stat. §2A: 53A-44, 2006) which granted immunity for owners and operators of venues in which a spectator was hit as long as certain conditions are met. For example, New Jersey requires the posting of warning signs in and around the stadium. It also limits New Jersey courts' ability to analyze cases involving flying objects at a sports contest.

New Jersey was not the first state to provide liability protection or limited immunity for owners or operators of sports-specific venues. Arizona, Colorado and Illinois, for example, have baseball-specific statutes for liability for a flying ball or bat. Colorado's Baseball Spectator Safety Act of 1993 protects arenas, venues, stadiums, and owners from liability unless plaintiff can prove gross negligence, or willful, wanton or reckless acts. It also states that a spectator of professional baseball assumes the risk of any injury to person or property resulting from any of the inherent dangers and risks of such activity. Interestingly, it only applies to professional baseball. Similarly, Illinois and Utah have hockey-specific statutes for arena and facility liability for hockey pucks. Minnesota, New York and Ohio have common law (judge-made) exceptions for hockey arenas as well.

Pre-Game Spectator Injuries

Not all spectators are hit in the stands during the actual sports contest. How do courts deal with spectator injuries during the pre-game warm-ups? This was the issue in Jones v. Three Rivers Mgmt., 394 A.2d 546 (Pa. 1978), in which a jury awarded Evelyn Jones $125,000 after being injured in an interior walkway during pre-game batting practice.

In Crespin v. Albuquerque Baseball Club, LLC, 216 P.3d 827 (N.M. Ct. App. 2009), four-year-old Emilio Crespin was attending an Albuquerque Isotopes minor league *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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baseball game with his parents. The family was sitting at a picnic table in the left field stands when a player for the New Orleans Zephyrs hit a batting practice home run that hit the boy and fractured his skull. The New Mexico Court of Appeals refused to accept the baseball rule, leaving it up to a judge or jury.

Golf

Baseball is not the only sport that warrants a discussion of flying objects. Litigation in golf is voluminous and includes failing to yell "fore" when a ball is hit which hit other golfers, spectators or housing communities surrounding the courses themselves.

In 2002 in New York, Dr. Anoop Kapoor hit a ball, without yelling "fore" in time, that struck Dr. Azaz Anand in the eye. The New York State Court of Appeals ruled in 2010 that being hit in the eye by a golf ball is part of the risk one assumes when playing golf. In Anand v. Kapoor, the court cited precedent and held that individuals who choose to participate in a sport or recreational activity consent to certain risks that "are inherent in and arise out of the nature of the sport generally and flow from such participation." Read the Kapoor case to see if you agree with the analysis.

▪ ***CASE 5***

Azad Anand, et al., Appellants, v Anoop Kapoor, Respondent ***Court of Appeals of New York***

A person who chooses to participate in a sport or rec-December 21, 2010, Decided

reational activity consents to certain risks that "are inherent in and arise out of the nature of the sport ***OPINION***

generally and flow from such participation" (Morgan v MEMORANDUM:

State, 90 NY2d 471, 484, 685 N.E.2d 202, 662 N.Y.S.2d The order of the Appellate Division should be

421 [1997].) A court evaluating the duty of care owed affirmed, with costs, and the certified question not to a plaintiff by a coparticipant in sport must therefore answered upon the ground that it is unnecessary.

consider the risks that the plaintiff assumed and "how those assumed risks qualified defendant's duty to him"

While playing golf with two friends at a nine-hole

(Turcotte v Fell, 68 NY2d 432, 438, 502 N.E.2d 964, 510

course in Suffolk County, defendant Anoop Kapoor

N.Y.S.2d 49 [1986].) However, a plaintiff "will not be

"shanked" a shot, striking plaintiff Azad Anand in the deemed to have assumed the risks of reckless or inten-left eye, with the errant ball. The accident occurred tional conduct or concealed or unreasonably increased during play on the first hole. Kapoor's second shot

risks" (Morgan, 90 NY2d at 485 [citations omitted]).

landed in the "rough." Without waiting for Kapoor to retrieve his ball, Anand went to look for his on the fair-Here, Kapoor's failure to warn of his intent to strike the way. Kapoor, meanwhile, found his ball and, without

ball did not amount to intentional or reckless conduct, calling "Fore" or giving any other warning to his

and did not unreasonably increase the risks inherent in friends, hit the shot that went in an unintended direc-golf to which Anand consented. Rather, the

manner in tion and struck Anand. Anand suffered retinal detach-which Anand was injured—being hit without warning

ment and permanent loss of vision in the injured eye.

by a "shanked" shot while one searches for one's own ball—reflects a commonly appreciated risk of golf (see Anand and his wife commenced this personal injury

Rinaldo v McGovern, 78 NY2d 729, 733, 587 N.E.2d 264, action against Kapoor, asserting that Kapoor's failure 579 N.Y.S.2d 626 [1991]).

to warn of his shot amounted to negligence and proximately caused Anand's injury. After discovery, Supreme

[…]

Court granted Kapoor's motion for summary judgment

Order affirmed, with costs, and certified question not and dismissed the complaint, both for the reason that answered upon the ground that it is unnecessary, in a Anand was not in the foreseeable zone of danger and

memorandum. Chief Judge Lippman and Judges

on assumption of risk grounds. The Appellate Division, Ciparick, Graffeo, Read, Smith, Pigott and Jones

with one Justice dissenting, affirmed. The same Court concur.

granted the Anands' motion for leave to appeal to this Decided December 21, 2010

Court. We now affirm.

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Chapter Three

Hockey

On March 18, 2002, 13-year-old Brittanie Cecil was hit in the head by a puck that shot over the glass during an NHL game between the Columbus Blue Jackets and the Calgary Flames. She died two days later, her story appearing as a cover article in an issue of Sports Illustrated. At the time, it was not common practice for NHL arenas to have any netting behind the Plexiglas. It was as a result of this incident that the NHL added a nylon mesh safety netting for the 2002–03 season, which spectators and television audiences can clearly see today. Cecil's family settled out of court.

Students are encouraged to research whether your state uses common law or statutory law with regard to flying objects and potential liability for owners and operators.

For sport managers, the issue of flying objects mandates considerable attention with regard to minimizing risks. Ultimately, it might come down to a ***cost-benefit*** *analysis.*

Sometimes, as in the case of Brittanie Cecil, changes occur after a tragedy.

Pre- and Post-Game Celebrations

It is important to recognize the potential vicarious liability for pre- and post-event celebrations as well. Fans may love to storm the court or charge the field in celebration of a major victory, but this can wreak havoc for colleges and universities, athletic directors, coaches and participants in the context of potential tort liability.

At Texas A&M University the massive Aggie Bonfire was built by students and alumni in preparation for the November football game against the University of Texas for decades, until a collapse during the construction on November 18, 1999 killed 12 and injured 27 others. Most of the claims were settled out of court after years of litigation and public outcry over the university's negligent supervision of the design and construction of the structure. The Aggie Bonfire has not been constructed since, though there has been a recent push to bring it back.

Similarly, post-game celebrations can cause serious injury. In 1993 at the University of Wisconsin's Camp Randall Stadium 73 people were seriously injured during a "stampede" after a 13-10 victory over the University of Michigan. Both the stadium security and the university were held liable for failing to control the crowd, and design changes were made to the stadium afterwards.

*In response to concerns over fans storming the field or court, the Southeastern Conference (**SEC**) established a rule in 2005 which administers fines to SEC athletic departments in the amounts of $5,000 for the first incident, $25,000 for the second, and $50,000 for each occurrence thereafter of storming the court or field. Clearly, the penalties are designed to deter fans from storming the court and (hopefully) to prevent celebratory injuries. Other conferences have followed the SEC's lead.*

Negligent Supervision or Operation

*There are unlimited potential liabilities in terms of facility management or operation, including slips and falls at stadiums, improper security measures, or improper maintenance of the facilities themselves. For example, during the 2011 Super Bowl at Cowboys Stadium, snow fell from the roof of the facility during Super Bowl week inuring at least six people below. Was this due to improper maintenance of the facility? Similarly, there have been incidents in which roofs of facilities collapse, **cost-benefit***

*analysis used by managers, lawyers and others to determine whether the cost of modification or change outweighs the benefits of the action particularly in light of potential liability **SEC***

Southeastern Conference

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like the Metrodome in Minneapolis, Minnesota mentioned in the Chapter 2. In 1978 the Hartford Civic Center roof collapsed, possibly due to a negligent design.

Also, scoreboards have fallen from the ceiling of arenas including Charlotte Coliseum (1988), HSBC Arena (1996), and the North Charleston Coliseum (1997).

Many MLB teams have recently decided to cease providing alcohol to players and other employees in the locker room celebration to avoid drunk-driving incidents and exposure to potential liability. Some have even banned alcohol on flights, buses or other team functions for all staff members and guests.

Negligent Hiring or Training

If an employer hires an unqualified employee to do a job, the employer exposes the organization to a claim of ***negligent hiring*** *(or training) in the event an injury occurs. For example, hiring a coach with a history of cheating or physically hitting student-athletes, if continued at the new institution, could lead to such a claim.*

Today, many employers out-source employment searches to companies that conduct personality tests, drug tests and background checks to ensure that they are minimizing the chances of hiring an individual who has the propensity to commit crimes. In this way, the employer established that they used the care of a reasonable employer. It should be noted that the federal ***Volunteer Protection Act of***

1997 *protects organizers from claims of negligence, but not gross negligence or recklessness, with regard to use of or acts by volunteers.*

Mascots

Mascots and other entertainers during a sports contest are generically referred to as components of ***game presentation****. For courts, many questions have been raised related to mascots and their antics and activities. Since mascots engage the crowd and sometimes throw items to spectators, do the rules related to flying objects, such as the baseball rule, apply to mascots? Are mascots considered part of the game, or should their conduct be viewed separately and distinct from the game itself as an independent form of entertainment? Are mascots considered employees (possible vicarious liability) or merely independent contractors? These are the types of questions involving mascots that sometimes require judges and juries to decide.*

For sports lawyers, mascots and other entertainers, such as cheerleaders, can be viewed as liabilities. Consider the potential liability for college teams that use live animals for mascots such as UGA (University of Georgia bulldog), Bevo (University of Texas steer), Mike (Louisiana State University tiger), and Ralphie (University of Colorado buffalo). What if one of these animals broke loose and wreaked havoc on participants or spectators?

In Harting v. Dayton Dragons Prof'l Baseball Club, L.L.C., 870 N.E.2d 766 (Ohio App. 2007), a fan at this minor league baseball game claimed she was distracted by the Famous San Diego Chicken mascot and, therefore, she should not be held responsible for assuming the risk of being hit by a foul ball. The Ohio court disagreed. However, in Lowe v. Cal. League of Prof'l Baseball, 65 Cal. Rptr. 25 105 (Ct.

negligent hiring

the failure of an employer to take reasonable steps to ensure that the hired employee does not have a history of criminal misconduct that would interfere with the job at hand ***Volunteer Protection Act of 1997***

federal law which protects race organizers from negligent acts by volunteers but does not protect for gross negligence or reckless acts ***game presentation***

the entertainment aspect of a sports contest often associated with the use of team mascots

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App. 1997), the California court of appeals, overruling the trial court, held that the antics of the mascot are not an essential or an integral part of a baseball game.

Therefore the mascot's acts distracted Lowe and created an increased inherent risk of Lowe being struck by a foul ball.

Sausage-Gate

In some cases, the issue of mascot liability might not involve fans, but rather the athletes themselves. For example, the Milwaukee Brewers' sausage race was established in 1995 and features characters dressed up as a bratwurst,

hot dog, Italian sausage, Polish sausage, and a chorizo running around the bases between the sixth and seventh innings at Miller Park in Milwaukee. In 2003, however, the sausage race resulted in controversy and a criminal charge. Randall Simon, a first baseman for the Pittsburgh Pirates, knocked Mandy Block to the ground with his bat while she was competing dressed up as the Italian sausage. Simon was hand-cuffed and taken to the Milwaukee County Jail after the game. Simon was cited for disorderly conduct and fined $2,000 by MLB and $432 by the local sheriff's office. He also issued a public apology. According to reports, all Block wanted in compensation was an autographed bat. She did not sue in tort law, but legal issues related to mascot injuries gained national attention.

Sluggerrr

In 2010 the Kansas City Royals and its team mascot were sued John Coomer, a fan.

Coomer claimed that he was hit in the eye with a hot dog thrown by the mascot, Sluggerrr, from behind its back, at Kauffman Stadium. In his complaint, Coomer characterized the mascot as an "agent, servant and/or employee" of the Royals who threw the hot dog recklessly. As a result of the Sluggerrr's toss, Coomer claimed that the hot dog hit him in the eye and detached his retina. Coomer wanted compensatory damages alleging negligence and battery, an intentional tort discussed later in this chapter. The jury ruled in favor of Sluggerrr (and the Kansas City Royals) in 2011.

Others

In 1994 a jury awarded $10,000 to a fan who was pulled onto the floor against her will by Burnie, the Miami Heat mascot, for her humiliation, though the trial court set aside that initial verdict. Chicago Bulls' mascot Benny the Bull was sued for giving too hard a high-five to a fan in 2008. The Phillie Phanatic, mascot of the Philadelphia Phillies, has been characterized as the "most-sued mascot in the majors." That reputation was maintained in 2010 when a 70 year old woman claimed that he injured her knees while climbing through the stands in a 2008

minor league game in Reading, Pennsylvania. The plaintiff sued the man who played the Phanatic, the Philadelphia Phillies, and the Reading Phillies as well.

Sports Officials

Sports officials are often subject to harassment, intimidation, and sometimes violent, physical displays of abuse from fans, players, and coaches. Whether professional or amateur, sports officials are often targets of hostile emotions due to extreme competitiveness. Some officials have even been sued in civil court for continuing to play in bad weather (when an injury occurs), suspending a player for on-the-field misconduct (which led to suspension for the next game as well), and negligently causing injuries to players or coaches during collisions.

Due to numerous lawsuits against sports officials for alleged intentional improprieties while judging a sports contest, states have been forced to enact laws that Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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provide officials with immunity from such lawsuits. Immunity from civil suits only applies to unintentional, negligent acts by the officials. This affords the sports official some protection against a sports litigant; however, such protection is not absolute. For intentional or grossly negligent acts by officials, the law generally provides no protection. Sports officials, of course,

*may sue fans, athletic participants, and others for torts suffered by them. The National Association of Sports Officials (**NASO**) has been proactive in advocating for state legislatures to adopt better protection for officials against overzealous fans.*

- ***Wrongful Death***

*While not every tort incident results from careless behavior, allegations of negligence can arise from tragic incidents resulting in fatal injuries. When someone dies as the result of negligence, the individual's estate may have a claim for **wrongful death**. This is the civil equivalent of the criminal charge of one of the varied forms of homicide, including murder. Put simply, wrongful death is a negligence claim which results in death. It might occur in a variety of contexts.*

During Participation

Virtually all sports involve an aspect of risk that could lead to the death of a participant. It is important for architects and administrators to provide protective screening and appropriate warnings for participants and spectators related to such concerns. In both negligence and wrongful death claims, the question is often,

"how foreseeable was it that this injury (or death) would occur?" That is, the more foreseeable the injury, the more potential liability for the injury.

*Unfortunately, sometimes it takes the death of a participant to mandate course design or equipment changes. In 2010, for example, Declan Sullivan, a 20-year-old junior at the University of Notre Dame, died after the tower from which he was filming football practice fell over as a result of high winds. After serious damage was done to a boxer, Congress passed the **Professional Boxing Safety Act of 1996**, which requires mandatory physical exams, on-site ambulances, and certifications from medical doctors.*

Helmets

In 2007, minor league baseball Coach Mike Coolbaugh was hit by a foul ball on the right side of his head in the ninth inning and died during the

game. While helmets for batters became required in 1971, helmets for coaches were not. Now, MLB requires first and third base coaches to wear some sort of head protection.

Design

In a training run for the luge at the Vancouver Olympics in 2010, 21-year-old Nodar Kumaritashvili from the Republic of Georgia violently crashed into a support pole and died. As a result, the officials changed the start position to reduce the speed around the track. The last known fatality in luge had been in 1975.

NASO

National Association of Sports Officials

wrongful death

death caused by a tort such as negligence

Professional Boxing Safety Act of 1996

federal law mandating physical exams, on-site ambu-

lances, and medical doctors at boxing events

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During Transportation

Wrongful death actions involve sports participants, but it could also involve fans, coaches, promoters and others. Claims might also involve team trips or other transportation. That is, colleges or other organizations could be held liable for negligence in the context of traveling. This might be due to negligent supervision or even negligent hiring.

Deaths have occurred infrequently during travel, but the examples can be significant. In 2007 four members of the Bluffton University travel baseball team were killed in an accident on Interstate 75 near Atlanta. This led to immediate discussion and proposals to increase bus safety standards and to federally mandate seat belts for motor coaches and school buses.

In 2010, a University of Mount Union professor and director of athletic training died when the wrestling team bus crashed into a snow plow. Other unfortunate examples of deaths involving transporting teams include the United States Skating Association team (1961), Marshall University's football team (1970), and some of the members of Oklahoma State University's basketball team (2001).

During Training Camps

In 2001 Korey Stringer of the Minnesota Vikings died due to heat stroke during pre-season training camp. In 2003 pitcher Steve Bechler died during spring training, allegedly due to dehydration related to a weight-loss product containing ephedrine which was legal at that time. In 2005 Rashidi Wheeler died due to an asthma attack during a hot summer workout. Many claims center on whether or not there were medical staff on-hand to deal with potential injuries.

Deaths during sports practice can include criminal charges as well. Such was the case against Coach David Jason Stinson in 2008 in which one of his players died three days after intense running sprints during a hot summer football practice. The Commonwealth of Kentucky charged him with reckless homicide and wanton endangerment in the death of 15-year-old Max Gilpin

in the Louisville area. The coach was found not guilty on the criminal charges and the high school district settled out of court in the civil suit.

As Spectators

In addition to examples used in baseball and hockey, there are other sports in which flying objects or debris has killed spectators. In fact, deaths have occurred in motor sports as well. In January 2009, a monster truck show promoter George Eisenhart, Jr.

was killed at one of his own shows in Madison, Wisconsin. This was merely a week after a six-year-old boy died and a man was injured at a monster truck event in Tacoma, Washington. In August, 2010, seven men and one woman were killed during an off-road dirt track racing accident northeast of Los Angeles in the Mojave desert. Evidence showed that some spectators ignored signs, stood too close to the action, and the unfortunate ones were run over when a truck lost control.

- ***Malpractice***

When a death occurs during a sports event, training, or transportation, one of the first questions raised is whether there was medical staff, including physicians or trainers, available to treat those who were injured. Some states require licensed or certified *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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athletic trainers on-site, including first-responders, to deal with potential injuries during athletic competition. Unfortunately, in some cases, there were no first-responders due to expense. If there were medical staff available, they may get blamed for their alleged inability to deal with the injury property. For example, what if a trainer or physician employed by a team recommends that the injured athlete continue to participate in an event because it is in the team's best interest rather than the athlete's? To whom does the medical practitioner owe a duty of care, the athlete or the team?

If a lawsuit ensues, the allegation of negligence on behalf of a sports medical practitioner is referred to as ***malpractice****. Malpractice is a broad category that could involve anything from an improper diagnosis to the prescription of an inappropriate medication. Malpractice is a claim of negligence involving a medical professional.*

Locality Rule

Whenever the alleged malpractice of a team doctor, physician, or trainer is at issue, courts have used the locality rule, comparing the alleged negligence of the physician to other physicians in the same geographic area or practice specialty.

Although many medical fields now have national standards of care, states such as North Carolina still seem to be bound by this old-fashioned rule.

Automated External Defibrillators

*Some states now require that health clubs maintain automated external defibrillators (****AED****) onsite. They are portable and provide a shock to the heart and cost $1,500–$2,000. There is a serious push to require AED's at high school sporting events around the country, particularly in football and baseball.*

During an NHL game on November 21, 2005, against the Nashville Predators, Jiri Fischer of the Detroit Red Wings collapsed on the bench after going into cardiac arrest. After being unconscious for six minutes, Fischer was resuscitated by CPR and by an AED. Undoubtedly, the AED saved his life, and at minimal cost.

Sickle Cell Anemia

*An unfortunate example of potential malpractice involves a trait known as sickle cell anemia. It appears to be one of the leading killers of college football players, including Aaron O'Neal (2005, University of Missouri), Dale Lloyd II (2006, Rice University), Ereck Plancher (2008, University of Central Florida), and Bennie Abram (2010, University of Mississippi). In 2007, the National Athletic Trainers Association (**NATA**) issued a warning and recommendations for dealing with athletes who possess the trait. The NCAA mandated sickle cell testing in 2010.*

Concussions and Brain Injuries

*Concussions, sometimes referred to chronic traumatic encephalopathy (**CTE**) and as Sudden Impact Syndrome (**SIS**), are injuries to the brain caused by repeated hits to the head. From a liability issue, administrators and owners must* ***malpractice***

negligence by a professional person, such as a lawyer or physician ***AED***

automated external defibrillators

NATA

National Athletic Trainers Association

CTE

chronic traumatic encephalopathy

SIS

Sudden Impact Syndrome

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address the need for trained personnel to deal with sports concussions on-site.

Concussions could happen in any sport activity, including competitive cheer and cheerleading.

Much attention has been given to concussions in recent years, especially after the suicides of former NFL players Andrew Waters (2006) and Dave Duerson (2011) Which were allegedly related to the effects of brain trauma suffered during their NFL careers. That same year, NFL player Austin Collie (Indianapolis Colts) continued to miss games during the 2010 season due to concussion-related symptoms. Similarly, the NHL's Sidney Crosby (Pittsburgh Penguins) took a hit to the head during the 2010 season causing Crosby to miss the rest of the season, reminiscent of career-ending injuries suffered by other former NHL stars Pat LaFon-taine (Buffalo Sabres) and Eric Lindros (Philadelphia Flyers).

So many concussions have occurred in recent years that leagues are considering changes to the rules of the game. In 2011, MLB and the MLBPA agreed to establish a seven-day disabled list forcing players diagnosed with a concussion to sit-out for this mandatory time period to address symptoms. Both the NFL and NHL will not allow a player to return after a concussion unless cleared by a medical doctor.

In 2002, Texas high-school football player Will Benson suffered two concussions within two weeks. He collapsed shortly after the second one and died six days later. In response, Will's Bill was passed in Texas in June 2007

and mandates basic emergency and safety training for sports officials in high schools, including education about second-impact syndrome and a special focus on concussion symptoms.

Infectious Diseases

Yet another area for potential liability involving negligence and malpractice is failing to maintain proper hygiene in the locker or during a sports contest. A team physician or the school itself could be held liable for failing to address concerns of ***MRSA*** *(methicillin-resistant Staphylococcus aureus). This is an antibiotic-resistant staph infection which commonly occurs on the knees and elbows. In 2008, a football game between Georgetown and Colgate was cancelled due to a norovirus out-break. In 2011, a wrestling match in North Dakota was cancelled for fear of rabies after the team came into contact with a raccoon.*

- ***Workers Compensation***

Workers compensation is a form of insurance required by the state to provide benefits to employees who are injured on the job. It has its roots in the industrial revolution. Workers compensation statutes divide up injuries as permanent, temporary, total, and partial, and allow for various combinations thereof. In sports which involve extreme contact, such as football, injuries sometimes result in permanent paralysis.

MRSA

methicillin-resistant Staphylococcus aureus

workers compensation

system designed to compensate employees injured on the job in the course of their employment

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In professional sports that involve employed players and their unions, compensation for injuries to the athlete is a prime subject for any collective bargaining agreement. When players are injured from an activity arising out of and in the

course of employment*, the private agreement between the players, team, and league often avoid needing to file a claim under the state's workers compensation statute.*

Independent contractors are generally not covered under workers compensation statutes, nor are student-athletes since neither are employees.

Student-Athletes

As of now, student-athletes who receive athletic scholarships are not entitled to compensation if they suffer a temporary or permanent injury while participating in their sport for their college or university. The student-athlete cannot claim workers compensation since student-athletes are not recognized as employees.

However, severe student-athlete injuries have had an impact on how the NCAA deals with such injuries.

*In Waldrep v. Texas Employers Ins. Ass'n, 21 S.W.3d 692 (Tex. Ct. App. 2000), the Texas Court of Appeals emphasized that there that there was no intent on the part of Texas Christian University (**TCU**) or Kent Waldrep that his scholarship should constitute payment for his football services. Therefore, no employment relationship existed and he was not entitled to*

workers compensation. Waldrep was a player for TCU and suffered permanent paralysis in a game against Alabama in 1974.

In Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E. 2d 1170 (Ind. 1983), the Indiana court ruled that no employment relationship was created and therefore no compensation was allowable under the statute. Further, in Coleman v. Western Michigan Univ., 336 N.W.2d 224 (Mich. App. 1983), the Michigan court rejected the assertion that intercollegiate football is integral to the university's primary businesses of education and research, thereby disallowing worker's compensation.

Recent instances of student-athlete participation resulting in permanent paralysis or death include Marc Buoniconti (The Citadel, 1985), Chucky Mullins (University of Mississippi, 1989), Travis Roy (Boston University, 1995), and Eric LeGrand (Rutgers University, 2010). Students are encouraged to explore the circumstances surrounding their injuries. Special attention should be given to how medical staff deal with such injuries in a timely fashion.

ESDI

*Though student-athletes are not entitled to receive workers compensation, the NCAA has established an insurance plan covering every student who participates in college sports, including managers, trainers, and cheerleaders. One can learn more about this plan by visiting the NCAA website (www.ncaa.org). In 1990, the NCAA also started the Exceptional Student-Athlete Disability Insurance program (**ESDI**) program. The ESDI program protects student-athletes in football, men's and women's basketball, baseball, and ice hockey who, based upon their athletic talents, are projected by the professional leagues to be potential first-round draftees.*

course of employment

test used to determine whether an individual employee is entitled to worker's compensation

TCU

Texas Christian University

ESDI

Exceptional Student-Athlete Disability Insurance

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Insurance

Since any sports activity involves a degree of risk or injury, it is generally recognized that event organizers and participants should purchase ***insurance*** *to protect against a claim of negligence arising from that activity. Sports insurance policies do not relieve an individual or event organizer from liability from negligent behavior.*

However, having insurance does ensure that if a judge or jury believes that damages should be awarded for an injury arising from the activity, the insurance company stands in the shoes of the defendant and must therefore pay in accordance with terms of the insurance policy. This is often referred to as indemnification or subrogation in the insurance industry.

Exceptional student-athletes, professional athletes, sporting events, and organizations are wise to purchase a policy—if possible—that covers their own participation in the activity, if an underwriter will provide such coverage. Such insurance for the professional athlete may be referred to as "career-ending injury" insurance and usually requires large premiums to maintain because of the potential for great financial loss, especially at the

professional level. One may also purchase insurance for organized amateur recreational activities, such as a local road race.

▪ *Statutes of Limitation*

Though the statutes vary, it is important to recognize that claims for personal injury have ***statutes of limitation*** *that force a plaintiff to sue within a particular time frame. If the potential plaintiff fails to bring suit within that time frame, the claim will be time-barred and likely forever lost under that particular legal theory.*

In some jurisdictions, the plaintiff has only one year from the time of the injury or when the injury was discovered (whichever is later). Plaintiffs are well advised to research a particular jurisdiction's statute of limitations before filing suit under a particular legal theory.

▪ *Torts and Waivers*

As discussed in the previous chapter, courts often have to deal with the issue of whether a waiver (known as a releases, disclaimers, or exculpatory clause) is valid. The ultimate purpose of the waiver is to relieve a party from liability and/or relinquishing the right to pursue legal action in the event of an injury. Sports that involve high risks, including bungee jumping, scuba diving, and parasailing, often require the signing of a waiver as a prerequisite to participation.

Though courts do not favor upholding these private agreements, most courts will do so as long as the agreement waived ordinary negligence as opposed to gross negligence or recklessness. Waivers found to have been an attempt to contract out of liability for gross negligence will likely be unenforceable. Waivers found on the back of ticket stubs are also generally unenforceable.

insurance

contract in which a company agrees to compensate the insured for loss due to perils or other liability

statute of limitations

amount of time a plaintiff has to file a lawsuit

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Minors and Waivers

Waivers are often signed by parents of a minor to avoid liability or give up the right to sue in the event of an accident that causes injuries. The law remains unclear as to whether parents who sign waivers on behalf of their children will release a potential defendant from liability to the minor. Though the trend is to enforce such waiver arrangements signed by parents, it is quite possible that a court could refuse to enforce such a waiver, especially for gross negligence or recklessness. Still, a court does have the option of not enforcing a waiver signed by the minor or parent. It is best to analyze such cases on a case-by-case basis, paying particular attention to the individual state's common law interpretations of waivers.

▪ Intentional Torts

When an individual intends to bring about an injury to another, such injury is categorized as an intentional tort. Intentional torts differ from negligence in that a person's motivation may be considered. This is similar to the intent or mens rea element of criminal law (for further discussion see Chapter 4). Major intentional torts in sports include assault, battery, fraud, and defamation.

In sports such as football, hockey, MMA and boxing, participants are usually encouraged to hurt the opponent. However, there are some instances in which the intentional sports tort is so outside the scope of a game that courts have awarded damages to participants for injuries. It can be a challenge for courts to decide cases in which a plaintiff is seeking financial redress during competition which was very likely to cause injury in the first place.

Assault and Battery

There are examples of head-butting referees, kicking camera operators, and stran-gling or spitting on coaches or players. These actions might result in intentional tort claims such as ***assault*** *and* ***battery****. In tort law, an assault is causing the apprehension of imminent harmful or offensive contact. A battery is unwelcome physical contact from another. These torts are also crimes. In some instances, criminal charges are filed as well by the local or state government. Often the analysis centers on how excessive the contact or misconduct was in relation to the specific sport.*

Most athletes, coaches, and referees seem reluctant to bring a lawsuit for these sorts of potential claims. At the professional level it is almost taboo to bring a suit for assault and battery during the course of the game. But what about cases of intentional acts, such as charging the baseball pitcher's mound with a bat? In Avila v. Citrus Cmty. Coll., 131 P.3d 383 (Cal. 2006), the California Supreme Court held that intentionally hitting the batter is actually a fundamental part of the game and therefore is not a battery.

Fan Behavior

It is quite common for fans to attack each other during a sports contest. This may be due to the use of alcohol or other drugs, or the close proximity of large groups ***assault***

the apprehension of imminent harmful or offensive contact from another ***battery***

the unwelcome physical contact from another that causes injury *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned,*

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of people, often in seating arrangements that are overcrowded. It might be due to overzealous parents. Fans have attacked players and coaches, and vice-versa.

Many recall the April, 1993 incident in Hamburg, Germany during a tennis match. A deranged fan of Steffi Graf stabbed Monica Seles in the back with a kitchen knife during a break in play. In March, 2001 at First Union Center, the Toronto Maple Leafs' Tie Domi wrestled with a fan in the penalty box during a game against the Philadelphia Flyers. In September, 2002 at Chicago's U.S. Cellular Field, a father and son attacked Kansas City Royals coach Tom Gamboa during a game.

Throwing Objects

Sometimes players retaliate when an object is tossed at them during a contest. For example, when NBA player Ron Artest attacked a fan in 2004 for throwing a beer on him, the chaos turned into a mêlée. So outrageous was the fight that many refer to this incident as the Throw-down in Motown or the Malice in the Palace.

In December 1995 at Giants Stadium, fans threw snowballs onto the field, striking the San Diego Chargers' equipment manager in the face and knocking him unconscious. Fourteen fans were arrested and 175 were ejected. Talladega Super-speedway permanently banned 14 fans from buying

tickets in the future after they threw beer cans at Jeff Gordon after he won the Aaron's 499 in 2007.

Promotions

Sometimes attacks between players, coaches and fans occur as part of a promotional activity. In June 1974 at Cleveland Stadium, the Cleveland Indians' 10-cent beer night promotion costs the team a forfeit after thousands of fans stormed the field, attacking players and umpires during the ninth inning of a game against the Texas Rangers.

In July 1979 at Comiskey Park in Chicago, a local disc jockey set up an anti-disco promotion to be held between games in a Chicago White Sox–Detroit Tigers doubleheader. After thousands of records were blown up in center field, a riot ensued and about 7,000 fans brawled and set bonfires with the debris, forcing postponement of the second game.

Participant Misconduct

Most assaults and batteries that occur during a sports contest are never litigated and are just accepted as part of the nature of competition and aggressiveness associated with the game. There are times where conduct by sports participants is so outrageous that one wonders why more tort claims are not brought for assault and battery. YouTube is rife with examples of misconduct prior to, during, or after a sports contest that would have resulted in lawsuits and most likely criminal charges if it were not for the fact that it was directly related to a sports contest.

Students should consider whether society should view the following examples any differently just because they involve a sport. Should sports control themselves with penalties for violators and establishing norms of conduct? That is, is it more appropriate for teams, leagues and universities to punish players privately rather than pursue penalties involving the U.S. legal system? It might depend upon the degree to which the conduct is considered unacceptable by society. One might still wonder why Mike Tyson was not sued or charged criminally for biting part of Evander Holyfield's ear off during the infamous 1997 boxing match.

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Competitors

In 2010, freshman college basketball player Brittney Griner (Baylor University) intentionally punched Jordan Barncastle (Texas Tech University) in the face and broke her nose. Griner was ejected from the game and suspended two games for the incident. Elizabeth Lambert (University of New Mexico) made violent tackles and pulled hair during a soccer match against Brigham Young University in 2009.

She was suspended for the rest of the season for her illegitimate conduct during the soccer game, but she was reinstated in 2010.

In 2006, professional football player Albert Haynesworth (Tennessee Titans) stepped on the helmet-less head of Andre Gurode (Dallas Cowboys) during a touchdown-scoring play. Gurode's helmet got knocked off during the play and Haynesworth seized the opportunity to step on his head causing a laceration which required 30 stitches. Haynesworth was suspended by the NFL for five games without pay, but there were no criminal charges and no tort lawsuits either.

In 2009, University of Oregon running back LeGarrette Blount pummeled Boise State's Byron Hout in the face after the first game of the season as the teams were leaving the field. Hout did taunt Blount verbally, but Blount used physical violence in response. Blount then hit a teammate and had to be

restrained from approaching a group of hostile fans in the stands, was escorted to the locker room, and was suspended for the rest of the 2009 season. However, Blount was reinstated in November after a public apology.

Coaches

One of the most infamous examples of a coach committing a battery was when Ohio State University's head football coach Woody Hayes punched Clemson University player Charlie Bauman in the neck after he made an interception during the 1978 Gator Bowl game. Hayes was fired the next day.

Temple University basketball coach John Chaney sent in a goon to send a message to the St. Joseph's University Hawks for setting what he perceived to be an illegal screen during the game. Temple forward Nehemiah Ingram entered the game under orders from Coach Chaney to commit hard fouls on Hawks players.

Indeed, one of the fouls resulted in a broken arm for Hawks' sixth man John Bryant. The incident has become known as Goon Gate.

Teams

It is not uncommon in baseball to have bench-clearing brawls, but is this part of the game? Occasionally teams in other sports engage in mêlée misconduct as well. In 2006, for example, players from the University of Miami and Florida International University became involved in a mêlée during a football game at the Orange Bowl. This proved to be one of the ugliest brawls in college football history. Indeed, one wonders if heated rivals take their competition too seriously, like the annual football rivalry between the University of Pittsburgh and West Virginia University that has become known as the Backyard Brawl, a trademarked phrase in recognition that the schools are only 75 miles apart.

Journalists

Sports broadcasters and journalists have also gotten involved in altercations at times. In 1994, sports broadcasting journalist Jim Rome taunted NFL quarterback *Copyright 2012 Cengage Learning. All Rights Reserved. May*

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Jim Everett by calling him "Chris" on several occasions rather than "Jim" during the taping of his show Talk2. This was a reference to Chris Evert, a women's professional tennis player, and Rome's analogy that Everett, then a member of the Los Angeles Rams, allegedly played more like a tennis player than a football player during the NFC Championship game after being sacked repeatedly by defenders.

Everett did not appreciate Rome's name-calling, and attacked Rome on the set.

In 1984, 20/20 reporter John Stossel asked professional wrestler David Schultz on camera if wrestling was fake. Schultz slapped Stossel with an open-hand, and hit Stossel again in the head before Stossel walked away from the interview. Stossel sued the World Wrestling Federation (WWF) over this incident, settling the claim out of court for a substantial financial settlement.

▪ ***Fraud/Misrepresentation***

In sports torts, fraud (also known as misrepresentation) can come in various forms.

It might come in the form of illegitimate autographs by players in the sports memorabilia industry. This is why buyers often require certificates of

authenticity from sellers of such items. Fraud might also appear as academic fraud, recruiting fraud, participation fraud, resume fraud and many other ways as well.

In the event of a lawsuit, courts do not favor those who intentionally deceived another. This is characterized as having ***scienter****, meaning knowledge that you intended to make a misrepresentation. Some jurisdictions might allow a claim for negligent misrepresentation in which one party might not have intended to misrepresent something, but lacked reasonable care to avoid so doing. In such a case, however, punitive damages would not be recoverable.*

This next section explores some of the examples in sports which involved intentional misrepresentation. The following list is by no means complete. Students should also consider also possible actions by players who feign an injury to stop the clock or those who use the assistance of a "Whizzinator," a product designed to help avoid testing positive for drug use in a urine sample.

Academic Fraud

Given that student-athletes must maintain certain academic standards in order to remain eligible to compete, there have been many examples in which colleges and universities have been involved in dishonest academic work. Concerns over high school "diploma mills" and instances of changing grades have been issues for many years as well.

For example, Florida State University was involved in an academic integrity scandal which involved 61 student-athletes in 2006–2007 who received access to online test answers and tutors who edited and typed papers. The NCAA ruled Florida State guilty of major violations and, among other things, vacated as many as 14

victories. Numerous employees lost their jobs and the athletic department made organizational changes as well. At the University of Kansas in 2005, student-athletes apparently were given answers to tests and shared answers for online correspondence courses. The University of Georgia was involved

in an academic scandal in which coach Jim Harrick's son, Jim Harrick, Jr., taught a fundamental basketball ***scienter***

Knowledge that one is committing fraud or misrepresentation *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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strategy class in which UGA basketball players received credit even though they did not show up for class. Both Harricks left the university in 2003 as a direct result.

Recruiting Fraud

Competing for student-athletes is part of the job of being a college coach. However, on occasion promises are made to prospective student-athletes which cannot be kept. Can a coach guarantee that he or she will not leave a school by the time the player arrives on campus? Or can a coach actually promise that a player he or she will start at a position?

In 1996, Brian Fortay sued the University of Miami after its former coach Jimmy Johnson promised Fortay the starting quarterback provision if he signed with the school. One year into his career at Miami, Johnson left for the NFL and Fortay did not fit into Johnson's successor's vision for the Hurricanes offense. Fortay ultimately transferred to Rutgers University in New Jersey.

In 2007 Nevada high school football player Kevin Hart took recruiting fraud to another level. Though he was not really being recruited by any college, he convinced his coaches, classmates and his community that he was good enough to play major college football and that he was being recruited. The fraud spun out-of-control: Hart even held a press conference in the high school gym in which he declared he was going to play for the University of California-Berkeley. The whole announcement later turned out to be a complete scam or, at best, a hoax. In essence, Kevin Hart was able to attract attention in hopes that the publicity might result in a real college scholarship.

Participation Fraud

Certain requirements must be met as a condition for participation in sports. Usually the focus is on someone's age, weight, gender and the like. Age falsification was the issue for Danny Almonte, the 14-year-old Little Leaguer who amazed coaches with his pitching exploits in 2001. The problem with Almonte was that 12

is the maximum age for participation in Little League baseball.

In 2010, China was stripped of 2000 Olympics gymnastic bronze medal for bringing female gymnast Dong Fangxiao, who was 14 at the Sydney Games. Participants in gymnastics have to be 16 during the Olympic year. The International Olympic Committee suspended the North Korean gymnastics team for two years for age falsification, noticing that Hong Su Jong had given three different birthdates from 2003–2010.

Resume Fraud

Football coach George O'Leary was removed as head coach after only five days on the job at the University of Notre Dame in 2001. This due to a resume discrepancy found after he had already been hired which falsely stated that he had a master's degree in education and had played college football for three years.

O'Leary's resume controversy prompted many universities to begin more serious background checks before hiring coaches to ascertain the veracity of

their employment history.

Identity Fraud

In rare cases, participants are actually able to mask their real identity. In 2010, it was discovered that West Texas high school student Jerry Joseph was really Guerdwich *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Monimere. He was not 16, he was 22, and he had already graduated from a Florida high school in 2007. Nonetheless, he led his Texas team to the state playoffs. He was arrested and charged with failing to identify himself to a police officer.

Similarly, Sports Illustrated discovered in 2009 that 16-year-old MLB prospect Esmailyn Gonzalez (Dominican Republic) was actually four years older and his name is really Carlos Lugo. After the Washington Nationals prospect's identity was revealed, the FBI began investigating systematic manipulation of birthdates and skimming of signing bonus payments to prospects as part of a fraudulent scheme over many years.

▪ ***Intentional Infliction of Emotional Distress***

Also known as the "tort of outrage," virtually all states now recognize the tort of ***intentional infliction of emotional distress****. Under this tort, damages are allowable for extreme or outrageous conduct by the defendant, such that*

it "shocks" the consciousness of society. This tort used to require some measurable degree of physical harm due to the defendant's extreme and outrageous conduct. However, it is now common for litigants to offer proof of, and recover for, purely mental and emotional injuries for egregious conduct.

Invasion of Privacy

In 2010, ESPN sports reporter Erin Andrews filed a lawsuit alleging invasion of privacy and intentional infliction of emotional distress against hotels for providing her room number to an individual who subsequently recorded her nude through a peephole and uploaded the videos to the Internet. Her case demonstrates how privacy in the Internet era presents completely different challenges today for individuals and courts. As a result, the concept of privacy rights may have changed entirely from merely a decade ago.

Disappointment Lawsuits

A claim of intentional infliction of emotional distress has also appeared in sports law by a recent trend of claims referred to as "disappointment lawsuits." That is, a student-athlete or parent sues a coach or school for the failure to play. As a result, plaintiffs claim that due to the fact they did not receive playing time, they did not earn an athletic scholarship or did not get drafted as high as they could have and, of course, the coach is to blame. Defendants routinely win these lawsuits.

Intentional Interference with Contractual Relations *As mentioned in the previous two chapters, competition for clients among sports agents can be quite fierce. If one agent lures a client away from another agent, or if one team attempts to lure a player from another team even though the player is*
intentional infliction of emotional distress

intentional tort in which the defendant causes emo-

tional distress by extreme or outrageous conduct

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clearly under contract, such an action might be characterized as ***tampering*** *in the sports industry. The more classic characterization of this tort is the intentional interference with contract relations, and it can trace its roots back to the old English case of Lumley v. Gye, 118 Eng. Rep. 749 (1853).*

To prove a claim of ***intentional interference with contractual relations*** *(tampering), the plaintiff must demonstrate:*

1. existence of a contract;

2. intentional interference with that contract by a non-party to the agreement; 3. causation;

4. damages to a party to the contract (such as the agent or team) as a result of the interference.

Recall that sports agent Leigh Steinberg and his firm sued David Dunn for this very reason. In business law, this tort often refers to a situation in which one business economically harms a competitor by intentionally inducing employees to breach their contracts or by interfering with their customer relationships.

Defamation of Character

Professional athletes live in the limelight and are often subject to a public life rife with criticism. In the Internet era, no one is immune from public

criticism, let alone athletes, coaches, agents and organizations. Opinions expressed publicly by anyone can appear to be slanderous or libelous statements.

Plaintiffs who sue for defamation of character are characterized in one of three ways:

***Public Officials**: this means that they ran for public office, were elected (or appointed) to a highly public position.*

***Public Figure**: most coaches and athletes at all levels fall into this category. However, sometimes one becomes a public figure with no intent to become one.*

***Private Figure**: this category has the greatest expectation of privacy.*

*Lawsuits by athletes and coaches for defamation often fail since the plaintiffs are usually considered to be public figures. Those who express harsh criticisms either spoken (**slander**) or written (**libel**) are often protected when such commentary constitutes a statement of opinion rather than a statement of fact.*

*When a journalist publishes a statement of opinion, such speech is generally regarded as constitutionally protected speech. The athlete-litigant will only be successful if he or she can prove that the statement by the defendant was knowingly false or made with reckless disregard of whether it was true or false, also known as **tampering***

another name for the intentional interference with contractual relations
***intentional interference with contractual relations** intentional tort of interfering with a known*

contractual relationship with the intent to induce one of the parties to breach
defamation of character

intentional tort whereby a false statement is published (libel) or spoken (slander) about the plaintiff

slander

spoken defamation

libel

defamation evidence in print or by a writing of some sort *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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actual malice*. However, even if such a statement is found to be false and therefore defamatory, if the plaintiff cannot prove actual malice, then the defendant may successfully defend against the claim.*

Jim Kelly

Sports agent A.J. Faigin sued his former client, NFL quarterback Jim Kelly of the Buffalo Bills, and sportswriter Vic Carucci, for defamation for statements made in Kelly's autobiography Armed and Dangerous. In the book, Kelly claimed that Faigin had mishandled his money. Kelly won at both trial and on appeal. The court held that a sports agent, as a limited-purpose public figure, was required to prove actual malice in order to prevail in his legal claim.

Once Private, Now Public

At times, the status of a person can change for defamation analysis purposes. For example, a private security guard named Richard Jewell became a pariah after taking the blame for the bomb which blew up in

Centennial Park during the Atlanta Olympics. It was revealed later that Eric Rudolph was responsible for the bomb, not Jewell. Jewell's status for defamation purposes changed from private figure to public figure after he sued several media outlets for defamation. His subsequent voluntary participation in national television interviews related to the incident was sufficient to make him a public figure. After settling defamation claims against NBC, CNN and others, Jewell also pursued his claims against the publishers of the Atlanta Journal-Constitution and the New York Post, unsuccessful in both instances.

Other individuals who were once otherwise anonymous but who became infamous public figures include Steve Bartman (Chicago Cubs fan) and Brian McNamee, the trainer for MLB pitcher Roger Clemens, who was involved in investigation and litigation related to whether or not Clemens used performance-enhancing drugs.

Defenses to Defamation

Truth is always a defense to a defamation claim. In other words, if what one says about another is embarrassing or malicious, it is still considered to be protected speech as long as there is a measure of truth in what was said. Additionally, the alleged defamatory statement is published by the media, journalists have a line of defense under the First Amendment to the United States Constitution's freedom of speech clause and that the subject matter was newsworthy.

Additionally, in the event of the publication of a possible defamatory statement made by the media, most states have retraction statutes which allow the press to correct errors in reporting within a certain time-period without fear of a lawsuit. Statements or cartoons which are meant to be jokes are generally protected speech as parody or satire accordingly. However, there are times where a judge or a jury believes that commentary crosses the line between fact and opinion.

Unfortunately, individual reputations can be scarred over the ubiquitous Internet even if they are successful in proving a defamation claim. Instant access to defamatory postings can be powerful even if removed from the

Internet. Consider, for example, how many lives were ruined and jobs were lost when a woman ***actual malice***

higher standard required to prove by a public figure plaintiff in a defamation case *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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claimed that she was raped by members of the Duke University lacrosse team. Her claim proved to be false. However, due to rush to judgment of "guilty" in a trial by the media, by Duke University's president, and by much of the Durham, North Carolina community, the student-athletes were kicked off the team and the lacrosse coach lost his job. After it was revealed that the story was illegitimate, the prosecutor was removed from his position and had his law license revoked.

The damage had already been done, even though the statements were false.

Commercial Misappropriation/Right of Publicity

The ***right of publicity*** *(sometimes referred to as commercial misappropriation) is a legal doctrine that prevents the unauthorized commercial use of an individual name, likeness, or other recognizable aspects of a persona. The right of publicity has been identified by courts as the inherent right of every human being to control the commercial use of his or her own identity. Right of publicity statutes typically prohibit an individual from using another's name, voice, signature, photograph or*

likeness in products or advertisements without that person's permission. Though athletes may find that a successful suit under defamation standards is extremely difficult, commercial misappropriation suits are often successful.

Since manufacturers and other sellers of products and services commonly use an athlete for marketing, athletes must be able to protect themselves against the unauthorized use of their image. Establishing a trademark (including an Internet domain name) for one's name or image may be necessary for professional athletes (and certainly professional and amateur leagues and organizations) to prevent improper use of a name for profit.

There are common law (judge-made) and statutory rights of publicity. Each state has its own common and statutory laws. Thirty states recognize the right (13

by statute, 17 by judicial decisions). For example, Pennsylvania's right of publicity states as follows: "Any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without consent may sue for an injunction and damages…." It gives an individual the exclusive right to license the use of their identity for commercial and consequently financial promotion.

Though right of publicity is primarily state law, plaintiffs might use a "false endorsement" claim under Section 43(a) of the Federal Trademark Act (the Lanham Act).

Cases

The actual phrase right of publicity was actually first used in 1953 by Judge Jerome Frank in Haelan Labs. Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953): Two competing chewing-gum manufacturers claiming that they had the exclusive right to use a baseball player's photograph in their marketing.

In Zacchini v. Scripps-Howard Broadcasting, 433 U.S. 562 (1977) Hugo Zacchini's 15-second "Human Cannonball" act was broadcast for 8-9 seconds on local television without his permission. The Supreme Court ruled

in favor of Zacchini, holding that it was an example of commercial misappropriation. Newsworthy events that result in a picture in newspaper are treated as a matter of public concern, ***commercial misappropriation***

tort of intentionally using a person's name, image, or likeness without permission for personal gain and profit

right of publicity

synonym for commercial misappropriation

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however, and would not be considered "commercial misappropriation." We will revisit right of publicity and commercial misappropriation concepts later in the course under intellectual property.

Right to Privacy/Invasion of Privacy

The phrase right to privacy (right of privacy) is not explicit in the Constitution. At least 35 states recognize it either by statute or by judicial decisions (common law). Justice Brandeis acknowledged this right in the decision of Olmstead v. United States, 277

U.S. 438 (1928). Brandeis argued that despite the lack of specific language in the Constitution, the framers considered the right to be the "most

comprehensive of rights" and the "right most valued by civilized men." Courts have to balance First Amendment speech issues with right to privacy with right of publicity with newsworthy issues. States and federal circuits often differ in their interpretation.

Athletes and celebrities can sue for the tort of invasion of privacy, which encompasses the right to privacy, due to the unyielding nature of some of the members of the media or fans or due to allegedly libelous statements that place the plaintiffs in a false light. However, like defamation, public figures have a lower expectation of privacy since their lives are public and newsworthy.

The Future of Privacy in Sport

One could certainly make the case that privacy law and privacy (in general) no longer exist. Social media sites like Facebook, along with Twitter and online search engines now make it easy to investigate a student-athlete, player, coach, or administrator. This has prompted many athletic administrators to suggest that prospective student-athletes should be subject to mandatory criminal background checks prior to being offered a scholarship. This could also apply to anyone involved in sport including referees, umpires and coaches.

Maybe the proper question to ask is "to what degree" may an institution conduct a background check on a player without violating their privacy so as to avoid a claim of intrusion. Consider the case of Willie Williams, a college football player who had been arrested 11 times prior to enrolling at the University of Miami, then transferred to the University of Louisville where he was then arrested again and subsequently dismissed from the team. Regardless, it is clear that privacy laws have fallen far behind the times to the point that the expressions right to privacy or invasion of privacy might be irrelevant in the future. Indeed, one should ponder if there is any privacy anymore at all.

- ***Products Liability***

Products liability in sports is an area of negligence involving sport-related equipment.

*When plaintiffs sue a manufacturer of sporting goods, the claimants allege that they suffered an injury due to the use of a product that was **defect** in the design (design defect) or manufacturing process (manufacturing defect). Similarly, when an allegation is made that the manufacturer failed to properly warn of the potential dangers of using the product, this is referred to as the failure to warn or warning defect.*

defect

the key word and issue when determining whether or not a product was responsible in some way for injury to a plaintiff.

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Manufacturers of bats, gloves, shoes, helmets, pads and other goods used in sports are subject to a lawsuit if there is a defect in the design or manufacturing process. Other sport-related lawsuits have involved injuries related to allegations of defective trampolines, artificial turf, and mislabeling of weight-loss products and nutritional supplements.

Warranties

*Since goods are involved, the **Uniform Commercial Code (UCC)** is often called into play. UCC's Article 2 governs the sales of goods and has been adopted in whole or in part by every state. Purchases and users of sports equipment (or someone injured by it) might allege that either the*

*manufacturer or seller (e.g., a retail store) breached an **express warranty** (a promise made by the manufacturer about the product), the **implied warranty of merchantability** (that the good works for its intended use), or the **implied warranty of fitness for a particular purpose** (in which the seller knows the peculiar reason that the buyer is relying on the seller's expertise as part of the sale of the good).*

Consumer Product Safety Commission

*In some cases, the federal agency known as the Consumer Product Safety Commission (**CPSC**) is called upon to determine whether a sporting good or sport-related product is safe. Of course, this includes the standard bats, balls, pads, shoes, helmets, and so on. However, in 2008, the CPSC was called upon to determine whether or not the levels of lead found in synthetic field athletic turf is safe. It confirmed that it is.*

Baseball Bats

One of the most controversial pieces of equipment in the sports industry are aluminum bats. There remains considerable debate as to whether or not these bats are an unreasonably dangerous product. Many have claimed that aluminum bats cause the baseball to rocket off the bat at such an excessive rate of speed that pitchers do not have time to react to a line-drive. In some instances, pitchers have been hit by baseballs with such velocity from aluminum bats that they have been permanently injured or killed.

*In 2007, New York City banned the use of aluminum baseball bats in high school for safety reasons. North Dakota passed a state-wide law banning aluminum bats, and other states such as New Jersey, Illinois, Montana, Pennsylvania, California and Massachusetts have considered the same. As of 2011, the NCAA mandated **Uniform Commercial Code (UCC)***

model act drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to provide certainty in governing the sale of goods, commercial paper, secured transactions, etc.

breach of express warranty

a specific promise made by the manufacturer about the product ***breach of the implied warranty of merchantability*** *implied promise that a product will be merchantable and fit for its ordinary use*

breach of the implied warranty of fitness for a particular purpose *implied warranty that arises*

when a seller of goods knows the particular purpose for which the purchaser needs the goods ***CPSC***

Consumer Product Safety Commission

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that aluminum bats must resemble wood in sound and performance. The purpose is to reduce the likelihood of injury. MLB only uses wooden bats.

In 2009, a Montana jury awarded the family of pitcher Brandon Patch a judgment of $850,000 against Hillerich & Bradsby (Louisville Slugger) because they believed that the manufacturer failed to adequately warn about the dangers of aluminum bats. The jury felt warnings should have been placed on the product.

Patch, at the time 18 and playing for the Miles City Mavericks, was hit in the head by a line-drive ball during an American Legion baseball game in Helena in 2003 and died. Other individuals involved in legal issues related

to baseball bats include Gunnar Sandberg (who recovered) and Cole Schlesner.

- ***Strict Liability***

Strict liability rarely applies in sports. Under a strict liability theory, also known as absolute liability or liability without fault, manufacturers of sporting goods could be held liable for any harm that is caused to a plaintiff due to a defective condition which is ultra-hazardous or unreasonably dangerous to the purchaser or a user.

Though many sporting goods may be deemed potentially harmful or unsafe, it is rare that a product or an activity for that matter is considered ultra-hazardous.

Still, one could argue that an ultra-hazardous or abnormally dangerous activity such as blasting and demolition during the construction (or destruction) of a sports arena might rise to such a level of liability. It might also come into play when fireworks, pyrotechnics or canons are used and do not function properly thereby injuring spectators. Still, most claims would fall under the negligence theories rather than strict liability.

- ***Summary***

Tort law allows an injured party to sue for damages. The burden of proof in any tort case is preponderance of the evidence. Some torts are also crimes. Torts can generally be divided into four major categories: negligence, intentional torts, strict liability, and products liability. Debate continues as to whether a sports participant should be able to sue another competitor for injuries suffered during a sports contest. As long as the injury suffered was clearly outside the scope of the game, a personal injury claim may be brought.

Negligence is the failure to act as a "reasonable person." Most states recognize the comparative negligence standard. Gross negligence and recklessness are higher forms of negligence where injury occurs due to intentional misconduct on the part of a defendant. If proof of recklessness is

shown, punitive damages might be appropriate. A wrongful death action may be brought in the event a death occurs as the result of negligent conduct.

Insurance issues are important for owners, managers, athletic directors, and others involved in the sports industry. Other tort issues include defamation, intentional infliction of emotional distress, intentional interference with contractual relations, and commercial misappropriation. Though waivers and releases are not favored by the courts, such private contracts will be enforced as long as they are reasonable. A study of tort law is important for all of the participants in a sporting event, including players, coaches, trainers, and owners.

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▪ ***Key Terms***

49 percent rule *in a comparative negligence jurisdiction, recovery may be made by plaintiff only if the percentage of fault is less than that of the defendant* ***50 percent rule*** *in a comparative negligence jurisdiction, recovery may be made by the plaintiff if the percentage of fault is equal to or less than that of the defendant* ***actual malice*** *higher standard required to prove by a public figure plaintiff in a defamation case*

American Rule *principle that parties to a lawsuit pay their own attorney fees rather than shifting such fees to the losing party*

assault *the apprehension of imminent harmful or offensive contact from another* ***assumption of risk (AOR)*** *voluntarily assuming a known risk* ***battery*** *the unwelcome physical contact from another that causes injury* ***breach of express warranty*** *a specific promise made by the manufacturer about the product*

breach of the implied warranty of fitness for a particular purpose *implied warranty that arises when a seller of goods knows the particular purpose for which the purchaser needs the goods*

breach of the implied warranty of merchantability *implied promise that a product will be merchantable and fit for its ordinary use*

caveat emptor *Latin expression meaning "let the buyer beware."*

caveat venditor *Latin expression meaning "let the seller beware."*

commercial misappropriation *tort of intentionally using a person's name, image, or likeness without permission for personal gain and profit* ***comparative fault***

comparative negligence (fault) *standard in which damages are rewarded based on the degree of fault among plaintiff and defendant; typically, plaintiff's degree of fault must be 49 percent or less to recover damages in many states (49 percent rule) while no more than equal to (50 percent rule) in other states* ***consent*** *defense to negligence in which participants voluntarily assume known risks by participation (****implied****) or by signing a waiver (****express****).*

contact sports exception *fundamental principle which holds that during competition which naturally involves physical contact, there will be no liability for negligent conduct but rather only for gross negligence or recklessness* ***contributory negligence*** *failure of plaintiffs to take reasonable precautions for their own safety*

cost-benefit *analysis used by managers, lawyers and others to determine whether the cost of modification or change outweighs the benefits of the action particularly in light of potential liability*

course of employment *test used to determine whether an individual employee is entitled to worker's compensation*

defamation of character *intentional tort whereby a false statement is published (libel) or spoken (slander) about the plaintiff*

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defect *the key word and issue when determining whether or not a product was responsible in some way for injury to a plaintiff.*

English Rule *principle in many countries in which the prevailing party in a lawsuit has their legal fees paid for by the losing party, also known as "loser pays."*

express assumption of the risk *agreeing, normally in writing, that one understands that certain risks of participation may result in an injury* ***game presentation*** *the entertainment aspect of a sports contest often associated with the use of team mascots*

gross negligence *failure to use a small amount of care to avoid harm to a plaintiff* ***implied assumption of the risk*** *voluntarily assuming the risk of being injured in an activity likely to cause an injury but without formally agreeing orally or in writing* ***insurance*** *contract in which a company agrees to compensate the insured for loss due to perils or other liability*

intent *desire to bring about a particular result* ***intentional infliction of emotional distress*** *intentional tort in which the defendant causes emotional distress by extreme or outrageous conduct* ***intentional interference with contractual relations*** *intentional tort of interfering with a known contractual relationship with the intent to induce one of the parties to breach*

intentional tort *tort closely related with crimes in which the tortfeasor intended to commit an injury to another*

Just Negligence Rule *states which analyze injuries due to flying objects such as foul balls in no special, sport-related way but rather in a typical negligence analysis* ***libel*** *defamation evidence in print or by a writing of some sort* ***Limited Duty Rule*** *states which adhere to the legal principle that as long as the owner or operator of a stadium provides enough protected screening for reasonably expected demand by spectators then there is no liability for injury due to flying objects emanating from the field of play*

malpractice *negligence by a professional person, such as a lawyer or physician* ***negligence*** *failure to act as an ordinary, reasonably prudent person* ***negligent hiring*** *the failure of an employer to take reasonable steps to ensure that the hired employee does not have a history of criminal misconduct that would interfere with the job at hand*

No Duty Rule *states which adhere to the legal principle that fans assume all risks of being hit by flying objects that are a natural part of the game* ***ordinary negligence*** *the failure to use the ordinary care that a reasonable person would use in similar circumstances.*

preponderance of the evidence *test in a civil case that plaintiff must prove the defendant is "more likely than not" responsible for the injuries sustained* ***products liability*** *tort law focusing on a defect in design, manufacture, or warning* ***Professional Boxing Safety Act of 1996*** *federal law mandating physical exams, onsite ambulances, and medical doctors at boxing events* ***reasonable person*** *test used to determine whether, in hindsight, a person acted reasonably*

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recklessness *such a high degree of carelessness that most courts view the harm to the plaintiff as intentional, making punitive damage awards likely* ***right of publicity*** *synonym for commercial misappropriation* ***risk management*** *expression used to describe manner and method of reducing the likelihood of an injury in the context of sport.*

scienter *Knowledge that one is committing fraud or misrepresentation* ***slander*** *spoken defamation*

statute of limitations *amount of time a plaintiff has to file a lawsuit* ***strict (absolute) liability*** *liability for an activity that involves an ultra-hazardous activity*

summary judgment *a decision by a court that essentially dismisses a case at the outset of the litigation*

tampering *another name for the intentional interference with contractual relations*

tort law *civil injury or wrong that violates a legal duty owed to another* ***tortfeasor*** *one who allegedly commits a tort*

Uniform Commercial Code (UCC) *model act drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to provide certainty in governing the sale of goods, commercial paper, secured transactions, etc.*

universal (baseball) rule *concept whereby courts expect that all spectators who watch baseball or softball games have a reasonable expectation that foul balls are part of the risk of watching a game, sometimes referred to as the limited duty rule* ***Volunteer Protection Act of 1997*** *federal law which protects race organizers from negligent acts by volunteers but does not protect for gross negligence or reckless acts*

workers compensation *system designed to compensate employees injured on the job in the course of their employment*

wrongful death *death caused by a tort such as negligence*

- ***Acronyms***

AED *automated external defibrillators*

AOR *assumption of risk*

CPSC *Consumer Product Safety Commission*

CTE *chronic traumatic encephalopathy*

ESDI *Exceptional Student-Athlete Disability Insurance* ***MRSA*** *methicillin-resistant Staphylococcus aureus* ***NASO*** *National Association of Sports Officials* ***NATA*** *National Athletic Trainers Association*

SEC *Southeastern Conference*

SIS *Sudden Impact Syndrome*

TCU *Texas Christian University*

UCC *Uniform Commercial Code*

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▪ *Discussion and Review Questions*

1. *Why is the tort of negligence more common in sports litigation than others?*

2. *Discuss the differences between ordinary negligence, gross negligence, and recklessness.*

3. *Why are waivers used in sports law and the sports business?*

4. *Discuss the relationship between tort (civil) law and criminal law.*

5. *To what degree do you think that the Internet has assisted in the erosion of privacy in general, especially for coaches and athletes?*

6. *Explain the struggle in the state of New Jersey and others related to flying objects and torts.*

7. *What mascots have been involved in tort-related litigation?*

8. *What might an institution do to reduce serious injury or death and potential liability during a sport practice or competition?*

9. *Has the advent of social media virtually eliminated claims over invasion of privacy and the right to privacy?*

10. *What is the difference between the English Rule and the American Rule?*

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CHAPTER FOUR

Sports Crimes

After reading this chapter you will be able to:

1. Describe the relationship between criminal law and tort law in the context of sports.

2. Explain the differences and similarities between the major categories of crimes.

3. Discuss legitimate, as opposed to illegitimate, sports violence.

4. Explain the difference between U.S. and Canadian approaches to unacceptable violence in sports.

5. Discuss whether courts should be the appropriate forum to decide potential criminal actions between sport participants.

6. Discuss the evolution of the law associated with ticket scalping.

7. Define the crime of counterfeiting and discuss its importance in sports law.

8. Provide examples of sports bribery at amateur and professional levels.

9. Explain the similarities and differences between hazing, stalking, and extortion in and its relationship to sports law.

10. Discuss whether pat-downs of spectators prior to entering a sporting event might violate the U.S. Constitution.

▪ *Introduction*

The focus of this chapter is on criminal conduct in the context of sport. Criminal law is based on state or federal statutes that define specific actions that are subject to punishment. Whereas compensation is the goal of tort law, the ultimate purpose of criminal law is to punish the misconduct of the defendant. Punishment can include incarceration and monetary fines, and is designed to send a message to society-at-large that such conduct is unacceptable.

The similarities between criminal law and tort law are indeed remarkable at times. In fact, some crimes and torts have the same names. Students must recognize that in tort law a defendant is sued by a plaintiff whereas in criminal law the defendant is charged with a crime by the state or federal government. For example, a private plaintiff may sue a defendant for the tort of assault or battery, and that same defendant might be charged by the government (i.e., the state) in the same incident for criminal assault or criminal battery. In the tort complaint, financial compensation is the goal, while in the criminal complaint, punishment is the goal. In tort law, the defendant is referred to as the tortfeasor whereas in criminal law the violator is referred to as the ***perpetrator****.*

perpetrator

one accused of committing a crime

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Chapter Four

Compared to tort law, there are relatively few examples of sports crimes related to on-the-court behavior. Students should ponder whether government should charge participants for their conduct during a sports contest at all, or whether punishment is better served and managed by the teams, leagues, or organizations as a matter of private justice.

Sports crimes can involve illegitimate physical force during the contest, but they might also involve non-violent criminal actions as well. These white-collar crimes can be committed in all environments and at all levels: youth sport, recreational activities and leagues, amateur competition, intercollegiate sports, and in the professional ranks. Crimes can be committed by participants, coaches, fans, parents, agents, organizers, referees, and others. The study of criminal law and its relationship to sports is quite broad. This chapter provides a basic understanding of the fundamental role of criminal law in sports.

▪ *Criminal Law Fundamentals*

Burden of Proof

*Students of sports law should know that the burden of proof for the state in a criminal case is **beyond a reasonable doubt**. No one can clearly define what*

this means, but it does not mean beyond all doubts. It is certainly a higher standard of proof than the ***preponderance of the evidence*** *standard in tort law (in other words, more-likely-than-not that the defendant committed the act). In addition, for each crime the state must prove that an act occurred (* ***actus reus****) which violated a federal or state statute, and that the defendant had the intent to commit such act (* ***mens rea****). The prosecutor, also known as the district attorney, determines when to prosecute for criminal misconduct based upon the evidence in the case and the willingness of the victim to press charges against the accused perpetrator. In Canada, the state is referred to as Regina (the "Queen") whereas in the United States, the prosecutor is referred to in various ways including the State, the Commonwealth, or the People depending upon the history of that state jurisdiction.*

In criminal law the terms guilt or innocence take the place of liable or not liable in tort law. If the defendant is found guilty of a crime, the judge must then render a sentence. Many criminal laws dictate a minimum and maximum sentence, and the judge might consider mitigating factors that might suspend or reduce a sentence, or enhance-ment factors that might increase the sentence such is the case of a repeat offender.

Criminal Intent

One commits a crime by violating a criminal statute, not by engaging in conduct that appears to be unethical or immoral. Societal influences and the acceptance of ultra-competitive and aggressive behavior have generally sidelined the presence of criminal law in sports participation. In fact, many fans expect violent behavior in ***beyond a reasonable doubt***

the test the government (state) must prove in a criminal case ***preponderance of the evidence***

proof in civil case in which plaintiff must prove that it is more-likely-than-not that the defendant committed the act in question ***actus reus***

criminal act; literally, the "act thing"

mens rea

criminal intent to commit a crime; literally, the "mind thing"

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sports, and it often becomes a selling point for a league. Videos showing violent hits in sport are among the most popular on YouTube.

As mentioned, the essence of criminal law is that the perpetrator has formed the intent to commit a crime and then carried out that intent. Though one cannot be punished for having criminal thoughts alone, the crime of ***conspiracy*** *does punish wrongdoers for agreeing to commit a crime. Additionally, if the attempt to commit a crime fails, the perpetrator may still be charged and punished under the theory of* ***attempt*** *such as attempted arson. Sometimes attempts that fail are referred to as being incomplete or* ***inchoate*** *crimes.*

Generally speaking, crimes can also be divided into two major violations: felonies and misdemeanors at both state and federal levels. ***Felonies*** *are more serious in nature. Such crimes carry a penalty of more than one year in state or federal prison.* ***Misdemeanors****, though still serious, do not allow for incarceration for more than one year in county jail. In both cases, there might be financial penalties as well.*

Implied Consent

In sports such as boxing, football, hockey, wrestling, and others, aggressive physical contact is an expected part of the contest. Participants know this and voluntarily consent to expected physical contact. As mentioned in the

previous chapter, most jurisdictions refer to this as implied consent, under which the participants voluntarily assume certain risks of injury or violence during a sport activity that would otherwise likely be considered assault and battery outside the arena. The implied consent doctrine is one of the strongest defenses to a criminal charge during a sports contest by participants, though the real question for judges and juries becomes where to draw the line between legitimate and illegitimate violence.

Assault and Battery

If physical contact in sport were a crime, assault and battery would likely be the most prevalent crimes in sports. An ***assault*** *is a willful attempt or willful threat to inflict injury upon another person. It is also defined as intentionally placing someone in fear of imminent bodily harm. A* ***battery*** *is the actual intentional physical contact. It is sometimes referred to as a successful assault. When an assault or battery involves a weapon, serious bodily injury, deadly force, or when the assault or battery is committed in conjunction with another crime, the term* ***aggravated*** *is often used. In sum, the crimes of assault and battery involve the unwelcome and excessive physical contact between two or more persons. Students should research definitions found in their own state statutes which can vary widely among jurisdictions.*

conspiracy

an agreement between two or more persons to commit a crime ***attempt***

an unsuccessful illegal act carried out with criminal intent ***inchoate***

an incomplete crime such as conspiracy or attempt

felony

crime punishable by more than one year in prison

misdemeanor

crime punishable by up to one year in county jail

assault

willful attempt or threat to inflict injury; usually associated with battery ***battery***

crime involving unlawful physical contact with another person ***aggravated crime***

crime involving the use of a weapon or causing serious bodily injury
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Chapter Four

Model Penal Code

*The national effort to create more uniform state laws, rather than maintain chaotic differences in terms, statutes, definitions and penalties, led to the enactment of the Uniform Athlete Agents Act (**UAAA**) and the Uniform Commercial Code (**UCC**), both discussed in previous chapters. In criminal law, the Model Penal Code (**MPC**) was drafted to assist state legislatures in defining, standardizing and updating laws regarding what constitutes criminal misconduct. It was developed by the American Law Institute (**ALI**) in 1962 and updated in 1981.*

With regard to assault, for example, the MPC divides criminal assault into two categories: simple or aggravated. A person is guilty of simple assault if he attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another; or negligently causes bodily injury to another with a deadly weapon; or attempts by physical menace to put another in fear of imminent serious bodily injury. Similarly, a person is guilty of aggravated

assault if he attempts to cause or purposely, knowingly, or recklessly causes serious bodily injury to another under circumstances manifesting extreme indifference to the value of human life; or attempts to cause, or purposely, or knowingly causes bodily injury to another with a deadly weapon. Most states have adopted some or all of the MPC.

Defenses to Crimes

Those charged with crimes are not defenseless. There are several ways to defend oneself against criminal charges, beginning with hiring a criminal defense attorney. Some of the defenses to crimes include express or implied consent to contact, ***self-defense****, and a general reluctance by the federal and state government to prosecute in the sports context due to the inherent physical nature of the game, also known as assumption of the risk (****AOR****).*

- ***Sports Violence***

So, if much of the violence found in sports would constitute crimes against the person if it occurred outside the sports contest, where does that leave us? Participants hit, punch, check, trip, and commit other aggressive and violent acts during the course of a sporting event, and such conduct is often considered part of the game especially in contact sports. Spectators often urge the commission of violence by participants during the contest itself. Still, on some occasions participant conduct is so outrageous that a criminal charge might be warranted.

UAAA

Uniform Athlete Agents Act

UCC

Uniform Commercial Code

MPC

Model Penal Code

ALI

American Law Institute

defenses to crimes

various claims made by those accused of crimes to demonstrate lack of guilt or intent, including self-defense

self-defense

one or more acts committed by defendant to protect oneself from an aggressor ***AOR***

assumption of the risk

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Sports Crimes

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Contact Sports

Athletes in contact sports are trained to be aggressive and are often encouraged to make violent plays, even as children. In football, hockey, and boxing, for example, participants are often encouraged by coaches and some parents from a young age to hurt the opponent. In boxing especially, the victor might win by literally knocking the opponent out. Most spectators or pay-per-viewers watch a boxing or mixed martial arts match for this very reason.

However, when a boxer bites off an opponent's ear, as boxer Mike Tyson did to Evander Holyfield in 1997, should the government step in and charge the participant with criminal misconduct? Should we arrest the players or coaches before, during or after a sports contest for illegitimate violence in the heat of the moment? Is there a clear-cut test in which participants, referees, coaches and spectators recognize that the type of violence which occurred is so far beyond the expected rules of the game that the participant could actually be charged with a crime such as assault or battery? These questions are not answered easily, and fear of arrest, prosecution and punishment could deter aggressive competition by sports participants.

In State v. Shelley, a pickup basketball game in the state of Washington turned into a brawl in which one player punched another in the face, breaking his jaw in three places. The court of appeals looked to the Model Penal Code's for guidance in determining whether or not such contact was reasonably foreseeable. The court of appeals affirmed the lower court decision and held that a participant in such an activity did not implicitly consent to throwing or receiving punches during a pickup basketball game. See if you agree with the court's decision.

▪ ***CASE 6***

The State of Washington, Respondent, v. Jason P. Shelley, Appellant ***Court of Appeals of Washington, Division One***

(the IMA). Pickup games are not refereed by an offi-

January 13, 1997, Filed

cial; rather, the players take responsibility for calling their own fouls. During the course of three games,

OPINION BY: C. KENNETH GROSSE

Gonzalez fouled Shelley several times. Gonzalez had a During a rough basketball game, Jason Shelley struck reputation for playing overly aggressive defense at the another player and broke his jaw in three places. He IMA. Toward the end of the evening, after trying to hit was convicted of

assault in the second degree after the the ball away from Shelley, he scratched Shelley's face, State successfully argued to the jury that Shelley inten-and drew blood. After getting scratched, Shelley briefly tionally punched the other player. On appeal, Shelley left the game and then returned.

claims that he was entitled to argue that the victim con-Shelley and Gonzalez have differing versions of what sented to the possibility of injury when he decided to occurred after Shelley returned to the game. Accord-play pickup basketball. While we agree that consent

ing to Gonzalez, while he was waiting for play in the may be a defense to assault in athletic competitions, game to return to Gonzalez's side of the court, Shelley Shelley has failed to establish a factual basis for that suddenly hit him. Gonzalez did not see Shelley punch defense. Further, while we hold that the consent

him. According to Shelley's version of events, when

defense is not limited to conduct within the rules of Shelley rejoined the game, he was running down the

the games, rather it is to the conduct and harm that court and he saw Gonzalez make "a move towards me

are the reasonably foreseeable hazards of joint partici-as if he was maybe going to prevent me from getting

pation in an athletic contest, we conclude that Shelley's the ball." The move was with his hand up "across my

conduct was not a reasonably foreseeable hazard.

vision." Angry, he "just reacted" and swung. He said he On March 31, 1993, Jason Shelley and Mario Gonzalez

hit him because he was afraid of being hurt, like the played "pickup" basketball on opposing teams at the

previous scratch. He testified that Gonzalez continually University of Washington Intramural Activities Building beat him up during the game by fouling him hard.

(continued)

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Chapter Four

A week after the incident, a school police detective It is a defense to a charge of second degree assault interviewed Shelley and prepared a statement for Shel-occurring in the course of an athletic contest if the ley to sign based on the interview. Shelley reported to conduct and the harm are reasonably foreseeable

the police that Gonzalez had been "continually slap-

hazards of joint participation in a lawful athletic

ping and scratching him" during the game. Shelley

contest or competitive sport.

"had been getting mad" at Gonzalez and the scratch

The trial court rejected these and Shelley excepted.

on Shelley's face was the "final straw." As the two were The trial court did instruct the jury about self-defense.

running down the court side by side, "I swung my right hand around and hit him with my fist on the right side First, we hold that consent is a defense to an assault of his face." Shelley asserted that he also told the detec-occurring during an athletic contest. This is consistent tive that Gonzalez waved a hand at him just before

with the law of assault as it has developed in Washington.

throwing the punch and that he told the detective

A person is guilty of second degree assault if he or she that he was afraid of being injured.

"[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm."1 One common law def-Gonzalez required emergency surgery to repair his jaw.

inition of assault recognized in Washington is "'an

Broken in three places, it was wired shut for six weeks.

unlawful touching with criminal intent.'"2 At the com-His treating physician believed that a "significant" blow mon law, a touching is unlawful when the person

caused the damage.

touched did not give consent to it, and was either harm-During the course of the trial, defense counsel told the ful or offensive.3 As our Supreme Court stated in State v.

court he intended to propose a jury instruction that: "A Simmons, "'where there is consent, there is no assault.'"4

person legally consents to conduct that causes or

The State argues that because Simmons was a sexual threatens bodily harm if the conduct and the harm

assault case, the defense consent should be limited to are reasonably foreseeable hazards of joint participa-that realm. We decline to apply the defense so narrowly.

tion in a lawful, athletic contest or competitive sport."

Logically, consent must be an issue in sporting events Although the trial court agreed that there were risks because a person participates in a game knowing that involved in sports, it stated that "the risk of being inten-it will involve potentially offensive contact and with this tionally punched by another player is one that I don't consent the "touchings" involved are not "unlawful."5

think we ever do assume." The court noted, "In basket-Our review of the cases and commentary on the issue

ball … you consent to a certain amount of rough contact.

of consent reveals that although the defense of consent If they were both going for a rebound and Mr. Shelley's is applied in the realm of sexual assault, it has been elbow or even his fist hit Mr. Gonzalez as they were both sparingly applied by the courts in other areas.6 The jumping for the rebound and Mr. Gonzalez'[s] jaw was rationale that courts offer in limiting it is that society fractured in exactly the same way … then you would have has an interest in punishing assaults as breaches of the an issue." Reasoning that "our laws are intended to

public peace and order, so that an individual cannot uphold the public peace and regulate behavior of indivi-consent to a wrong that is committed against the public duals," the court ruled "that as a matter of law, consent peace.7 Urging us to reject the defense of consent

cannot be a defense to an assault." The court indicated because an assault violates the public peace, the State that Shelley could not claim consent because his conduct argues that this principle precludes Shelley from being

"exceed[ed] what is considered within the rules of that entitled to argue the consent defense on the facts of his particular sport[:]"

case. In making this argument, the State ignores the

[C]onsent is to contact that is contemplated

factual contexts that dictated the results in the cases it within the rules of the game and that is incidental

cites in support.

to the furtherance of the goals of that particular

When faced with the question of whether to accept a

game.

school child's consent to hazing8 or consent to a fight,9

If you can show me any rule book for basketball

or a gang member's consent to a beating,10 courts have at any level that says an intentional punch to

declined to apply the defense. Obviously, these cases the face in some way is a part of the game, then

present "touchings" factually distinct from "touchings"

I would take another—second look at your

occurring in athletic competitions.

argument. I don't believe any such rule book

If consent cannot be a defense to assault, then most exists.

athletic contests would need to be banned because

Later Shelley proposed jury instructions on the subject many involve "invasions of one's physical integrity."11

of consent:

Because society has chosen to foster sports competi-

An act is not an assault, if it is done with the contions, players necessarily must be able to consent to sent of the person alleged to be assaulted.

physical contact and other players must be able to

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Sports Crimes

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rely on that consent when playing the game. This is the similar statutory defense, the Iowa court required a view adopted by the drafters of the Model Penal Code:

"nexus between defendant's acts and playing the

game of basketball."16 In State v. Floyd, a fight broke There are, however, situations in which consent to

out during a basketball game and the defendant, who

bodily injury should be recognized as a defense to

was on the sidelines, punched and severely injured sev-crime…. There is … the obvious case of participa-

eral opposing team members. Because neither defen-

tion in an athletic contest or competitive sport,

dant nor his victims were voluntarily participating in where the nature of the enterprise often involves

the game, the defense did not apply because the statute risk of serious injury. Here, the social judgment

"contemplated a person who commits acts during the

that permits the contest to flourish necessarily

course of play, and the exception seeks to protect those involves the companion judgment that reasonably

whose acts otherwise subject to prosecution are com-

foreseeable hazards can be consented to by virtue

mitted in furtherance of the object of the sport."17 As of participation. [12]

the court noted in Floyd, there is a "continuum, or slid-The more difficult question is the proper standard by ing scale, grounded in the circumstances under which which to judge whether a person consented to the par-voluntary participants engage in sport …which governs ticular conduct at issue.

the type of incidents in which an individual volunteers The State argues that "when the conduct in question is (i.e., consents) to participate[.]"18

not within the rules of a given sport, a victim cannot be The New York courts provide another example. In a

deemed to have consented to this act." The trial court football game, while tackling the defendant, the victim apparently agreed with this approach.

Although we rec-hit the defendant. After the play was over and all of the ognize that there is authority supporting this approach,13

players got off the defendant, the defendant punched we reject a reliance on the rules of the games as too the victim in the eye. The court in People v. Freer held limiting. Rollin M. Perkins, Criminal Law explains:

that this act was not consented to:

The test is not necessarily whether the blow

Initially it may be assumed that the very first punch exceeds the conduct allowed by the rules of the

thrown by the complainant in the course of the

game. Certain excesses and inconveniences are to

tackle was consented to by defendant. The act of

be expected beyond the formal rules of the game.

tackling an opponent in the course of a football

It may be ordinary and expected conduct for

game may often involve "contact" that could easily

minor assaults to occur. However, intentional

be interpreted to be a "punch". Defendant's

excesses beyond those reasonably contemplated

response after the pileup to complainant's initial

in the sport are not justified. [14]

act of "aggression" cannot be mistaken. Clearly,

Instead, we adopt the approach of the Model Penal

defendant intended to punch complainant. This

Code which provides that:

was not a consented to act. People v. Freer, 86

Misc.2d 280, 381 N.Y.S.2d 976, 978 (1976).

(2) Consent to Bodily Injury. When conduct is

charged to constitute an offense because it causes

As a corollary to the consent defense, the State may or threatens bodily injury, consent to such conduct

argue that the defendant's conduct exceeded behavior or to the infliction of such injury is a defense if: foreseeable in the game. Although in "all sports players consent to many risks, hazards and blows," there is "a

….

limit to the magnitude and dangerousness of a blow to b) the conduct and the injury are reasonably fore-which another is deemed to consent."19 This limit, like seeable hazards of joint participation in a lawful

the foreseeability of the risks, is determined by present-athletic contest or competitive sport or other con-

ing evidence to the jury about the nature of the game, certed activity not forbidden by law.[15]

the participants' expectations, the location where the The State argues the law does not allow "the victim to game has been played, as well as the rules of the game.

'consent' to a broken jaw simply by participating in an Here, taking Shelley's version of the events as true, the unrefereed, informal basketball

game." This argument magnitude and dangerousness of Shelley's actions were presupposes that the harm suffered dictates whether

beyond the limit. There is no question that Shelley

the defense is available or not. This is not the correct lashed out at Gonzalez with sufficient force to land a inquiry.

substantial blow to the jaw, and there is no question but The correct inquiry is whether the conduct of defen-that Shelley intended to hit Gonzalez. There is nothing dant constituted foreseeable behavior in the play of in the game of basketball, or even rugby or hockey, that the game. Additionally, the injury must have occurred would permit consent as a defense to such conduct.

as a byproduct of the game itself. In construing a

Shelley admitted to an assault and was not precluded (continued)

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from arguing that the assault justified self-defense; but Comments 1995); 2 Wayne R. LaFave & Austin

justification and consent are not the same inquiry.

W. Scott, Jr., Substantive Criminal Law § 7.15(e),

Related to his consent argument, Shelley claims that the at 311-12 (1986); 1 Paul H. Robinson, Criminal

assault statute20 is vague when applied to sports altercations Law Defenses §§ 23, 106(b) (1984); W.E. Shipley,

because it fails to provide either adequate notice of pro-Annotation, Assault and Battery–Consent as Defense, scribed conduct, or standards to prevent arbitrary enforce-58 A.L.R.3d 662, 664 (1974).

ment as to athletes who believe they can be rough because 7. See State v. Brown, 143 N.J. Super. 571, 364 A.2d they are accustomed to unprosecuted rough play. A statute 27, 28 (1976).

is void for vagueness if it either "does not define the crimi-8. People v. Lenti, 44 Misc. 2d 118, 253 N.Y.S.2d nal offense with sufficient definiteness that ordinary 9 (1964).

people can understand what conduct is proscribed" or if 9. People v. Lucky, 45 Cal. 3d 259, 753 P.2d 1052, it fails to "provide ascertainable standards of guilt to protect 247 Cal. Rptr. 1 (1988), cert. denied, 488 U.S. 1034

against arbitrary enforcement."21 Because his claim does (1989); State v. Hatfield, 218 Neb. 470, 356 N.W.2d not implicate any First Amendment rights, Shelley cannot 872, 876 (1984).

claim the statute is facially vague; he may argue only that it is vague as applied to him.22

10. Helton v. State, 624 N.E.2d 499, 514 (Ind. Ct.

App. 1993).

Our holding that a defendant is entitled to argue that another player may legally consent to conduct that

11. Cf. Helton, 624 N.E.2d at 514 & n.23.

causes or threatens bodily harm if the conduct and

12. Model Penal Code supra, § 2.11 cmt. 2, at 396

the harm are reasonably foreseeable hazards of joint (footnotes omitted).

participation in a lawful, athletic contest or competitive 13. People v. Lucky, 753 P.2d at 1072 (dicta); Wayne sport cures any problem with vagueness. With this

R. LaFave & Austin W. Scott, Jr., Criminal Law §§

defense, an ordinary person should understand that

57, 81, at 408, 608 (1972).

intentionally punching a person in an athletic competition may result in criminal prosecution. Accordingly, 14. Rollin M. Perkins & Ronald N. Boyce, Criminal the crime is defined with sufficient definiteness.23

Law, at 154 (3d ed. 1982) (citing Regina v. Watson, Additionally, the statute did not invite arbitrary

26 CCC 2nd 150 (Prov. Ct. Ont. 1975) (upholding

enforcement by law enforcement on the facts of this

conviction of hockey player who pursued an oppo-

case given that breaking another's jaw in three places nent and beat him with fists)).

satisfies the substantial bodily harm element of RCW

15. Model Penal Code supra, § 2.11, at 393. See 1

9A.36.021(1)(a).

Paul H. Robinson, Criminal Law Defenses § 23, at

We affirm.

80 & n.13 (1984) and statutes cited therein; Robinson supra, § 106(b), at 520.

FOOTNOTES

16. State v. Floyd, 466 N.W.2d 919, 922 (Iowa Ct. App.

1. RCW 9A.36.021(1)(a).

1990).

2. State v. Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 17. 466 N.W.2d at 922.

320 (1994) (quoting State v. Bland, 71 Wn. App.

18. 466 N.W.2d at 923 n.3.

345, 353, 860 P.2d 1046 (1993)).

19. Freer, 381 N.Y.S.2d at 978.

3. State v. Garcia, 20 Wn. App. 401, 403-04, 579 P.2d 1034 (1978) (citing Rollin M. Perkins, Criminal 20. RCW 9A.36.021(1)(a).

Law § 2.A.1, at 107-08 (2d ed. 1969)). See also

21. City of Spokane v. Douglass, 115 Wn.2d 171, 178, WPIC 35.50; 13A Royce A. Ferguson, Jr. & Seth

795 P.2d 693 (1990); State v. Halstien, 122 Wn.2d A. Fine, Washington Practice, Criminal Law § 404, 109, 117, 857 P.2d 270 (1993).

at 49 (1990).

22. State v. Stark, 66 Wn. App. 423, 832 P.2d 109

4. State v. Simmons, 59 Wn.2d 381, 388, 368 P.2d 378

(1992).

(1962) (quoting Guarro v. United States, 99 U.S. App.

23. Cf. City of Seattle v. Taylor, 50 Wn. App. 384, 388, D.C. 97, 237 F.2d 578, 581 (D.C. Cir. 1956)).

748 P.2d 693 ("The concept of offensive touching 5. See 2 Wayne R. LaFave & Austin W. Scott, Jr., Sub-is well rooted, and persons of ordinary under-

stantive Criminal Law § 7.15(e), at 311-12 (1986).

standing from the early days of the common law

6. Model Penal Code And Commentaries pt. 1, §

to the present have understood its meaning."),

2.11 cmt. 2, at 396 (Official Draft & Revised

review denied, 110 Wn.2d 1036 (1988).

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Governmental Legislation

There have been several attempts at the federal level to regulate sports violence, such as proposal of The Sports Violence Act of 1980. This act

would have imposed up to one year in prison for professional athletes who knowingly used excessive force during a game. However, it failed to gain enough votes. Another proposed act, the Sports Violence Arbitration Act of 1983, attempted to create a sports court for excessive violence, but also failed to pass.

Private Justice: Internal League Controls

While certain individual or collective behaviors during a sports contest would likely be prime targets for criminal charges if they occurred outside the arena, U.S.

prosecutors rarely charge athletes for acts committed during a game. In sports, a stick, ball or bat could conceivably be used as a deadly weapon to seriously hurt an opponent. Violence in sports has become so prevalent that professional sports leagues, the NCAA, and other governing bodies and commissions have had to police such activity themselves and provide punishment for misdeeds. This also includes internal, rather than criminal, penalties for violations of rules or policies, such as the regulatory scheme established by the NCAA discussed in Chapter 1.

In soccer, overly aggressive behaviors can lead to a yellow (warning) card or a red (ejection) card handed out by the referee. Ice hockey and lacrosse both recognize a variety of penalties, and give penalty box time for transgressors of the rules.

Ice hockey gives penalties for actions including boarding, butt-ending, charging, clipping, cross-checking, elbowing, fighting, high-sticking, holding, hooking, knee-ing, roughing, slashing, spearing, and tripping. Football imposes penalties for roughing the passer and kicker, unnecessary roughness, holding, spearing, and tripping. All of these acts would likely constitute criminal and civil assaults and batteries, if not for their occurrence during a sports contest.

Unlike football, hockey and lacrosse, baseball is not considered a contact sport. However, everyone knows that baseball regularly occasions bench-clearing brawls and pitches intended to bean the batter. Players and managers may be thrown out of a game for violent verbal and sometimes

physical confrontations with the umpires. A runner charging home plate from third base is often taught to violently collide with the catcher. So, who is in the best position to decide penalties for sport participants: leagues or the police? Unfortunately, sometimes it takes a severe injury or even death in order to generate the impetus for a change in league rules or state or federal laws.

League Suspensions and Fines

One of the major objections to leagues controlling violent behavior in sport is that the penalties may not go far enough to deter the same conduct again. When fines or suspensions are handed down, the penalties often mock justice, so to speak, and it has little impact to coaches and athletes who make multi-millions of dollars. However, the Big Four leagues, including the NCAA, appear to be taking more severe action against egregious conduct, especially that which borders on criminal misconduct.

In the NFL, for example, there have been some notable and well-deserved suspensions. In 2006 Albert Haynesworth (Tennessee Titans) suffered the longest suspension in NFL history for on-field violence (five games without pay) for kicking opponent Andre Gurode (Dallas Cowboys) in the face with his cleats. Gurode's
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helmet had been knocked off during play, and Haynesworth used the opportunity to kick him in the head while he was down. Prior to that, the longest suspension for on-field violence in the NFL was for two games in 1986 when Charles Martin (Green Bay Packers) was suspended for slamming quarterback Jim McMahon (Chicago Bears) to the ground.

The NHL has become quite competent in doling out suspensions over the years for vicious and intentional displays of aggression, and penalizes players for fighting, though normally fights do not lead to game suspensions. On the other hand, some conduct is so outrageous that the NHL has suspended players for the rest of the season. For example, Chris Simon (New York Islanders) was suspended 25 games and part of the next season for violently swinging his stick at the face of New York Rangers forward Ryan Hollweg in 2007. The Nassau County district attorney decided against filing criminal charges, and Hollweg was apparently not interested in pressing charges either. Hockey remains the only Big Four sport where fighting is considered an inherent part of the game.

▪ ***Variety of Crimes***

Crimes are generally divided into four major categories: 1. ***crimes against persons****;*

2. ***crimes injurious to personal and real property****; 3.* ***crimes affecting the public health and welfare****; and 4.* ***crimes against the government****.*

*These designations are not mutually exclusive; a single crime could fall into several categories. As you will see in this chapter, not all crimes involve physical violence either. This might include possession and use of certain performance-enhancing drugs (****PEDs****),* ***sports gambling****,* ***ticket scalping****,* ***sports bribery****, counterfeiting, and even the crime of failing to register as a sports agent (in certain states).*

Cheating in sports does not normally rise to the level of criminal misconduct.

Examples of cheating could include stealing signs in baseball, surreptitiously video recording coaches in football to obtain their play calls,

using illegal equipment such as corked bats or bats which have a pine tar grip, employing illegal aerody-namics in motor racing, or any other manner or means of obtaining an unfair advantage in which the rules are intentionally broken.

crimes against the person

including assault, battery, robbery, hazing, murder, rape, and kidnapping

crimes injurious to property

including arson, trespass, vandalism, and theft

crimes affecting the public health and welfare

including blackmail, illegal gambling, and

prostitution

crimes against the government

including tax evasion, treason, RICO violations, and terrorism ***PEDs***

performance-enhancing drugs

sports gambling (gaming)

illegal in most states and of particular interest to professional and amateur sports leagues

ticket scalping

buying tickets to sports events and then reselling them for a profit, usually well in excess of face value

sports bribery

illegal influence over an athlete, coach, referee, or other participant to affect the outcome of a sports event, also referred to as point-shaving *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned,*

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Participants

As mentioned, very few criminal cases involving sports competitors during a sports contest have actually proceeded to a criminal prosecution and trial. Currently only a few major cases set a standard for prosecuting athletes for illegitimate violence in sports. Most of the discussion and analysis stems from hockey and the Canadian courts. The following sections focus on the crimes against the person category of sports crimes in the Big Four sports. Other than hockey, criminal cases seem to center on activities surrounding the game, rather than the game itself.

Hockey

It appears that Canadian and U.S. prosecutors and courts differ in their approach to dealing with illegitimate violence in hockey. Hockey players' overly aggressive misconduct has resulted in numerous legal cases, including several criminal convictions in Canadian courts. One can only speculate as to why Canada prosecutes hockey violence more than the United States, but many believe that it is primarily because hockey is Canada's national sport, and that the nation takes great pride in making sure that illegitimate violence is deterred. The following cases are some of the more prominent incidents and criminal prosecutions in that sport.

Maki and Green

In the twin Canadian cases of Regina v. Maki and Regina v. Green, Wayne Maki (St. Louis Blues) and Ted Green (Boston Bruins) were charged with assault after each attempted to swing their sticks among the shoving in an pre-season exhibition game in Ottawa in 1969. Maki connected with Green's head, fracturing Green's skull. The assault charges were dismissed against both Green and Maki in the separate cases. In the Green case, Green was found not guilty because it was held that his actions were an involuntary reflex and part of the roughness of the game. The same court also noted that sports leagues should not consider players immune from criminal prosecution. Both courts held that the amounts of force were not excessive, that players assumed certain risks in the game, and that self-defense justified the actions.

Ciccarelli

In Regina v. Ciccarelli, Dino Ciccarelli (Minnesota North Stars) hit Luke Richardson (Toronto Maple Leafs) with his stick during a game in Toronto, Ontario in 1988.

However, unlike the Maki and Green incident, Ciccarelli was sentenced to one day in jail for the criminal assault and received a $1,000 fine. The court wanted to send a message to fans and participants that certain types of violence in hockey cross the line. This was the first-ever jail sentence for a professional athlete for violence that occurred during a sports event.

Boulerice

Jesse Boulerice was charged with ***aggravated assault*** *(assault to do great bodily harm less than murder) in an Ontario Hockey League (****OHL****) match in April 1998. Boulerice (Plymouth Whalers) swung his stick at Andrew Long* ***aggravated assault***

attempt to commit serious bodily harm especially with an object or weapon ***OHL***

Ontario Hockey League

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(Guelph Storm) hitting him in the face. Long suffered a broken nose and nasal cavity, concussion, and 20 stitches to his nose and lip. Boulerice pleaded no contest to the felony charge in 1999 and received 90 days probation. He was suspended from the OHL for the season.

*Interestingly, Boulerice has been involved in excessive hockey violence on numerous occasions since the Long incident in 1998. In 2007 Boulerice delivered a cross-check to the face of Vancouver Canucks forward Ryan Kesler and received a 25-game suspension from the NHL. Boulerice, now playing for the Wilkes-Barre/Scranton Penguins after playing for many NHL and American Hockey League (**AHL**) teams, was suspended in 2011 for 10 games for intentionally shoving an AHL referee in a match against the Charlotte Checkers. One wonders if private, internal-league controls and penalties are sufficient for repeated misconduct.*

McSorley

Marty McSorley (Boston Bruins) was suspended 23 regular-season games for swinging his stick into Donald Brashear's (Vancouver Canucks) head, knocking him out, in a 2000 game. McSorley was also criminally charged with assault with a weapon for the incident, and a British Columbia judge found him guilty in the first trial for an on-ice attack in the NHL since the Ciccarelli incident in 1988. He was sentenced to 18 months of probation.

The NHL additionally fined him $72,000, and McSorley did not return to the NHL after the incident.

Bertuzzi

In 2004, Todd Bertuzzi (Vancouver Canucks) grabbed Steve Moore (Colorado Avalanche) from behind, punched him in the head and drove his head into the ice. Moore was left with three fractured neck vertebrae, a concussion and other injuries. Vancouver authorities charged him with assault. He pleaded guilty to assault causing bodily harm on December 22, 2004 in British Columbia, and was then sentenced to probation and community service. Bertuzzi was reinstated to the NHL after being indefinitely suspended and missing 13 regular-season games and the Stanley Cup playoffs in 2004.

Baseball

Baseball can be violent, but it is not normally considered a contact sport. That does not mean, however, that criminal law is inapplicable in cases of illegitimate behavior. Recall the 2003 incident discussed in Chapter 3: Sports Torts, when Randall Simon (Pittsburgh Pirates) was arrested, cited for disorderly conduct, fined $432, and issued a public apology for knocking down one of the sausages at Miller Park in Milwaukee during the sausage race.

Unlike hockey, fighting is not an acceptable part of baseball. Players do not go to a penalty box for fighting: they are thrown out of the game and suspended.

However, there are many examples of pitchers intentionally hitting batters with the ball. Is throwing a pitch at a batter's head considered part of baseball? In 2006, the California Supreme Court, in a non-criminal case, addressed the issue in Avila v. Citrus Cmty. Coll. , 131 P.3d 383 (Cal. 2006), and held that such conduct did not fall outside the range of ordinary activity in the sport. In fact in 2006, Sean Tracey, a pitcher for the Chicago White Sox, did not hit a batter after his manager ordered him to do so and was actually demoted for failing to comply. In recent ***AHL***

American Hockey League

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Sports Crimes

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years, baseball incidents involving outlandish behavior between participants attracted the attention of prosecutors.

Castillo

In 2009, minor league player Julio Castillo was forced to serve 30 days in jail and 3 years probation for injuring a ***fan*** *when he threw a baseball into the stands during a brawl between his Peoria Chiefs and the Dayton Dragons. He was found guilty of felonious assault causing serious physical injury against the spectator. He was acquitted of felonious assault with a deadly weapon. Officials in the Midwest League also suspended and fined 15 players and the team managers for the mêlée.*

Offerman

In 2007, Jose Offerman, a former Boston Red Sox player, was thrown out of an independent minor league game, arrested and charged with two counts of second-degree assault after charging the pitcher's mound and swinging his bat at the opposing team's pitcher after he was hit by a pitch. He pleaded not guilty and was given two years special probation. In 2010, acting as a team manager during a Dominican winter league game, Offerman was removed from the game and taken to a police station for hitting an umpire.

Basketball

As a popular international sport, there have been many violent displays of illegitimate play in basketball around the world (many now posted on YouTube). In the NBA, there have been incidents of illegitimate sports violence during the course of a game that have embarrassed this league. While it is debatable as to whether basketball really is a contact sport, there is no doubt that basketball has had criminal and civil issues throughout its history.

Kermit and Rudy

In 1977, Kermit Washington (Los Angeles Lakers) punched Rudy Tomjanovich (Houston Rockets) in the face in what is now known by many as The Punch.

Tomjanovich appeared to be trying to break up an altercation with another player at the time. Washington got a 60-day (26-game) suspension and Tomjanovich's jaw was broken. In Tomjanovich v. California Sports, Inc., Tomjanovich sued the Los Angeles Lakers under respondeat superior (vicarious liability), though the case settled out of court after trial and before appeal.

Storming the Stands

In the 2004 incident known as Malice in the Palace or Throw Down in Motown, Ron Artest (Indiana Pacers) charged into the stands of the Detroit Pistons' home, the Palace at Auburn Hills, to attack a spectator who threw a cup of beer towards him.

A mêlée broke out and the arena turned to chaos. Artest was suspended for the rest of the season (73 regular season games plus the playoffs). The fan was sentenced to 30 days in jail and 2 years of probation. No NBA players received jail time, though several players including Stephen Jackson, Jermaine O'Neal, and Ben Wallace, were suspended for several games, and four players including Reggie Miller and Chauncey Billups among others, were suspend for a game and without pay.

fan

person passionate about a favorite player, team, or league; short for "fanatic"

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The act of NBA players attacking fans in the stands is not new, however. In 1995, Vernon Maxwell (Houston Rockets) attacked a spectator in Portland, Oregon. He was suspended for 10 games and fined $20,000. Similarly, Antonio Davis (New York Knicks) was suspended in 2006 for entering the stands during a game against the Chicago Bulls. Davis claimed that someone was harassing his wife. Issuing suspensions and fines are a legitimate way to deal with illegitimate sports violence, but one wonders how effective a deterrent such penalties are, and why more participants are not arrested and charged criminally for storming into the stands.

Football

One would think that in a violent contact or collision sport such as American football that there would be more criminal cases. In fact, there are virtually none at the professional level involving sports participants.

Hackbart v. Cincinnati Bengals

Though discussed briefly in the previous chapter, and often mischaracterized as a criminal case, in Hackbart v. Cincinnati Bengals, Inc., is a civil case that nonetheless has relevance to criminal sports law. In this case, the court

employed the involuntary reflex defense to aggressive contact during a sports contest. Charles "Boobie"

Clark (Cincinnati Bengals) hit Dale Hackbart (Denver Broncos) on the back of the head out of frustration after an interception. The play was over, and Hackbart was not looking when he was hit from behind. The hit broke three vertebrae in Hackbart's neck and he suffered several muscular injuries as a result. The Tenth Circuit Court of Appeals reversed the trial court by holding that even a football player may be held responsible for injuring an opponent if he acts with the reckless disregard for the opponent's safety. The case was eventually settled out of court.

St. Pius High

In 1996, an incident involving an Albuquerque high school football game drew national attention. A player from St. Pius High School, with his father's help, wore razor-sharp helmet buckles in order to cut several players from Albuquerque Academy during a game. At least five players from Albuquerque Academy suffered cuts during the game and one was taken to the hospital to received ten stitches on his forearm. The student was banned from competition for a year. He was also expelled from St. Pius. Both father and son were sentenced to community service and probation, and the father was sentenced to two days in jail as well after being charged with conspiring to commit aggravated assault with a deadly weapon.

Toughman

Participants in Big Four sports other than hockey are not normally prosecuted for illegitimate violence. However, concern over other violent sports such as the Toughman competition has led to it being banned in a few states, especially after the death of a female participant in Florida in 2003, the third death in 10 months.

During the two-day tournaments, fighters with little experience step into the ring to box in three one-minute rounds for the chance to win small financial rewards.

Similarly, a few states still refuse to allow (i.e., license) mixed martial arts (MMA) competition in their state due to the inherently violent nature of the sport, though the vast majority of states allow it.

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Figure Skating

Figure skating is not a contact sport, it is not even a violent sport. However, figure skaters Tonya Harding and Nancy Kerrigan were competing to make the 1994

United States Olympic team at the U.S. Figure Skating Championships in Detroit's Cobo Arena. In a low point for Olympic sports in general, Kerrigan was clubbed in the knee with a baton by Shane Stant. The incident was planned by Harding's ex-husband Jeff Gillooly and friend Shawn Eckardt. At least four members of the group who assisted in attacking Kerrigan received prison sentences. At the Olympics, Kerrigan won the silver medal and Harding finished eighth. Harding pleaded guilty to conspiracy to hindering prosecution, received three years' probation, a $160,000 fine, was banned from U.S. Figure Skating, and stripped of her 1994

Championship title.

Illegitimate violence in sport can occur in all sport activities, but rarely are criminal charges brought against the actual participants. Even in crazy and

chaotic situations such as incidents involving players and entire teams before, during and after games, no arrests are made. In sum, other than in hockey, criminal charges for sport participants during the game are rare.

- ***Spectators***

Unlike participants, spectators at sporting events and practices are been charged with crimes frequently. There are countless examples of fans storming the field, and both civil and criminal actions have been instituted against them thereafter.

Many such incidents have caused permanent injuries and death. Incidents have occurred at all levels including Little League, high school, college, professional and Olympic.

It is quite common for fans during the heat of a contest to become violent in the stands among each other and, unfortunately, against sports officials and even athletes. During a 1995 football game between the New York Giants and the San Diego Chargers, there was a snowball fight. One man was charged with improper behavior, 15 people were arrested, 175 people were ejected, and 15 people were injured. The Chargers' equipment manager was knocked unconscious. Sometimes sports fans may have to be controlled.

Serious violence happens outside of the stands as well. In 2011, on opening day at Dodger Stadium spectator Bryan Stow, a San Francisco Giants fan, was beaten unconscious. He required extreme medical care to control seizures due to the traumatic brain injury. The two men who allegedly attacked Stow were eventually arrested, and Stow's family filed a civil lawsuit against the Los Angeles Dodgers.

Violent spectator behavior is not is not unique to the United States. In fact, it is generally accepted that the most violent fans in the world are at soccer matches, especially in England. Numerous fans have died during pre-and post-game soccer celebrations. There are countless examples of spectators storming the field or court during a contest, not just as part of the post-game celebrations or skirmishes.

Such actions have led to criminal prosecutions. The next sections explore some examples of outrageous incidents involving spectators in a wide variety of sports, many resulting in criminal charges.

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Chapter Four

Attacking Participants

Sometimes spectators run from the stands onto the field and attack players.

Usually they are charged with crimes such as trespassing or disorderly conduct.

On occasion, the spectators receive harsh treatment from the participants for the disruption. For example, in 1995, Chicago Cubs reliever Randy Myers was charged by a 27-year-old bond trader who ran out of the stands at Wrigley Field. Myers saw the man coming, dropped his glove and knocked him down with his forearm. In 1999 in Milwaukee, a 23-year-old fan attacked Houston right fielder Bill Spiers, who ended up with a welt under his left eye, a bloody nose and whiplash.

Monica Seles

On April 30, 1993, in Hamburg, Germany, U.S. tennis player Monica Seles was stabbed by Günter Parche, an obsessed fan of rival Steffi Graf. Parche ran from the crowd to the edge of the court during a break between games

and stabbed Seles between her shoulder blades with a kitchen knife. She was quickly rushed to a hospital, and her tennis career was on hold for over two years. Parche was charged, but under German law he was not jailed because he was found to be psychologically abnormal and was instead sentenced to two years' probation and psychological treatment. The incident, and Germany's treatment of it, shocked the international sports community.

Trespassing

Fans entering the field of play can cause confusion and serious injury, and fans that do so are often charged with trespassing. In November 2005, a Cleveland Browns fan ran onto the field during a contest with the Pittsburgh Steelers. He was charged with the crimes of disorderly conduct and criminal trespassing. Similarly, on October 2005, a fan ran onto the field during a Cincinnati Bengals and Green Bay Packers game and actually took the football from quarterback Brett Favre. This fan was banned from Paul Brown Stadium and Cincinnati Reds' Great American Ball Park.

Flying into the Arena

On November 6, 1993, paraglider James Miller, sometimes referred to today as Fan Man, crashed his flying contraption, which was powered by a rear-fan, into Caesar's Palace in Las Vegas during the heavyweight title boxing match between Evander Holyfield and Riddick Bowe. Miller descended into the arena in the seventh round of the fight and his paraglider device became caught in the overhead lights as he was dangling on the top rope of the ring. A mêlée ensued and Miller was knocked unconscious by crazed fans and security. He was charged with the crime of dangerous flying and was released on $200 bail.

Miller was also arrested in January, 1994 for flying into the stadium during the Denver Broncos game against the Los Angeles Raiders at the Coliseum in Los Angeles. He was charged with interfering with a sporting event. As if that were not enough, somehow Miller repeated the stunt the very next month in England, served a prison sentence, and then was deported back to the United States.

Calvin Klein

In response to this kind of outlandish behavior by fans, some states and cities have enacted laws against interfering with a professional sporting event, more commonly Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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referred to as Calvin Klein laws after the famous clothing designer. In March 2003, Klein left his seat at Madison Square Garden and grabbed New York Knicks' player Latrell Sprewell during an NBA game before he was ushered back to his seat.

Essentially Calvin Klein laws are city ordinances that make trespassing on the playing area of a major sporting event a misdemeanor.

In May, 2004, a Totowa, New Jersey man became the first person to be prosecuted under the Calvin Klein law when he ran onto the field during a Mets game holding a sign saying "Howard Stern, Here's Johnny." Under this law, such criminal trespass at a sporting event in New York City provides civil penalties between $1,000 and $5,000 and between $10,000 and $25,000 for making physical contact with a player, as Calvin Klein did in 2003.

Philadelphia and Eagles Court

No city in the United States has become more infamous with regard to spectator misbehavior and crimes than Philadelphia. As far back as December, 1968, in what became known as the Santa Claus incident, angry fans threw snowballs at a man dressed as Santa Claus during the halftime show of Philadelphia Eagles football game. Examples of uncivilized behavior are too numerous to list. However, acts of violence by Eagles fans against fans of visiting teams, combined with on-going difficulties relating to public drunkenness prompted Philadelphia municipal judge Seamus McCaffrey and the Philadelphia Police Department to establish a small, in-stadium courtroom known as Eagles Court at Veteran's Stadium in 1997. A courtroom was built into the stadium below the playing field where unruly fans were taken for quick judgment and sentencing in cases involving disorderly conduct, public intoxication, and other offenses. The court often forced offenders to give up season tickets, pay a $400 fine and sit in jail for the rest of the game. In 2007

Philadelphia Eagles became the first NFL team to allow fans to use text messaging to report unruly fans to security personnel.

Still, Philadelphia fans have found ways to maintain their status of ill-repute. In 2009, a fan was charged with two misdemeanor counts for throwing a beer on Philadelphia Phillies player Shane Victorino while making a play in the outfield.

In 2009, three people were charged with murder and conspiracy in an attack on fan David Sale, Jr., who was beaten and kicked to death near Citizens Bank Park during a Philadelphia Phillies baseball game. In 2010 a 21-year-old New Jersey man, sometimes referred to as Vomit Man, was sentenced to up to three months in jail for intentionally vomiting on another spectator and his 11-year-old daughter in the stands at a Philadelphia Phillies baseball game. Matthew Clemmens, of Cherry Hill, N.J., pleaded guilty to charges of assault, harassment and disorderly conduct after he admitted that he stuck his fingers down his throat and vomited on Michael Vangelo, an off-duty police captain, and Vangelo's daughter.

Parents and Youth Sport

Incidents across the country, including shootings of high school coaches, have drawn national attention to parents involved in criminal youth-sport misconduct.

The state of New Jersey passed a law in 2002 increasing the punishment for assaults committed during youth sporting events, especially by intense, overzealous and in some cases raging parents. Currently, the maximum possible punishment is up to 18 months in prison and more than $10,000 in fines. The crime used to be considered merely disorderly conduct.

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The New Jersey state law likely changed in response to a criminal case in which a parent was found guilty of ***involuntary manslaughter*** *(an unintentional killing as a result of a battery) during a fight after a youth hockey practice. A Massachusetts jury convicted Thomas Junta, rejecting claims that he acted in self-defense when he beat another father to death at a youth scrimmage during 2000. He was sentenced 6 to 10 years in prison for the death of parent Michael Costin, who was acting as the informal referee at the time. Junta was released in 2010.*

Junta is clearly not alone, however, in his out-of-control behavior involving a raging parent at a practice or competition. Some raging parents have been charged with child abuse for violent attacks on their children and others' children during a game. Coaches, players, and referees have been stabbed,

shot and killed in some instances. In 2006, an East Texas jury found a man guilty of aggravated assault with a deadly weapon in the shooting of a high school football coach who survived the injury. In Michigan, a man attacked his sons' baseball coach with an aluminum bat after the coach benched the boys. He was sentenced to two months in jail, ordered to pay $660 in fees and fines after pleading no contest to intent to commit great bodily harm. After two 17-year-olds were shot just outside the local stadium, the school district in Racine, Wisconsin, moved Friday night football games to Saturday afternoon.

*Other instances of criminal misconduct in sport include a father who drugged his children's tennis opponents, leading to one player's death. Christophe Fauviau was sentenced to eight years in prison after being convicted in France. He had confessed to the crime and to spiking the water bottles of his children's opponents 27 times in tournaments across France from 2000 to 2003, using the anti-anxiety drug Temesta, which can cause drowsiness. As a result of the continued outrageous behavior by parents and coaches in youth sport, the National Center for Safety Initiatives (**NCSI**) in partnership with the National Council of Youth Sports has created a national standards of care and a formalized background screening check in an effort to eradicate harm to children by adults and increase the level of safety among youth sports overall.*

Sports Officials

Numerous examples of players, parents, and other spectators attacking referees and umpires have forced states to enact legislation to protect sports officials from violence. In 2002, for example, a father and son stormed the field and attacked Kansas City Royals first-base coach Tom Gamboa during a game against the Chicago White Sox in Chicago. The son pleaded guilty to aggravated battery and mob action and was sentenced to five years' probation and community service. The father originally pleaded innocent, but he later changed his plea to guilty and was given 30 months'

probation, community service, and had to remain in a substance abuse program.

Many states have laws specifically related to the protection of sports officials.

*The National Association of Sports Officials (**NASO**) serves as an organization which advocates for sports officials' rights. Oklahoma became the first state to adopt state laws to protect sports officials from assaults, and states continue to address **involuntary manslaughter***

*the unintentional killing of another as a result of a battery **NCSI***

National Center for Safety Initiatives

sports official

*individual who referees a professional or amateur sports contest **NASO***

National Association of Sports Officials

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this issue through legislation. Some laws even extend protection to other personnel, including coaches, trainers, and administrators.

▪ Other Crimes Against Persons

Hazing

Hazing is a crime involving forced initiation. It has been at the forefront of national discussion in recent years. Forty-three states have some type of law prohibiting hazing, and examples of interscholastic and intercollegiate hazing rituals and incidents are too numerous to list. While many hazing incidents take place off-campus, published photographs of hazing incidents on the Internet have embarrassed student-athletes, parents, and their coaches and wreaked havoc for managers and administrators. Hazing incidents have led to the resignation of coaches and administrators, even if they were not directly part of these incidents or had no knowledge of the actions. While a formal initiation into groups and organizations is normally a respected process, hazing in today's society is a recipe for disaster and is simply no longer acceptable at any level.

Recent examples include several Frostburg State University (Maryland) field hockey players who pleaded guilty to hazing and were fined $300 each in 2005

for their roles in an alcohol-related initiation incident involving an 18-year-old woman off campus. Northwestern University's girls soccer team was suspended after hazing incidents were discovered in 2006. This led to the resignation of their coach. Chico State cancelled its softball season after a hazing incident in 2000. In Michigan, a Ferris State University student died after participating in an unofficial fraternity hazing party that involved heavy drinking. In 2008, the University of Wisconsin band was suspended for hazing.

Stalking

Stalking is a serious crime that affects both men and women from all walks of life.

Stalking involves unwelcome—sometimes psychotic—repetitive misconduct including harassing, annoying, threatening, and sometimes potentially deadly behavior.

Stalking does not merely involve direct, physical contact: telephone and online stalking are referred to as electronic or cyberstalking. Stalking is often related to domestic violence and abuse, but it does not have to be.

All states have now enacted anti-stalking laws. Many states have both criminal and civil anti-stalking laws. Stalking opportunities have skyrocketed due to the nature of e-mail and social media websites. No one is immune from this unwanted and obsessive behavior. With just a click of a button, anyone can obtain names, dates of birth, addresses, phone numbers, marital status, and so on via the Internet. With cellphones and smartphones, stalking is just one click or text away.

The appropriate remedy for stalking is a restraining order (sometimes referred to as an order of protection or personal protection order), but such remedies make situations public, cost money, and are ultimately served at the discretion of a judge who may or may not issue one. California enacted the first anti-stalking statute in 1990, primarily in response to the public outcry over the stalking and murder of actress Rebecca Schaeffer.

ESPN sideline reporter Erin Andrews garnered a lot of unwanted public attention in 2009 when a man named Michael David Barrett stalked her and recorded *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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videos of her through hotel peepholes. To make matters worse, he then posted videos of her nude on the Internet. Garrett pleaded guilty to interstate stalking and was sentenced to 27 months in prison and $5,000 in fines.

Numerous other sports celebrities and athletes have been subjected to highly publicized instances stalking. NBA player Luke Walton (Los Angeles Lakers), MLB

broadcaster Bob Uecker (Milwaukee Brewers), tennis player Serena Williams, and Olympic gymnast Shawn Johnson have all been subjects of stalkers' unwanted attention. In 2007, Florida A&M University basketball coach Mike Gillespie, Sr.

was fired for a misdemeanor stalking charge.

Extortion

Also known as blackmail, ***extortion*** *is a heinous crime in which one uses threats of intimidation to coerce someone to do something against their will. In some cases, the extortionist will demand money, services or property using threats to their victim's reputation, employment or life. States define extortion in various ways, and some require the actual transfer of money or property—as opposed to mere threat—but ultimately it is a crime of coercion. Often the motivation for extortion is financial.*

Karen Sypher

In 2011, Karen Sypher was sent to federal prison after being found guilty of attempting to extort University of Louisville head basketball coach Rick Pitino.

She was convicted in 2010 of attempting to coerce Pitino to give her cash (according to the government, she wanted up to $10 million) and gifts. She did so by threatening to report his alleged rape of her 2003, and though the evidence of rape was not examined by the courts, it apparently demonstrated their intercourse to be consensual. Sypher was sentenced to 87 months (7 years) in prison. The jury also found her guilty of lying to the FBI and retaliating against a witness.

- ***Crimes Related to Property***

Sports Memorabilia

While there are relatively few sports related crimes involving real or personal property, there is huge concern over the sale of fraudulent sports memorabilia.

Whether through public auctions or retail stores, many individuals have been found guilty of fraud and forgery after investigations by the FBI. Fraud was thoroughly discussed in Chapter 3: Sports Torts. However, examples of fraud in criminal law context have their place in the study of sports law as well.

*One of the ways to avoid memorabilia fraud is to use Certificates of Authenticity (**COA**) to validate the legitimacy of the signatures and the goods. Other methods include the use of holographic seals, notarized letters, and online databases for transparency in transactions. Some of the most reputable memorabilia dealers might offer 100 percent lifetime guarantees of authenticity, a guarantee of sorts allowing the purchaser a full refund if they discover the item to be fraudulent.*

extortion

also known as blackmail, the act of attempting to force someone to do something against their well out of intimidation, fear of physical threat or public embarrassment.

COA

Certificates of Authenticity

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In 2006, a father and son from Las Vegas who sold sports memorabilia bearing forged signatures pled guilty to wire fraud. Knowingly selling fraudulent merchandise can also be characterized as the crime of ***counterfeiting*** *which is more thoroughly discussed in Chapter 10: Intellectual Property.*

Embezzlement

In 2010, seven University of Kansas employees were charged with stealing more than $2 million in tickets and selling them for personal use. Charlette Faye Blu-baugh, while the director of ticket operations, distributed tickets to all of her four co-conspirators and to two other men charged in related cases and used her computer expertise to hide the thefts. In 2011, a federal judge sentenced her to 57 months in prison and also ordered her to pay, with other defendants in the case including her husband, about $2.5 million in restitution to the university and the Internal Revenue Service. Individual defendants pled to wire fraud and conspiracy. Ben Kirtland, former associate athletic director, was sentenced to 57 months in prison as well and pleaded guilty to conspiracy to defraud the United States through wire fraud, tax obstruction, and interstate transportation of stolen property.

Destruction of Property

Alabama resident and University of Alabama fan Harvey Updyke, Jr., became quite the object of hatred when he was accused of poisoning two historic, 130-year-old oak trees with herbicide on the campus of Auburn University at the famous Toomer's Corner in February, 2011. Toomer's Corner is noted for the place where hundreds of Auburn fans gather to celebrate victories, often by toilet-papering the trees. At the time of this writing, the 62-year-old Updyke faced two felony counts of first-degree criminal mischief, two felony counts of unlawful damage, felony vandalism or theft of property from a farm animal or crop facility and two misdemeanor counts of desecrating a venerated object. The incident caused

outrage among Auburn and Alabama fans and garnered considerable national attention as well.

▪ Crimes Affecting the Public Health and Welfare

Ticket Scalping

The unauthorized reselling of an event ticket is referred to as ticket scalping, and is a crime in many jurisdictions. Ticket scalping is the process of legitimately purchasing a ticket (or large numbers of tickets) from a primary seller, such as an off-site box office, the arena or venue, or the team or league office, and then reselling the tickets on the street for more money. The intent is to profit from the difference in price.

Scalping laws were originally enacted for safety, to avoid fan harassment and public nuisance, and for tax and other governmental reasons. State laws and city ordinances which regulate ticket scalping focus on where a sale of a ticket may (or may not) take place, and to what degree the scalper may sell a ticket above ***counterfeiting***

the intentional act of misrepresenting something, such as memorabilia or other merchandise, as authentic

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its face value. The driving force behind ticket scalping is to make a profit by charging the highest price possible for a limited-seating event.

Today, many think scalping laws are antiquated and out-of-step with reality. As of 2010, 28 states regulate the resale of tickets. Ticket-scalping is more often done through various secondary ticket marketing brokers online than in person. While some states have repealed their statutes entirely and do not regulate ticket scalping at the state level, there are some hold-out states that do have laws governing scalpers and usually limit scalpers' activities by one or more of the following: 1. Requiring a license, fee, or other tax to work as a scalper; 2. Limiting the amount that a scalper (or broker) may resell the ticket in terms of actual dollar increase, maximum, or percentage of stated ticket price; 3. Establishing a ceiling on the number of tickets an individual scalper may sell for a profit;

4. Limiting the resale to no higher than the actual price stated on the ticket; 5. Restricting the geographic location of a sale of a scalped ticket in terms of distance away from an event.

States that have adopted laws regulating ticket scalpers claim that such activity still negatively affects public welfare and public interest. These laws allow for civil and criminal penalties for violators. Sometimes, civil lawsuits are brought under the theory of violation of consumer protection acts when counterfeiting is involved.

Reselling tickets online at face value is legal in all 50 states. Other states have some sort of restriction on how much tickets can be marked up by sellers: in Massachusetts the maximum markup is $2 plus fees, and in Pennsylvania it is 25

percent of the ticket's original price plus fees. Some cities such as St. Louis and Detroit and Pittsburgh and Seattle have required that scalping be performed outside established no-scalping or buffer zones. In New York state, for venues which hold more than 5,000 people, one cannot sell within 1,500 feet, and for venues that seat less than 5,000 it is 500 feet.

There are no federal laws directly governing ticket scalping, and several states and municipalities have given up attempting to enforce scalping laws

altogether, even though they remain on the books. Missouri, New York, Illinois, Florida, Minnesota, and South Carolina recently repealed their ticket-scalping laws. De-regulating scalping appears to be a trend, especially with the ease of reselling online by companies such as StubHub, Paciolan, Razorgator, Tickets.com, and TicketLiquidator.com. Interestingly, eBay bought StubHub in 2007 for $310 million and the NCAA has teamed up with Razorgator as a way to distribute tickets for championship events.

Sports Bribery (Point-Shaving)

Sports bribery, or intentionally fixing a game, is also known as point-shaving. Sports bribery is illegal and numerous examples have been brought to light in the area of sports law. At the heart of sports bribery is the concern that games are "fixed"

by players, coaches, trainers, or others, defeating the idea that the outcome of a sporting event is left to chance and skill. A disturbing issue in sports is the role that the athletes, coaches, and even sports officials themselves might play in alter-ing the outcome of a game in order to profit from betting on a loss, victory, or the point spread. Fixing a game is often associated with basketball. Since only five players per team are on the court at any given time, there is a greater likelihood *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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that one player can affect the game. Federal and state legislation guards against bribery in sports contests by imposing fines or imprisonment for conspiracy.

Sports Gambling (Sports Wagering)

Sports gambling (interchangeably referred to as sports wagering) does not involve any physical force, but federal and state governments have been concerned enough to enact anti-gambling prohibitions under the government's general ability to protect the health, safety, and welfare of its citizens under its constitutionally authorized police power.

Though federal laws such as the Wire Communications Act of 1961, the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) (organized crime), and the Bribery in Sporting Contests Act of 1979 have been applied in sports law prosecutions, attempts to regulate sports gambling been met with simultaneous resistance and success. Certainly, the advent of the Internet has greatly shaped the landscape with regard to sports wagering.

Professional and Amateur Sports Protection Act (PASPA) *A federal law, the Professional and Amateur Sports Protection Act of 1992 (also known as the Bradley Act), was enacted to stop the spread of state-authorized gambling and to protect the integrity of sporting events generally. Nevada, the only state at that time that had legalized sports gambling, was granted immunity from this federal law (also known as the Las Vegas loophole). Under PASPA it is unlawful for a governmental entity, or a person acting pursuant to the law of such an entity, to operate, sponsor, advertise, promote, license, or authorize a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive game in which amateur, Olympic or professional athletes participate.*

The Act exempts pari-mutuel betting events such as horse races and jai alai games. The states of Delaware, Montana and Oregon are also exempt from the Act. Oregon discontinued sports gambling in 1997, but Delaware allowed sports betting in 2009. In response, the NCAA approved a policy that bans states, such as Delaware, from hosting championship events if they

allow fans to bet on single games, though the same policy does not apply to states that allow parlay betting, lottery tickets, pull tabs and sports pools.

Office Pools

Part of the allure of the NCAA's March Madness basketball tournament is participating in office pools all around the country and online. Employers have criticized the lack of productivity for workers during this time period, though many employers support the use of office pools as a way for employees to bond and boost morale.

Regardless, any wager (including vacation days) on this annual event more than likely violates state criminal law, except in a few states. Student-athletes could lose their eligibility for placing wagers, and coaches can be terminated.

Coach Rick Neuheisel was fired as the University of Washington's football coach in June 2003 for his participation in tournament pools in which he won more than $12,000, even though it was legal in that state.

PASPA

Professional and Amateur Sports Protection Act

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Fantasy Sports

But does gambling on fantasy sports involve strictly games of chance, or does it involve skill? The answer remains unclear at the state level. If the latter, it is might not be considered gambling. Based upon Attorney General opinions, it appears that in the states of Florida and Louisiana that wagering on fantasy sports is illegal. In Pennsylvania, the only legal forms of gambling are the state lottery, small games of chance such as Bingo, horse races and slot machine gambling.

Meanwhile, Montana actually has a state-run fantasy sports league lottery (Mont.

Code Ann. § 23-5-802). Indeed in Montana, you can actually participate in a state-run NCAA March Madness basketball tournament.

***Unlawful Internet Gambling Enforcement Act (UIGEA)** At the federal level, Title VIII of the SAFE Port Act, also known as the Unlawful Internet Gambling Enforcement Act of 2006 (**UIGEA**), actually contains specific language stating that participation in fantasy sports does not constitute gambling (31 U.S.C. §5361-5367). However, any Internet casino that attempts to accept credit card payments, bank transfers or other illegal gambling payments should be blocked from doing so under this law. The law does not target individuals, but those who facilitate the transfer of money from a U.S. account using credit.*

In 2009, BetOnSports.com founder Gary Kaplan pled guilty to federal racketeering conspiracy as customers lost more than $16 million (he made more than $100 million) as part of his offshore criminal gambling enterprise. The company ceased operation in 2006. Similarly, in 2011, 11 people including the founders of three of the biggest Internet poker companies, PokerStars, Full Tilt Poker, and Absolute Poker, were charged with bank fraud, money laundering and illegal gambling. The U.S. government also seized five Internet domain names used to host the poker games.

NCAA and Sports Wagering

The NCAA has a keen interest in protecting the integrity of its sports product and frowns upon any sort of sport-related gambling. Therefore, the NCAA has various bylaws related to sports wagering. NCAA Bylaw 10.3, Sports Wagering Activities, for example, stipulates that certain individuals shall not knowingly participate in sports wagering activities or provide information to individuals involved in or associated with any type of sports wagering activities concerning intercollegiate, amateur or professional athletics competition. Those individuals include: (a) Staff members of an institution's athletics department; (b) Nonathletics department staff members who have responsibilities within or over the athletics department (e.g., chancellor or president, faculty athletics representative, individual to whom athletics reports);

(c) Staff members of a conference office; and

(d) Student-athletes.

Bylaw 10.3.2, Sanctions, notes that

(a) A student-athlete who engages in activities designed to influence the outcome of an intercollegiate contest or in an effort to affect win-loss margins ("point-shaving") or who participates in any sports wagering activity involving the student-athlete's ***UIGEA***

Unlawful Internet Gambling Enforcement Act

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institution shall permanently lose all remaining regular-season and postseason eligibility in all sports.

(b) A student-athlete who participates in any sports wagering activity through the Internet, a bookmaker or a parlay card shall be ineligible for all regular-season and postseason competition for a minimum period of one year from the date of the institution's determination that a violation occurred and shall be charged with the loss of a minimum of one season of eligibility. If the student-athlete is determined to have been involved in a later violation of any portion of Bylaw 10.3, the student-athlete shall permanently lose all remaining regular season and postseason eligibility in all sports.

Similarly, the NCAA defines Sports Wagering in Bylaw 10.02.1: Sports wagering includes placing, accepting or soliciting a wager (on a staff member's or student-athlete's own behalf or on the behalf of others) of any type with any individual or organization on any intercollegiate, amateur or professional team or contest. Examples of sports wagering include, but are not limited to, the use of a bookmaker or parlay card; Internet sports wagering; auctions in which bids are placed on teams, individuals or contests; and pools or fantasy leagues in which an entry fee is required and there is an opportunity to win a prize.

It also defines Wager in Bylaw 10.02.2:

A wager is any agreement in which an individual or entity agrees to give up an item of value (e.g., cash, shirt, dinner) in exchange for the possibility of gaining another item of value.

In essence, student-athletes may not gamble on any sport that is a recognized NCAA sport. Student-athletes may play fantasy sports unless the student-athlete has something to lose such as cash money.

College Incidents: Early Years

Concerns over the influence of sports gambling and sports bribery are justified at all levels. Several incidents involving NCAA schools justify its position that student-athletes may not engage in sports gambling of any type.

Student-athletes have become targets for illegal gambling activities, particularly since they cannot receive pay for their services and the financial enticement to intentionally throw a game could be too tempting to give up.

In 1945, five Brooklyn College players were involved in a scandal of sports bribery. None were prosecuted, but the bookies who paid each of them $1,000 to throw games were sentenced to prison. The 1950–51 City College of New York was also involved in a widespread point-shaving scandal involving 33 players. In fact, New York District Attorney Frank Hogan indicted players from four New York schools, including City College, Manhattan College, New York University, and Long Island University.

The University of Kentucky basketball team did not play during the 1952–53

season due to a point-shaving scandal revealed in 1951 in which three players were arrested for taking bribes to influence a game in Madison Square Garden.

In the 1960s, St. Joseph's University (Pennsylvania) had to relinquish its third place finish in the NCAA basketball tournament after it was revealed that a student-athlete was involved in sports bribery.

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In 1981, Rick Kuhn, a member of Boston College's basketball team, and four others were found guilty of sports bribery and sentenced to jail for game-fixing during the 1978–79 season. Infamous gangsters Henry Hill, a member of the Lucchese crime family of New York and the inspiration for the movie Goodfellas, and Jimmy Burke were involved in the incident. Kuhn was sentenced to 10 years in prison, but it was reduced to 28 months. In the 1980s, Tulane University's John "Hot Rod" Williams was charged with conspiracy and sports bribery for throwing basketball games, but the charges were dropped after a mistrial.

College Incidents: 1990s

Arizona State University's basketball team was involved in a sports bribery scheme during the 1993–94 season in which two players, Stevin "Hedake" Smith, and Isaac Burton, intentionally influenced the outcome of four games. The FBI got involved after unusual and heavy betting took place with sports bookmakers in Las Vegas.

Both players pled guilty to conspiracy to commit sports bribery in 1997.

In 1994, Dennis Lundy, a former running back at Northwestern University pled guilty to perjury related to point-shaving and intentionally fumbling the football at the 1-yard line in a game against the University of Iowa. In 1995, Kevin Pendergast, a placekicker from Notre Dame, placed a bet in Las Vegas that Northwestern University's basketball team would lose to the University of Michigan.

Pendergast had convinced Dewey Williams and Dion Lee (both Northwestern players) to shave points in exchange for money. All three were arrested, found guilty and sentenced to prison, though both the FBI and the NCAA influenced the court to use the three as examples by having them engage in public discussions about sports gambling instead.

College Incidents: 2000s

In 2003, Former Florida State quarterback Adrian McPherson was accused of gambling on college and professional games, including games he played in. His trial ended in a mistrial when the jury could not reach a verdict. He

ultimately agreed to plead no contest to gambling and theft charges and did not have to serve jail time. Also in 2003, University of Washington head football coach Rick Neuheisel said he took part in a college basketball March Madness office pool in violation of NCAA bylaws. Washington terminated Neuheisel's contract, though he did receive a $4.7 million settlement after it was revealed that Neuheisal asked a university NCAA compliance officer if participation in office pools was acceptable.

In 2010, four former University of Toledo student-athletes entered guilty pleas in an alleged point-shaving scheme involving the Rockets' football and men's basketball teams during 2003–06. On April 11, 2011 a grand jury in the Southern District of California handed down an indictment against two former University of San Diego basketball players, a former assistant coach, and seven others for conspiracy to commit sports bribery (among other charges) in violation of 18 U.S.C. §371. The indictment alleged that San Diego players influenced the outcome of multiple games for monetary bribes. One of the players implicated in the scandal was Brandon Johnson, San Diego's all-time leader in points and assists.

Clearly, the above incidents demonstrate that sports gambling, wagering, bribery, and point-shaving, no matter what they are called, continue to be a
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challenge to monitor for the NCAA. Though he was never charged or convicted of sports bribery, former University of Florida basketball star

Teddy Dupay was kicked off the team in 2001 just prior to his senior year for merely associating with students, one who was his roommate, who placed bets on games including those he played in. The sports agency IMG now forbids employees from betting on college sports after a 2010 lawsuit alleged that the CEO bet on college football games and March Madness while the organization represented college coaches.

Professional Sports

Chicago "Black" Sox

In 1919, eight members of the Chicago White Sox, including "Shoeless" Joe Jackson, received lifetime bans for intentionally playing poorly to influence the outcome of baseball games. In what became known as the Black Sox scandal, allegations were made that the Chicago White Sox members threw the World Series to the Cincinnati Reds in exchange for payoffs from mobster Arnold Rothstein out of spite against Charlie Comiskey, the team's owner. All were acquitted after a two week trial, but their professional baseball careers were over. The incident was the subject of the 1988 film Eight Men Out.

Pete Rose

Pete Rose, manager of the Cincinnati Reds, agreed to permanent ineligibility in 1989

after an investigation concluded he had bet on Reds games as far back as 1985.

Evidence chronicled gambling on the Reds and on other games while he was the manager, from 1984–89. After years of denials, Rose confessed to betting on the Reds in a 2004 book, My Prison Without Bars. Rose's alleged gambling problem led Major League Baseball to ban him for life.

Art Schlichter

In 1982, the Baltimore Colts football team selected Art Schlichter as the fourth overall pick in the NFL draft. The Colts did not know of course, that Schlichter had a gambling addiction. Schlichter was ultimately suspended by

for betting on sports, and the NFL has banned him for life. He has been imprisioned numerous times for crimes including fraud, forgery, swindling, and writing bad checks. Still, Schlichter remained an advocate promoting the dangers of gambling. Then in 2011, Schlichter pleaded not guilty to all charges in a 13-count indictment in which he was accused of theft in the sale of Super Bowl tickets. Schlichter discussed his misfortunes in his 2009 book Busted: The Rise and Fall of Art Schlichter, with the help of co-author Jeff Snook.

Tim Donaghy

Tim Donaghy was an NBA referee when, in 2007, a betting scandal was discovered which led to charges of conspiracy to commit wire fraud and transmitting wagering tips. He pled guilty to betting on NBA games, including some he was officiating.

Donaghy won about 75 percent of his bets and was sentenced in 2008 to 15 months in prison, was later transferred to Hernando County (Florida) jail, and released in 2009. Like others banned from their sport due to criminal misconduct, Donaghy became an author and chronicled his experiences in his 2010 book, Personal Foul.

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Chapter Four

Crimes Involving Animals

Cruelty to Animals

On August 4, 1983, New York Yankees player Dave Winfield accidentally killed a seagull by throwing a ball while warming up before the fifth inning of a game against the Toronto Blue Jays at Toronto's Exhibition Stadium. After the game, he was brought to the Ontario Provincial Police station and charged with cruelty to animals. He was released after posting a $500 bond. The charges were dropped the following day. Ironically, Winfield became a member of the Blue Jays several years later in 1992.

Cockfighting

Cockfighting *is a fight between roosters to the death on which spectators gamble.*

As of 2008, it is illegal in all states, Louisiana and New Mexico being the last two to ban the activity. In 2002 federal legislation made it a crime to transport fowl across state lines to engage in fights. However, instances of illegal cockfighting operations appear annually. In 2005, for example, about 400 people were arrested at the Del Rio Cockfight Pit near Newport, Tennessee, and police confiscated about $40,000

in cash. Today, Tennessee is one of a few states where cockfighting is still a misdemeanor and violators rarely face more than a nominal fine of $50. This appears to be an ineffective deterrent for cockfighting.

Dogfighting

Dogfighting is a felony in 48 of 50 states, and a misdemeanor in the two others.

*NFL star Michael Vick brought to light the underworld of dogfighting when a search warrant was executed in 2007 as part of a drug investigation involving his cousin. An inspection of property owned by Vick in rural Virginia turned up hid-den dogfighting facilities. This led to state and federal investigations which then revealed drugs, gambling, and an interstate dog fighting operation. Vick and three other men were ultimately charged with operating an unlawful interstate dog fighting venture and violations of the federal Racketeer Influenced and Corrupt Organizations Act (**RICO**). Vick*

plea bargained by pleading guilty to Conspiracy to Travel in Interstate Commerce in Aid of Unlawful Activities and to Sponsor a Dog in an Animal Fighting Venture.

Sports Agent Crimes

Other than SPARTA, no current federal law specifically regulates sports agents either criminally or civilly. Numerous states have adopted criminal legislation against sports agents for failing to register with the state while recruiting student-athletes as potential clients.

Walters and Bloom

As discussed in Chapter 1, in United States v. Walters, Norby Walters, a sports agent, was charged with conspiracy, RICO violations, and mail fraud. The mail fraud ***cockfighting***

crime involving secretive gambling ring in which trained roosters to fight to the death

RICO

Racketeer Influenced and Corrupt Organizations Act, which spells out laws against organized crime

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charge arose from his actions in which student-athletes violated NCAA rules by signing post-dated contracts with him and his associate Bloom. The federal government argued that the mail fraud statutes were violated because each university required its athletes to verify their eligibility to play by letters sent to the appropriate athletic conference. Walters was initially convicted by a jury, but that conviction was reversed on appeal. Conspiracy and racketeering (RICO) charges were ultimately dismissed.

Human Trafficking

Also mentioned in Chapter 1, California-based sports agent Gustavo "Gus" Dominguez was convicted in 2007 of the federal crime of ***human trafficking*** *for smuggling Cuban baseball players into the United States. More specifically, he was charged with conspiracy to commit alien smuggling for profit, bringing aliens into the United States, and transporting and harboring aliens for the purpose of commercial advantage and private financial gain.*

In August 2004, Dominguez succeeded in smuggling 19 Cubans into the United States. Prosecutors said Dominguez paid for the smuggling of five of those Cuban baseball players for the purpose of profiting by subsequently representing them as their sports agent. The new arrivals were then driven from Florida to California in a rented van and put to work training for Major League tryouts. Interestingly, United States immigration policy allows Cubans who make it to U.S. soil to stay in the country. Dominguez was sentenced to five years in prison, three years of probation and a fine of $12,000.

- ***Crimes against the Government***

If you think about it, all crimes are technically against the government. That is, the state via the district attorney or prosecutor brings criminal charges against a perpetrator for a violation of a rule that society says is a punishable offense. The following crimes are some of the most general violations or charges that the government has brought against criminal defendants including those found in sports law.

RICO

The term racketeering is the act of operating an illegal business or scheme in order to make a profit. It is a broad term which encompasses many criminal acts including bribery, counterfeiting, sexual exploitation of children, and illegal gambling, among many others. Racketeering is closely associated with organized crime, the mob. The Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted in 1970 to prevent illegitimate organizations from engaging in a mock business enterprise to profit through the use of bribery and extortion. This federal law has been used to prosecute attempts to affect the outcome of otherwise legitimate sports events. RICO has appeared in sports law in a variety of ways, especially in the sports gambling incidents and Michael Vick's dogfighting operation.

human trafficking

term used to describe smuggling scheme which involves the illegal importation of persons into the country

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Chapter Four

Wire and Mail Fraud

The Wire Communications Act of 1961 (18 U.S.C. §1084) was established to crimi-nalize gambling behavior which uses a wire communication (such as a telephone) to transmit to place illegal bets across state lines (i.e., via interstate commerce). The federal mail fraud statute (18 U.S.C. §1341)

defines fraud as a scheme or artifice which uses the mail to execute the scheme. This statute is often used by United States Attorneys in the prosecution of white-collar crimes. Similarly, the crime of wire fraud (18 U.S.C. §1343) provides for a penalty for any criminally fraudulent activity involving electronic communications. These crimes have appeared in scenarios involving sports agents who recruit student-athletes to become their professional clients.

Obstruction of Justice

Interfering with the work of police, investigators, agencies, prosecutors, or government officials is often referred to as ***obstruction of justice****. Former MLB player Barry Bonds was charged with 11 counts of* ***perjury*** *(lying under oath) and obstruction of justice after telling a federal grand jury in 2003 that he never knowingly took performance-enhancing drugs. Bonds pled not guilty. In 2011, a federal jury found Bonds, MLB's all-time home run leader, guilty of obstruction of justice for giving an evasive answer under oath about his alleged steroid use.*

As of the time of this writing, Bonds faced up to 10 years in prison for the guilty verdict, though many legal experts believe he will not serve nearly that amount of time.

False Accusations/Perjury

Accusations of rape ruined the lives of many in the Durham, North Carolina and Duke University communities. District attorney Mike Nifong lost his law license in 2007 for prosecutorial misconduct for his part in representing stripper Crystal Mangumn who alleged that she was raped by players David Evans, Collin Finnerty and Reade Seligmann after she danced at a team party in 2006.

In March 2006, Nifong gave almost 100 media interviews in which he said he had "no doubt" that three members of the team had engaged in a vicious, racially motivated rape, according to the complaint. The players' lawyers, on the other hand, said the district attorney was using the woman's false allegations to win re-election to his position. State Attorney General Roy Cooper took over the case in January 2007 and dropped the charges. The

federal civil case Evans v. Durham is still in litigation as of the time of this writing.

Other Crimes

Eventually the exploration of criminal law in the context of sport must end.

There are indeed countless examples of amateur and professional sports figures who have been charged and convicted of driving under the influence of drugs or ***obstruction of justice***

Intentional interference with a governmental investigation ***perjury***

lying under oath

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alcohol, disorderly conduct, illegal drug possession, domestic (or spousal) abuse or violence, failure to pay child support, kidnapping, and so on. Other crimes might include charges or convictions involving coaches, players, student-athletes or fans who engage in acts of voyeurism or peeping Tom activities, instances of public intoxication, perjury, hooliganism (mobbing), streaking (indecent exposure), bankruptcy fraud, and so on.

In 2007, the crime of ***driving under the influence*** *took an odd twist in New Jersey when the driver of a Zamboni ice-cleaning machine was charged with*

DUI for his antics in-between periods of a hockey game. However, the New Jersey judge held that a Zamboni is not considered a motor vehicle under state law because Zambonis do not carry passengers and are not used on state highways or public roads. In 2010, hot dog eating champion Takeru Kobayashi (Japan) was charged with the crime of ***trespassing*** *and* ***resisting arrest*** *when he attempted to get on the stage of the July 4 Nathan's Hot Dog Eating Contest for which he did not participate due to a contract disagreement.*

The following table demonstrates a way to categorize criminal law in the context of sports:

▪ *TABLE 4–1* ***Categories of Crimes***

Crimes Against

Crimes Against

Crimes Against Public

Crimes Against

Persons

Property

Health, Safety, and Welfare

Government

Assault

Counterfeiting of tickets Conspiracy to commit a crime Human trafficking (assisting

and merchandise

(solicitation)

in illegal immigration)

Battery

Embezzlement

Cruelty to animals

Illegal gambling (sports

wagering)

Extortion (Blackmail)

Theft

Dangerous flying

Mail and wire fraud

(parachuting)

Fraud

Trespassing

Disorderly conduct

Obstruction of justice

Hazing

Vandalism

Driving under the influence

Perjury

(DUI/DWI)

Manslaughter

Desecration of Property Point-shaving (sports

Racketeering (RICO) and

bribery)

organized crime

Mobbing

Destruction of Property Sports agent crimes

Use, sale or possession of

performance-enhancing

drugs

Reckless Homicide

Streaking/indecent exposure

Tax evasion

Reckless Endangerment

Corruption (of a public official)

Ticket scalping

Stalking

Drug trafficking

Voyeurism (Peeping Tom)

driving under the influence

Also known as DUI, the crime of operating a motor vehicle on a public road while impaired.

trespassing

entering real property without the consent of the owner ***resisting arrest***

failing to voluntarily comply with an officer's attempt to make an arrest
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Chapter Four

▪ Constitutional Law

Pat-Down Searches

Though more of a constitutional law issue than a criminal law concern, searching spectators prior to entry into an event or arena might involve the Fourth Amendment and its protection against unreasonable searches and seizures by the government, if the government is involved. State cases appear to reach inconsistent judicial decisions around the country. Constitutional issues in sports law will be addressed further in Chapter 12: Religion and Sports. A copy of the Amendments to the U.S. Constitution is found at the end of this textbook.

The NFL instituted a pat-down policy in 2005 in which males search males, females search females prior to entry. The intent of this policy was to deter the likelihood of an act of terrorism. Some feel that such pat-downs

*constitute **state action**, no different than being patted-down after an arrest. Others such as the American Civil Liberties Union (ACLU) believe that such procedures are even worse since they are suspicionless. That is, the search is conducted without reasonable suspicion.*

In Johnston v. Tampa Sports Auth., 530 F.3d 1320 (11th Cir. 2008), the Eleventh Circuit Court of Appeals reversed trial court and stated that Gordon Johnston, a high school government teacher and Tampa Bay Buccaneers season ticket holder, consented to suspicionless searches by voluntarily attending the game knowing he would be searched. The ACLU brought the case on behalf of Johnston. However, in a similar state case Sheehan v. San Francisco 49ers, 201 P.3d 472 (Cal. 2009), the California Supreme Court reversed and remanded lower court decisions which had ruled against ticket holders (the Sheehans) who claimed privacy violations as Johnston did.

State and federal laws appear to be inconsistent in this area. In State of North Dakota v. Seglen, 700 N.W.2d 702 (N.D. 2005), the North Dakota Supreme Court held that pat-down searches at a college hockey game were unconstitutional. However, in Stark v. Seattle Seahawks, 2007 U.S. Dist. LEXIS 45510 (W.D. Wash. 2007), a federal judge granted summary judgment to the Seahawks by holding that pat-down searches were conducted by private security personnel, and the government had no meaningful role in drafting or enforcing the pat-down policy. Thus, there was no state action, no violation of the Fourth Amendment, and no violation of 42

U.S.C. §1983, a federal civil rights statute.

- ***CASE 7***

Fred Stark, et al., Plaintiffs, v. The Seattle Seahawks, et al., Defendants
United States District Court for the Western

Defendants The Seattle Seahawks ("Seahawks"), Foot-

District of Washington

ball Northwest, LLC ("Football Northwest"), and First ***June 22, 2007, Decided***

& Goal, Inc. ("First & Goal") (collectively, the "private ***June 22, 2007, Filed***

entities") filed one combined motion for summary

judgment (Dkt. # 21), and Defendant Washington

OPINION BY: JAMES L. ROBART

State Public Stadium Authority ("Stadium Authority"), together with Defendant Lorraine Hine, filed a sec-I. INTRODUCTION

ond motion for summary judgment (Dkt. # 22). The

This matter comes before the court on Defendants'

court has considered the papers filed in connection

motions for summary judgment (Dkt. # # 21, 22).

with the motions and has heard oral argument. For

state action

an action by the government or an agent of the government which requires due process under the Fifth or Fourteenth Amendments and which might otherwise violate civil rights or liberties if not enforced

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the reasons stated below, the court GRANTS Defen-

Stadium Authority, in consultation with First & Goal, dants' motion.

began construction on what is now called Qwest

Field.1 The parties do not dispute that Qwest Field, ***II. BACKGROUND***

which cost approximately $430 million to build, is

Plaintiffs Fred and Kathleen Stark challenge the pat-a public facility owned by the Stadium Authority.

down searches that are a condition of a ticket-holder's Kawasaki Romero Decl. P 5. The majority of funding,

entry to National Football League ("NFL") games held approximately $300 million, for the development

at Qwest Field & Event Center ("Qwest Field"). The and construction of Qwest Field came from public

Starks, who are season ticket-holders, contend that the funds, with First & Goal financing the remaining pat-downs constitute unreasonable searches in violation $130 million. Id.

of the Fourth Amendment, pursuant to 42 U.S.C. § 1983

In November 1998, upon completion of construction of ("Section 1983"), and Art. I, § 7 of the Washington State Qwest Field, the Stadium Authority and First & Goal Constitution. For purposes of these motions, Defen-entered into a Master Lease agreement making First

dants' sole contention is that the pat-down searches,

& Goal "the sole master tenant."2 Ainsworth Decl., Ex.

which are authorized by private entities and conducted 4 (Master Lease) § 2.1. The Master Lease vests First & by private security personnel, do not constitute "state Goal with "exclusive power and authority to possess, action," as required to state a claim for a constitutional operate, use, sublease, and enter into …agreements"

violation. The facts pertinent to these motions are not involving Qwest Field. Id. In return, First & Goal pays in dispute.

an annual rent to the Stadium Authority of $850,000, In their Complaint, the Starks name the private entities plus any reasonable operating expenses that exceed

responsible for conducting the pat-down searches: the the annual rent. Id. at § 5.1. With some exceptions

Seahawks team (a member of the NFL), its owner,

set forth below, First & Goal retains all revenues Football Northwest, and First & Goal (a Washington derived from its operation of Qwest Field. Master

corporation that leases Qwest Field for the benefit of Lease § 2.1.

the Seahawks). They also name the public entity that Both the Stadium Act and the Master Lease require

owns Qwest Field, the Stadium Authority, and its Board First & Goal to pay the Stadium Authority 20% of the of Director's Chair, Lorraine Hine. The Starks contend net profits from the Exhibition Hall (a building next to that the private entities and the Stadium Authority are the stadium) into a common schools fund. Master

so closely entwined in the operation of Qwest Field that Lease § 6.1.2; Dunbar Decl., Ex. C at 1. First & Goal the searches conducted by the

private entities consti-also collects and remits to the Stadium Authority a

tute state action.

1.2% ticket surcharge that the Stadium Authority uses to pay down its tax obligation—$37 million in deferred ***A. Relationship Between the Stadium Authority***

sales tax on construction costs. Ainsworth Decl, Ex. 4

and the Seahawks

(Sec. Am. to Master Lease) § 18.2.3; see also RCW §

In 1997, the Washington Legislature enacted the Sta-

36.102.070. The Stadium Authority also receives fixed dium and Exhibition Centers Financing Act ("Stadium

payments from the sale of the naming rights for Qwest Act") setting forth a comprehensive financing plan for Field, which go toward major maintenance and moda new stadium and exhibition hall. The legislature

ernization improvements of Qwest Field. Id.; Master

passed the Stadium Act in response to concerns that

Lease § 11.6. Finally, if the Seahawks are sold within the then owner of the Seahawks, Ken Behring, planned 25 years of the issuance of the bonds used to finance to move the Seahawks to California. Wojtanowicz Decl., construction, the state will receive 10% of the gross sell-Ex. 4 at 3. In an attempt to keep the team in the

ing price. RCW § 43.99N.020(2)(b)(vi).

greater Seattle area, Football Northwest negotiated

and eventually acquired an option to purchase the Sea-B. NFL Pat-Down Policy

hawks from Mr. Behring. Id. Football Northwest

In August 2005, the NFL adopted a policy mandating

announced that it would not exercise its option to pur-

"limited pat-down inspections" of everyone entering

chase the team unless there was a public commitment

NFL stadiums on the day of an NFL event. Ahlerich

"to enable and partially fund construction of a new

Decl. P 13, Ex. B. First & Goal, at the Seahawks' behest, football stadium for the Seahawks." Id. The passage of implemented the pat-downs at the start of the 2005 sea-the Stadium Act followed.

son, and in accordance with NFL guidelines. Shieck

The Stadium Act created the Stadium Authority entity, Decl. P 13. First & Goal hired a third-party security ven-granting it authority to "construct, own, remodel and dor, Staff Pro, which provides about 180 licensed

operate" an event center. See RCW § 36.102.050.

private security guards to visually inspect bags and con-Shortly after the Stadium Act went into effect, the

duct the pat-downs of ticket-holders on a same-gender (continued)

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basis. Id. at P 10-11. The Starks do not offer any evi-conducts its analysis mindful of the Supreme Court's dence to suggest that the Stadium Authority had any

direction in Brentwood:

role in planning or implementing the pat-down

What [constitutes state action] is a matter of nor-

searches, or that it approved, encouraged, or was even mative judgment, and the criteria lack rigid sim-consulted about these procedures. Defendants, on the plicity…. No one fact can function as a necessary

other hand, provide evidence that the Stadium Author-condition across the board … nor is any set of cir-

ity had no role in the implementation or execution of cumstances absolutely sufficient, for there may be

the pat-down searches. Kawasaki Decl. P 10.

some countervailing reason against attributing

III. DISCUSSION

activity to the government. 531 U.S. at 295.

[…]

1. Joint Activity Courts have found joint activity sufficient to impute state action in two general patterns: con-B. State Action

certed or conspiratorial activity between state and

To prevail on their federal and state constitutional private actors and the existence of a symbiotic relation-claims, the Starks must show that the pat-down searches ship. The Starks argue the latter, that the Stadium

at Qwest Field are fairly attributable to state action. The Authority is in a symbiotic relationship with First & Fourth Amendment prohibits only unreasonable searches Goal. A symbiotic relationship occurs when the govern-conducted by the government or its agents. United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed.

ment has "so far insinuated itself into a position of inter-2d 85 (1984). Private conduct may be considered gov-dependence with [a private entity] that it must be

ernment action if the deprivation of a federal right is recognized as a joint participant in the challenged

fairly attributable to the state. Lugar v. Edmondson Oil activity." Burton v. Wilmington Parking Auth., 365 U.S.

Co. Inc., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed.

715, 725, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). As evidence 2d 482 (1982) (noting that the Fourteenth Amendment of the alleged symbiotic relationship between the Sta-sets forth an "essential dichotomy" between govern-

dium Authority and First & Goal, the Starks point to ment action subject to scrutiny and private conduct, the following: (1) First & Goal leases Qwest Field, a

"however discriminatory or wrongful," for which it

publicly-owned facility, from the Stadium Authority; offers no shield). Conduct that constitutes state action (2) the Stadium Authority shares revenue with First & also satisfies Section 1983's "under color of law" require-Goal in the form of a ticket surcharge, naming rights ment.3 Id. at 935; Brentwood Acad. v. Tennessee Secondary payments, and profits from the Exhibition Hall; and

Sch. Athletic Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148

(3) Washington state owns an equity stake in the Sea-L. Ed. 2d 807 (2001). Similarly, Washington's constitu-hawks if the team is sold within 25 years from the issu-tional protections against unreasonable searches canance of the construction bonds. Opp'n at 18. The Starks not be invoked absent state action. State v. Carter, 151

also point to various provisions in the Master Lease Wn.2d 118, 85 P.3d 887, 890 (Wash. 2004).

requiring First & Goal to provide benefits to the public The Starks do not contend that the Stadium Author-not normally associated with commercial leases. For

ity conducted or authorized the pat-down searches.

example, the Master Lease requires that the Seahawks Instead, they argue that the Stadium Authority and

offer a certain number of affordable tickets, that First & First & Goal are so closely entwined that First & Goal comply with minority and woman-owned hiring

Goal's actions can fairly be attributed to the Stadium goals, and that First & Goal make payments into a Authority. In furtherance of their theory, the Starks fund for the development of youth athletic facilities.

argue that there is a symbiotic relationship between Id. While these facts establish an on-going relationship the Stadium Authority and First & Goal, or alterna-between the public and private entities, they do not, tively, that First & Goal is performing an act that is without more, show that the Stadium Authority "has so

"governmental in nature." Opp'n at 14, 23. The

far insinuated itself into a position of interdependence"

courts recognize the former theory as the "joint activ-with First & Goal, or the other Seahawks Defendants, ity" test for state action, and the latter as the "public function" test. Although the Ninth Circuit recognizes such that there is a symbiotic relationship between the at least four different criteria, or tests, to identify two. See Burton, 365 U.S. at 725.

state action, see Kirtley v. Rainey, 326 F.3d 1088, The Starks rely on Burton and Halet v. Wend Inv. Co., 672

1092 (9th Cir. 2003), the court limits its analysis to F.2d 1305 (9th Cir. 1982), to argue that state action is these two test, as there is no evidence or argument

satisfied by showing the integration and alignment of in support of the application of the remaining two

financial interests between the public and private enti-tests for state action. Notwithstanding, the court

ties. In Burton, the Supreme Court considered whether Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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a restaurant's refusal to serve plaintiff because of his private entity in a building owned and operated by

race could fairly be attributed to the public entity that the State, and a showing that the State profited from owned the building that housed the restaurant. 365 U.S.

the private entity's discriminatory conduct." Morse, 118

at 723. In finding state action, the Court stressed that F.3d at 1341.4 Thus, the Starks must tie the Stadium the restaurant was located on public property and that Authority's profits to the pat-down searches conducted the rent from the restaurant contributed to the support by the private entities.

of the public building. Id. The Court was further con-In light of Rendell-Baker and Morse, the court therefore vinced of state action by the argument that the restau-considers additional factors for determining whether a rant's profits, and hence the state's financial position, symbiotic relationship exists in this case. While the would suffer if it did not discriminate based on race.

Starks point to several ways in which the Stadium

Id. Similarly, in Halet, the Ninth Circuit found sufficient Authority and First & Goal benefit from their relation-evidence of state action where the county leased land to ship, they do not offer sufficient evidence that the Sta-a private entity who owned and operated an apartment dium Authority operates Qwest Field, or that it profits complex on the land. 672 F.2d at 1310. The Ninth Cir-from the allegedly unconstitutional pat-down searches.

cuit found a symbiotic relationship between the county There is no dispute regarding the Stadium Authority's and the owner based on the fact that the county owned grant to First & Goal of the exclusive right to operate the land and had developed it using public funds, the Qwest Field. See Master Lease § 2.1 ("[First & Goal] has county leased the land to the owner for the benefit of the exclusive power and authority to … operate …

providing housing to the public, and the county con-

[Qwest Field]"). The parties do dispute, however,

trolled the use and purpose of the apartment, as well whether the evidence supports a finding that the Sta-as the rent the owner could charge, a

percentage of

dium Authority profits from the pat-down searches.

which was paid to the county. Id.

The Starks contend that the Stadium Authority indirectly In Burton and Halet, the Supreme Court and Ninth Cir-benefits from the searches because the Seahawks want to cuit found symbiotic relationships between the public make fans feel more secure, and more likely to purchase and private entities based primarily on the presence of tickets. Opp'n at 21. These hypothetical increased ticket a mutually beneficial relationship. Subsequent courts sales, according to the Starks, correlate to greater profit that have considered the definition of a symbiotic rela-for the Stadium Authority based on the 1.2% ticket

tionship, however, have narrowed the scope and appli-surcharge it receives from First & Goal. As explained by cation of Burton. In Rendell-Baker v. Kohn, 457 U.S. 830, the Stadium Authority, and not refuted by the Starks, 842, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982), for exam-however, the ticket surcharge paid to the Stadium

ple, decided shortly after the Ninth Circuit decision in Authority is not profit, but is used to pay a tax obligation Halet, the Supreme Court rejected a symbiotic relation-the Stadium Authority owes on the construction of the ship argument because, although the state and private stadium. Dunbar Decl, Ex. E (Fuller Dep.) at 4. The tax school were in a mutually beneficial relationship, there obligation is a set amount, $ 37 million, that First & Goal was no showing that the state derived any benefit from owes to the Stadium Authority. Sec. Am. to Master Lease the challenged activity—i.e., the termination of school

§ 18.2.4. If the surcharge is not sufficient to retire the personnel. 457 U.S. at 842-43. In distinguishing Burton, debt at the time specified in the Master Lease, First & the Court emphasized that there was evidence that the Goal must make up the difference. Id. First & Goal's obli-state in Burton actually "profited from the restaurant's gation to collect the surcharge and pay it to the Stadium discriminatory conduct." Id. at 843. The Rendell-Baker

Authority ceases once it reaches the set amount. Id. Thus, Court found no such connection between the benefit

*the only effect the supposed increased ticket sales has on conferred to the state by the school and the challenged the surcharge is potentially to [*18] retire the debt activity, and thus no symbiotic relationship. Id. In sooner; an increase in ticket sales does not therefore Morse v. N. Coast Opportunities, Inc., the Ninth Circuit directly profit the Stadium Authority.*

later expounded on the Supreme Court's decision in

Rendell-Baker, finding "that governmental funding

The Starks' remaining arguments regarding the Sta-

and extensive regulation without more will not suffice dium Authority's ability to profit from the pat-down to establish governmental involvement in the actions of searches are unavailing. The Starks point to rental

a private entity." 118 F.3d 1338, 1341 (9th Cir. 1997) and naming rights payments that the Stadium Author-

(citing Rendell-Baker in overruling Ginn v. Mathews, ity receives from First & Goal, yet there is no dispute 533 F.2d 477 (9th Cir. 1976), a decision relying on Bur-that these are fixed amounts that do not depend on

ton). The Morse court noted that Burton's symbiotic

ticket sales. Dunbar Decl., Ex. A at 7; Kawasaki Decl.

relationship test requires additional evidence of interP 9. The Starks also contend that the Stadium Authordependence, such as "the physical location of the

ity profits from the revenues received from the

(continued)

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Exhibition Hall, a separate building next to the staThe Starks' reliance on the public function test is mis-dium. Again, the uncontroverted evidence before the

placed. The public function test is not satisfied simply court is that there is no pat-down search prior to enter-because a private entity performs a public function; ing this building and, on days when the Seahawks are rather, it requires that the public function be one that playing at 'Qwest Field, the revenue from the Exhibi-is traditionally reserved to the government. While pro-tion Hall does not go to the Stadium Authority. Kawaviding an event center may be considered a public

saki Decl., P 9, Ex. A at 24-25; Master Lease § 6;

*[*21] function in light of the directives in the Stadium Kawasaki Dep. at 3-5, Ex. F at 3. Finally, the Starks Act, the court is not persuaded that operating an event point to the State's 10% interest in the Seahawks if center is a function that has traditionally and exclu-they are sold within 25 years after issuance of the con-sively been reserved to the state. Indeed, there are struction bonds. The court fails to see how this interest, very few functions considered "exclusively reserved to which is pure speculation at this time, [*19] supports a the state" when determining state action. See Flagg finding*

that the Stadium Authority profits from the cur-Bros. v. Brooks, 436 U.S. 149, 158, 98 S. Ct. 1729, 56 L.

rent pat-down search policy at Qwest Field.

Ed. 2d 185 (1978) ("While many functions have been Although the court acknowledges the existence of a

traditionally performed by governments, very few have beneficial relationship between the private entities been 'exclusively reserved to the State."). The context and the Stadium Authority in this case, and that they in which courts have recognized traditional state func-may even publicly proclaim themselves a "model for

tions include administering elections, Terry v. Adams, public-private partnerships," this does not rise to the 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953); and level of a symbiotic relationship. The Stadium Author-running a company-owned town, Marsh v. Alabama, 326

ity did not participate in the original decision to con-U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). The court duct pat-down searches of ticket-holders, nor did it concludes that operating an event center, on the other control, profit, or directly benefit from the pat-down hand, does not rise to the level of a traditional state searches conducted by the private entities at Qwest

function. See, e.g. Jackson v. Metro. Edison Co., 419 U.S.

Field. Accordingly, the court concludes that the Starks 345, 352, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (holding have failed to come forth with sufficient evidence to that utility services, though marked with a strong public meet the symbiotic relationship test for demonstrating interest, were not the exclusive prerogative of the state, state action.

but associated with both the public and private

spheres); see also Lee v. Katz, 276 F.3d 550, 555 (9th 2. Public Function In the alternative, the Starks con-Cir. 2002) (noting that to satisfy public function test, tend that the pat-downs constitute state action because the task must be "both traditionally and exclusively gov-the Stadium Authority

"delegated nearly its entire pub-ernmental"). Indeed, the Ninth Circuit's Lee decision, lic function to First & Goal" and conferred the "govern-which the Starks rely on, "turn[ed] on what is quintes-mental" responsibility of managing a publicly owned

sentially an exclusive and traditional public function—

stadium required to yield numerous public benefits.

the regulation of free speech within a public forum."

Opp'n at 23-24. One way to find state action is by show-276 F.3d at 556-57 (holding that regulating speech ing that the private entity exercises powers "tradition-within the Rose Quarter Commons was state action,

ally exclusively reserved to the State." Jackson v. Metro.

but emphasizing "we do not hold that everyone who

Edison Co., 419 U.S. 345, 352, 95 S. Ct. 449, 42 L. Ed. 2d leases … a state-owned public forum will necessarily become a State actor") (citing Lansing v. City of Mem-477 (1974). In support of this theory, the Starks offer phis, 202 F.3d 821, 828-29 (6th Cir. 2000)).

testimony by the Executive Director of the Stadium

Authority, that the Master Lease requires First & Goal The expenditure of public funds for the construction to provide certain public benefits to the community, of Qwest Field does not alter the court's analysis. In that are not typical to a commercial lease. Wojtanowicz Rendell-Baker, the Supreme Court held that a privately Decl., Ex. 1 (Kawasaki Romero Dep.) at 10. Similarly, owned school that received up to 99% of its funding

from public sources and was subject to significant pub-the Starks offer evidence that the Stadium Authority's lic regulation did not perform a traditionally exclusive mission is to provide "economic and entertainment

public function. 457 U.S. at 842; see also Blum v. Yar-benefits to residence across the State of Washington."

etsky, 457 U.S. 991, 1011-12, 102 S. Ct. 2777, 73 L. Ed. 2d Id. at 32. Essentially, the Starks contend that because 534 (1982) (finding no public function where state sub-the Stadium Authority was created to provide a public sidized operating and capital costs of nursing homes benefit, i.e., an event center, its delegation of this duty and paid 90% of patients' medical expenses). The rel-to First & Goal does not relieve it of liability for First & evant question is not whether a private group served a Goal's actions. Opp'n at 24.

public function, or served one funded by the public, Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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but rather whether the function was one "traditionally of operating and maintenance responsibilities,

the exclusive prerogative of the State." Rendell-Baker, 457

risk, legal liability, and costs associated with the U.S. at 842 (emphasis in original) (citations omitted).

stadium and exhibition center, the team affiliate

Finally, to the extent the Starks argue that providing secu-becomes the sole master tenant…." RCW §

rity is a public function, for the same reasons as stated 36.102.060(8).

above, the court concludes that it is not. In so concluding, 3. Section 1983 provides, in relevant part: "[e]very the court finds the Tenth Circuit's decision in Gallagher person who, under color of any statute, ordinance,

persuasive. 49 F.3d at 1457. Under analogous facts to regulation, custom, or usage, of any State … sub-those before the court in this case, the Tenth Circuit jects, or causes to be subjected, any citizen of the held that providing security for a company that leased a United States … the deprivation of any rights, pri-government-owned facility did not constitute a public vileges, or immunities secured by the Constitution

function. Id. (concluding that where two private firms and laws, shall be liable to the party injured…." 42

planned and conducted pat-down searches indepen-

U.S.C. § 1983.

dently of university officials, the public function test was 4. The Tenth Circuit likewise recognized the lim-not satisfied). Because neither operating a stadium nor itations of Burton. In Gallagher v. Neil Young Free-providing security is a function traditionally and exclu-dom Concert, it found no symbiotic relationship

sively reserved to the state, the court concludes that the where a private lessee of a state university event

pat-down searches conducted by private actors at Qwest center contracted with a third-party to conduct

Field do not constitute state action.

pat-downs of all concertgoers. 49 F.3d 1442, 1453

(10th Cir. 1995). The Tenth Circuit noted that sub-IV. CONCLUSION

sequent Supreme Court decisions "have read Bur-

For the reasons stated above, the court GRANTS

ton narrowly" and distinguished it on its facts "as

Defendants' motions for summary judgment (Dkt. ##

part of [the Court's] justification for not finding

21, 22). The court directs the clerk to enter judgment state action." Id. at 1451. The Starks argue that consistent with this order.

Gallagher was not a case involving a symbiotic rela-

Dated this 22nd day of June, 2007.

tionship because the private-state interests were

JAMES L. ROBART

much less entwined than in the present case.

United States District Judge

Opp'n at 20-21. The Gallagher court, however,

found the lease and other economic and non-

FOOTNOTES

*economic benefits [*16] between the university*

1. Qwest Field did not became known as such until

and the private lessee insufficient under both the July 2004. Dunbar Decl., Ex. A. For ease of refer-nexus and symbiotic relationship tests because

ence, however, the court refers to the stadium as

the allegedly unconstitutional pat-downs could

Qwest Field for all events, including those occur-

not be tied to university policies or profits indis-

ring prior to July 2004.

pensable to the university's financial success. 49

2. The Stadium Act authorized the Stadium

F.3d at 1453 (noting also that joint activity did Authority "to enter into a long-term lease agree-not exist simply because the university shared the

ment with a team affiliate whereby, in consider-

private defendants' goal of ensuring a profitable

ation of the payment of fair rent and assumption

concert).

The issue of constitutionality on pat-downs is unclear at this point. Students should ponder whether such searches violate a right to privacy, constitute an unreasonable act by the government, and whether lawsuits alleging violations of constitutional freedoms are with or without merit.

- ***Summary***

The study of crimes certainly has its place in sports law. The relationship between torts and crimes is close, but understanding their differences is vital. For example, in criminal law, the state brings a charge against the perpetrator. The burden of proof *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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in a criminal case is beyond a reasonable doubt. Rarely are athletes and other participants prosecuted for conduct during a sports contest, but they are not immune from prosecution and certainly not immune from a civil suit under tort law.

Crimes can be divided into four general categories: crimes against persons, crimes against property, crimes against the public health, safety, and welfare, and crimes against the government. Crimes are either felonies or misdemeanors. The government has an interest in maintaining the integrity of sports contests both on the playing field and in the stands.

Specific types of sports crimes include sports gambling, ticket scalping, and sports bribery. RICO statutes have deterred the influence of organized crime in the sports world, though there are numerous examples of organized crime and its influence in college and professional sports.

There are countless examples of high-profile athletes and coaches being charged with crimes unrelated to their sport, though that is not the focus of this chapter. Recent suspensions involving the illegal use of performance-enhancing drugs, allegations of point-shaving schemes, and the continuing illegitimate violent physical misconduct by parents, players and spectators provide enough material for an entire semester, and many of the examples found in this chapter can easily be found on YouTube.

Regulating gambling over the Internet continues to present challenges for the government despite laws which make it a crime. Ticket scalping is an ever evolving subject for legislatures to address and, again, with the advent of the Internet many states are either repealing or failing to enforce ticket scalping laws in this new era of secondary ticket marketing and distribution. There have been constitutional challenges related to mandatory pat-downs at professional and college sports under the Fourth Amendment's prohibition against unreasonable searches and seizures by the state.

▪ ***Key Terms***

actus reus *criminal act; literally, the "act thing"*

aggravated assault *attempt to commit serious bodily harm especially with an object or weapon*

aggravated crime *crime involving the use of a weapon or causing serious bodily injury*

assault *willful attempt or threat to inflict injury; usually associated with battery* ***attempt*** *an unsuccessful illegal act carried out with criminal intent* ***battery*** *crime involving unlawful physical contact with another person* ***beyond a reasonable doubt*** *the test the government (state) must prove in a criminal case*

cockfighting *crime involving secretive gambling ring in which trained roosters to fight to the death*

conspiracy *an agreement between two or more persons to commit a crime* ***counterfeiting*** *the intentional act of misrepresenting something, such as memorabilia or other merchandise, as authentic*

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crimes affecting the public health and welfare *including blackmail, illegal gambling, and prostitution*

crimes against the government *including tax evasion, treason, RICO violations, and terrorism*

crimes against the person *including assault, battery, robbery, hazing, murder, rape, and kidnapping*

crimes injurious to property *including arson, trespass, vandalism, and theft* ***defenses to crimes*** *various claims made by those accused of crimes to demonstrate lack of guilt or intent, including self-defense*

driving under the influence *Also known as DUI, the crime of operating a motor vehicle on a public road while impaired.*

extortion *also known as blackmail, the act of attempting to force someone to do something against their well out of intimidation, fear of physical threat or public embarrassment.*

fan *person passionate about a favorite player, team, or league; short for "fanatic"*

felony *crime punishable by more than one year in prison* ***human trafficking*** *term used to describe smuggling scheme which involves the illegal importation of persons into the country*

inchoate *an incomplete crime such as conspiracy or attempt* ***involuntary manslaughter*** *the unintentional killing of another as a result of a battery*

mens rea *criminal intent to commit a crime; literally, the "mind thing"*

misdemeanor *crime punishable by up to one year in county jail* ***obstruction of justice*** *Intentional interference with a governmental investigation* ***perjury*** *lying under oath*

perpetrator *one accused of committing a crime* ***preponderance of the evidence*** *proof in civil case in which plaintiff must prove that it is more-likely-than-not that the defendant committed the act in question* ***resisting***

arrest *failing to voluntarily comply with an officer's attempt to make an arrest*

RICO *Racketeer Influenced and Corrupt Organizations Act, which spells out laws against organized crime*

self-defense *one or more acts committed by defendant to protect oneself from an aggressor*

sports bribery *illegal influence over an athlete, coach, referee, or other participant to affect the outcome of a sports event*

sports gambling (gaming) *illegal in most states and of particular interest to professional and amateur sports leagues*

sports official *individual who referees a professional or amateur sports contest* ***state action*** *an action by the government or an agent of the government which requires due process under the Fifth or Fourteenth Amendments and which might otherwise violate civil rights or liberties if not enforced* ***ticket scalping*** *buying tickets to sports events and then reselling them for a profit, usually well in excess of face value*

trespassing *entering real property without the consent of the owner*
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▪ ***Acronyms***

AHL *American Hockey League*

ALI *American Law Institute*

AOR *assumption of the risk*

COA *Certificates of Authenticity*

MPC *Model Penal Code*

NASO *National Association of Sports Officials* ***NCSI*** *National Center for Safety Initiatives*

OHL *Ontario Hockey League*

PASPA *Professional and Amateur Sports Protection Act* ***PEDs*** *performance-enhancing drugs*

UAAA *Uniform Athlete Agents Act*

UCC *Uniform Commercial Code*

UIGEA *Unlawful Internet Gambling Enforcement Act*

- ***Cases***

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Sports Crimes

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▪ ***Discussion and Review Questions***

1. *How does the burden of proof in a civil case differ from that in a criminal case?*

2. *Does criminal law have a place during a sports contest due to the inherent violent nature of certain sports and the expectations by participants and spectators?*

3. *Why does Canada prosecute illegitimate acts of sports violence far more than in U.S. jurisdictions?*

4. *Should ticket scalping laws be repealed altogether in light of extreme advances in technology?*

5. *Provide examples of raging parents and overzealous spectators and fans and how this has led to enactment to Calvin Klein laws.*

6. *How has the city of Philadelphia become infamous in criminal law as it relates to sports?*

7. *Compare and contrast the crimes of hazing, stalking and extortion, and provide examples.*

8. *Discuss the various incidents throughout the years involving the NCAA and sports bribery.*

9. *Provide examples of incidents in sports law related to cruelty to animals.*

10. *Discuss the constitutional law issues related to stadium pat-downs and how it relates to criminal law.*

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CHAPTER FIVE

Title IX and Gender

Issues

After reading this chapter you will be able to:

1. Discuss how perceptions of women and sports have changed over time.

2. Describe the contoured history of women in sports including the battle between the Association for Intercollegiate Athletics for Women (AIAW) and the NCAA.

3. Explain Title IX and its applicability to sports law.

4. Discuss how Title IX is enforced, including the emphasis on the three-part test for compliance.

5. Explain how the Constitution and other relevant federal laws influence interpretation of Title IX.

6. Discuss the major cases involving Title IX through the present.

7. Outline the relevant employment-related laws encompassing gender issues in sport.

8. Describes concerns related to homophobia in sport.

9. Discuss the issues related to transgender athletes and eligibility.

10. Discuss the continuing challenges related to the evolving interpretation of Title IX.

▪ *Introduction*

The focus of this chapter is on ***Title IX of the Education Amendments of 1972***

(20 U.S.C. §1681 et seq.), a controversial and highly-litigated federal law that has had far-reaching impact since President Nixon signed the bill into law. Title IX

prohibits gender discrimination in athletic programs at institutions that receive federal funds. In 2002, the 30th anniversary of Title IX, the law was renamed the Patsy T. Mink Equal Opportunity in Education Act, in honor of its principal author.

However, it is still predominantly referred to as Title IX.

Title IX has had quite an impact on generations of young men and women who desire to compete in sports at the high school and collegiate levels. As a result of this federal legislation, which went into effect on July 21, 1975, the number and quality of female high school, college and professional athletic programs have increased tremendously. This is a direct result of the law's application to elementary, secondary, and post-secondary schools that receive federal funds. Title IX is ***Title IX of the Education Amendments of 1972***

federal law prohibiting gender discrimination in

athletic programs at institutions that receive federal funds ***199***

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Chapter Five

also blamed for the systematic elimination of hundreds of men's teams in order to comply with the statute.

Title IX litigation frequently arises involving employment discrimination, retal-iatory discharge for reporting a possible Title IX violation, sexual harassment claims, lawsuits related to scheduling and facility inequity issues, and the elimination of men's and boy's teams. There are few areas of sports law that generate as much vibrant discussion, debate, and threat of litigation as gender-related topics such as Title IX. Title IX is not the only gender issue in sports law, however, and this chapter explores other issues. Much has changed in the last decade alone regarding gender in the context of sports law.

Though interpretation of Title IX has turned on judicial decisions involving colleges and universities, today more Title IX cases emanate from high schools than colleges. Collegiate athletic departments and universities that do not comply with Title IX may be subject to severe penalties by the federal government, including termination of federal funds. Such a penalty could crumble or significantly damage college or university sports programs. Still, no such penalty has ever been handed down in 40 years.

Unfortunately, like many federal laws, no one really knows what Title IX

clearly means. It is continually evolving, subjected to influence from political and advocacy groups, and ultimately means what the courts and the Department of Education tells us it means through its various clarifications. After decades of interpretations, court decisions and opinions, Title IX has become a federal law which is a boon to trial attorneys and plaintiff lawyers, while a curse for coaches and administrators who fail to comply with Title IX. Allegations of violations of Title IX can be quite personal in nature and many colleges and other defendants settle out of control rather than fight the battle in the legal system. Maybe it is time for Congress to clarify this federal law rather than leave it to the courts.

While reading this chapter, students should ponder whether there have been any unintended consequences of Title IX.

Gender Equity

Title IX is often referred to as the ***gender equity*** *statute, and passionate followers often view its purpose as leveling the playing field for women in sports. Others argue that Title IX has turned into an unjust quota system that continues to decimate established men's intercollegiate athletic programs. So despised is Title IX*

compliance in some athletic departments that it is sometimes referred to as ***roster***

management *rather than Title IX compliance in both the interscholastic and intercollegiate levels.*

Perception of Women and Sport

Prior to exploring Title IX, it is important to recognize how the perception of women in sport has made dramatic changes in the last century at all levels of competition. An exploration of the evolving change in respect of women in sport today is warranted, whether as participants, coaches, referees, journalists, or broadcasters. A lot has changed from the famous The Battle of the Sexes tennis match in ***gender equity***

concept associated with Title IX, evaluating whether equal opportunities to participate in intercollegiate athletics are available to both men and women
roster management

alternative expression for Title IX compliance

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Title IX and Gender Issues

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1973 when 29-year-old Billie Jean King defeated 55-year-old Bobby Riggs. From the triumphant United States women's World Cup soccer victory in 1999 to the comment made by prominent radio personality Don Imus who called the Rutgers University women's basketball team "nappy-headed hos" in 2007, an exploration of changing (or unchanging) perceptions demonstrates that women are still not viewed equally with men in sports.

For example, it was not until the 1972 Munich Olympic Games that women were allowed to compete in the 1,500 and 3,000 meters track races. The 1984 Los Angeles Olympics was the first to allow women to compete in the marathon.

*Women were not allowed to compete in the 5,000 and 10,000 meters races until 1992 in Barcelona, and women's steeplechase was only added for the 2008 Beijing Olympics. The International Olympic Committee (**IOC**) has women's boxing on the schedule for the 2012 London Olympics when, for the first time ever, all 26*

summer Olympic sports will have male and female competitors.

*Women have made considerable gains in many areas of sports law and in the sports business, but many argue that the progress is far from over. The National Girls & Women in Sports Day (**NGWSD**), in fact, is a special day for girls and women to celebrate their participation in sports and athletics. This day presents a prime opportunity to communicate to others what Title IX has accomplished and how many girls and women it helps. It is usually held in February each year.*

In college sports, women have made strides in coaching, refereeing, and administering intercollegiate athletics. For example, women are athletic directors at some major colleges, including Deborah Yow (formerly at the University of Maryland and now at North Carolina State University), Lisa Love (Arizona State), Sandy Barbour (University of California, Berkeley), Kathy Beauregard (Western Michigan University), and Cary Groth (University of Nevada, Reno). In years past, it would seem highly unlikely that at woman would be in charge of athletics at such large institutions.

Advocacy Groups

Students also must recognize that the gender-related legal issues are only part of the story. Title IX is as much a socio-political issue as much as a legal one. Not surprisingly, lobbyists and advocacy groups have sprouted up vehemently defending or denouncing Title IX.

*Groups which adamantly support Title IX advancement include the National Organization for Women (**NOW**), the Women's Sports Foundation (**WSF**), the National Women's Law Center (**NWLC**), and the National Association for Girls and Women in Sport (**NAGWS**). Groups that actively criticize Title IX include the Independent Women's Forum (**IWF**) and the College Sports Council (**CSC**).*

IOC

International Olympic Committee

NGWSD

National Girls & Women in Sports Day

NOW

National Organization for Women

WSF

Women's Sports Foundation

NWLC

National Women's Law Center

NAGWS

National Association for Girls and Women in Sport

IWF

Independent Women's Forum

CSC

College Sports Council

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Chapter Five

Of course, while all appear to be advocacy groups, not all have equal merit as such.

Visit the aforementioned organization's websites, Facebook pages and Twitter accounts and judge their legitimacy for yourself. Additionally, students are strongly encouraged to explore noted professor Erin Buzuvis' (Western New England College of Law) popular Title IX Blog.

▪ The Legal Environment

Recognition of the strides made by girls and women in sport cannot be viewed out of context. Certainly, Title IX has had an impact on shaping the landscape of women's sports today. Understanding Title IX requires acceptance that really there are three components to Title IX in addition to numerous judicial (court) decisions and interpretations. These include:

1. The statute itself;

2. Department of Education regulations (reg's); and 3. Department of Education policy guidance and clarifications.

Interestingly, Title IX is only made up of 37 words. It states: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance …

Title VII

Title IX actually evolved from and amended Title VII of the Civil Rights Act of 1964

(20 U.S.C. §§ 1681-88) and is implemented by federal regulations 34 C.F.R. § 106.41

(athletics generally) and 34 C.F.R. § 106.37c (distribution of athlete scholarships).

Those who have studied business law, employment law and human resources management are likely quite familiar with Title VII. Title VII provides that an employer may not discriminate on the basis of race, color, religion, sex, or national origin. Title IX extends that same philosophy to any program that receives funding from the federal government. That is, the program must not discriminate on the basis of gender when it comes to applying the funds to sports programs. Title VII forbids discrimination based on sex against any individual in hiring with respect to compensation, terms, conditions, and privileges of employment. In order for Title VII to apply, the employer must have 15 or more employees.

Title VI

Similarly, Title VI prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. While Title VI itself prohibits intentional discrimination, occasionally decisions or practices made by federal agencies might have the effect of discrimination on the basis of race, color, or national origin even if they were originally unintended. This is sometimes referred to as having a disparate impact.

In Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999), the Third Circuit Court of Appeals overturned the Eastern District of Pennsylvania's decision which had permanently enjoined the NCAA from using its Proposition 16 to establish initial eligibility academic standards for freshmen athletes. More importantly, the Third *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Title IX and Gender Issues

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Circuit determined that the NCAA is not a program or activity receiving federal funds and therefore Title VI does not apply to it per se even though it does apply to its member institutions. The plaintiffs had claimed that the NCAA's initial eligibility standards (such as the minimum SAT or ACT score) discriminated or had an disparate impact on them because they were African-Americans.

Equal Protection Clause (14th Amendment)

Studying Title IX also requires a fundamental understanding of the Equal Protection Clause of the 14th amendment of the U.S. Constitution (found in its entirety at the end of the text). The Equal Protection Clause is often referenced in a plaintiff's Title IX lawsuit. This amendment prohibits states from denying any person within its jurisdiction the equal protection of the laws. In other words, the laws of a state must treat each individual in the same manner as any other in similar conditions and circumstances.

42 U.S.C. § 1983

Many Title IX lawsuits also include allegations of violations of the Civil Rights Act of 1871, codified today as a 42 U.S.C. § 1983. These "section 1983" claims are often inserted in a lawsuit if the plaintiff alleges that the defendant (usually an educational institution) deprived them of a constitutional right while acting under color of state law. Specifically, § 1983 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

In sum, § 1983 claims permit victims of employment discrimination by state actors to obtain a jury trial at which both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded. In Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009), a peer-on-peer sexual harassment case involving bullying a kindergarten girl by a third-grade boy on a bus in Massachusetts, the Supreme Court reached a unanimous decision, which allows in part that § 1983 claims do not preclude a claim under Title IX involving allegations of gender discrimination in schools.

Office of Civil Rights (OCR)

*In 1979, the Congress of the United States actually split the former Department of Health, Education and Welfare (**HEW**) into two: the Department of Health and Human Services (**HHS**) and the Department of Education (**DOE**), transferring all the education and enforcement functions to the DOE. Title IX administration **Department of Health, Education and Welfare (HEW)** former federal agency originally charged*

with enforcing Title IX provisions

HEW

Department of Health, Education and Welfare

HHS

Department of Health and Human Services

DOE

Department of Education

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enforcement is assigned to the DOE's the investigative arm, the Office of Civil Rights ***(OCR)****.*

1979 Policy Interpretation (Clarification)

In 1979, the ***OCR*** *promulgated an Intercollegiate Athletics Policy Interpretation of Title IX that compared numerous programs' areas of financial assistance and other funding categories for both men's and women's sports programs. This 1979*

clarification remains the most important first step in the evolution and interpretation of Title IX.

Laundry List

Based on the OCR's interpretation in 1979, these factors must be taken into account when comparing Title IX compliance between men's and women's athletic programs: (1) equipment and supplies; (2) scheduling of games and practice time; (3) travel and per diem allowances; (4) tutoring; (5) coaching; (6) locker rooms, practice, and competitive facilities; (7) medical and training facilities and services; (8) housing and dining facilities and services; (9) publicity; (10) support services; and (11) recruitment of student-athletes (i.e., budget). This is also known in many circles as the ***Laundry List****.*

Permissible Differences

Title IX requires that colleges and universities provide equitable (notice not equal) resources to student-athletes of different genders. Interpretations, clarifications, and judicial decisions have demonstrated that there are some permissible differences between the genders including costs for recruiting, costs for event management, and compensation of coaches. Title IX investigations and compliance analyzes whether or not money is being allocated equitably between men's and women's programs based on the number of students attending such schools. Fiscal responsibility is left in the hands of the colleges and universities themselves. The key component in many Title IX cases is whether the institution developed a plan and carried out its mission to expand and accommodate the interests of female student-athletes, coaches, and administrators.

Tests

In order to comply with Title IX, a school must meet one of three tests (sometimes referred to as prongs) which the DOE also established from its 1979 Policy Interpretation. If a school passes any one of the three tests, then there is compliance with the federal statute. However, Congress did not debate this. Rather, it was established by the DOE's Office of Civil Rights (OCR) unilaterally. Students of sports law must recognize the impact of politics on Title IX in general and especially with the three-part test.

In theory, then, an educational institution can demonstrate compliance with Title IX by establishing that it meets one of the three tests. In reality, courts

consistently seem to only look at the first prong. Consider whether it is now time for the ***Office of Civil Rights (OCR)***

federal agency that enforces Title IX provisions

OCR

Office of Civil Rights

Laundry List

colloquial expression used to describe the various factors which should be compared when determining compliance with Title IX

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OCR and the courts to view Title IX compliance with more emphasis on the second and third prongs.

Test 1: Substantial Proportionality

Is an institution providing participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment as full-time undergraduate students?

*The **substantial proportionality** test is the one that is most often used by plaintiffs and courts to determine whether an institution is in compliance with Title IX.*

*Assistant Secretary for Civil Rights under the Clinton administration Norma Cantu referred to this test, also known as the **Proportionality Test**, as the only **safe***

***harbor** in 1996. That is, if you comply based upon the numbers alone, then you are in compliance with Title IX. It is usually the easiest method to assess compliance because it is based on numbers.*

Put differently, if 50 percent of women are full-time undergraduates enrolled at a particular college, then 50 percent of the participants in sports programs must be women. This seems relatively straightforward. It matches percentage undergraduate enrollment numbers of men and women to percentage athletes in varsity (as opposed to club) intercollegiate athletics.

Still, there has been considerable debate as to what the substantial proportionality test means in terms of the statistical ratio that athletic departments must adhere to in order to be in compliance. Does it have to be a perfect 50–50 or can there be a slight variance in the percentage? A perfect 50–50 ratio has been difficult for many university athletic departments to achieve, especially since sports such as football do not have an equivalent women's sport.

Test 2: History of Expansion of Women's Programs

Has an institution demonstrated a history and continuing practice of program expansion for the underrepresented sex?

*If an institution can demonstrate a **history of expansion (test)** of women's sports programs, then the institution is likely to survive a claim against it charging noncompli-ance with Title IX. Also known as the **Expansion Test**, very little guidance has been provided on this matter and it seems almost irrelevant today since the focus is on the snapshot of substantial proportionality (first prong) and not on a history of expansion.*

In theory, the second prong does allow schools that do not demonstrate proportionality to prove a history of adding team sports in response to demands and interests of the underrepresented sex. However, this test has failed to be used by most courts as Title IX evolved. Further, today it is generally accepted that many ***substantial proportionality***

test under Title IX that reviews whether intercollegiate level participation for male and female students is provided in numbers substantially proportionate to respective enrollments

Proportionality Test

synonym for substantial proportionality test which provides for a safe harbor based upon a comparison of the number of male to female participants ***safe harbor***

compliance with substantial proportionality test and allows for full, clear-cut protection from a discrimination claim for a violation of Title IX

history of expansion (test)

test under Title IX on whether a collegiate institution can show a history of continuing practice of program expansion for the underrepresented gender
Expansion Test

synonym for history of expansion test

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colleges and universities have a larger female population than male. So does this test apply when the historically underrepresented sex is now the overrepresented sex?

Boucher

In the seminal case Boucher v. Syracuse Univ. , 164 F.3d 113 (2nd Cir. 1999), the Second Circuit Court of Appeals opined that that female athletes participating only on club teams have no standing to bring a Title IX claim, and that Title IX only applies to varsity sports run by the athletic department. As such, it ruled in favor of Syracuse University in a Title IX case that began in 1995. Members of the women's club lacrosse team and club softball team filed a class action lawsuit alleging that Syracuse was in violation of Title IX. In 1998, the District Court ruled in favor of Syracuse holding that it satisfied the second prong by adding women's lacrosse and soccer as varsity sports after the suit was filed. This was the first time that the second prong had been successfully used. Put differently, the university's history and continuing practice of program expansion constituted compliance with the university's legal obligations under Title IX.

Test 3: Full and Effective Accommodation of

Interests

Has an institution fully and effectively accommodated the interests and abilities of the underrepresented sex?

This test is sometimes referred to as the ***Interests Test****. The third prong allows a school to demonstrate that its disproportionate numbers are not due to discrimination against the underrepresented sex, but, rather, reflect an accommodation of the interests and abilities of its students. How one proves that women (or men) are having their interests* ***effectively accommodated*** *is a bit murky, however.*

Recommendations have included conducting on-campus surveys in-person, online or by e-mail. Athletic opportunities must be provided if there is sufficient interest to sustain a viable team. If a school can demonstrate that

there is no demand for a sport that it does not offer to the underrepresented sex, it can show that there is no discrimination in not offering said sport. Unfortunately, rather than focusing on the efficacy of the third prong on compliance, the focus on this prong has been on the legitimacy of using a model survey in the first place.

Subsequent "Clarifications"

Over time, the OCR decided to clarify the 1979 Clarification on Title IX which had established the three-part test. Subsequent clarifications, their dates, and the presidential administration in office at that time are summarized below.

1996 (Clinton Administration)

The OCR attempted to clarify the three-part test specifically with regard to accommodating students' athletics interests and abilities. Examples were
Interests Test

characterization of third prong of Title IX analysis to determine whether a full and effective accommodation of interests has been demonstrated
effective accommodation

test under Title IX that determines whether the interests and abilities of the underrepresented gender have been fully and effectively accommodated by the present state of the athletic program

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provided to assist in this regard. The OCR established that only the first prong was a safe harbor.

2003 (Bush Administration)

*In 2001 and 2002, the General Accounting Office (**GAO**) released a study of intercollegiate athletics including all kinds of statistics on adding and discontinuing teams. Town hall meetings were held all over the United States. In 2003, the OCR declared that no one particular prong of the three-part test was favored, and said that complying with Title IX does not require schools to cut teams and this is actually a disfavored practice. The OCR also stated that equal weight should be given to all three prongs of the three-part test.*

2005 (Bush Administration)

The OCR says that one of the ways in which schools may demonstrate compliance with the Interests Test is by using a model online survey to establish that the underrepresented sex has no unmet interests in athletic participation. Even if there is an unmet interest, the institution will not be found to have violated Title IX unless the DOE also finds that there is sufficient ability to sustain a team and a reasonable expectation of intercollegiate competition in the sport within the school's normal competitive region.

A user's guide provided a web-based prototype model survey that institutions could rely on to survey the underrepresented sex. Many Title IX advocacy groups expressed outrage over the use of a model survey, saying that it is inherently flawed. In fact, the National Women's Law Center said the Department of Education's report suggests a "dangerous change in policy that allows schools to skirt their responsibility to provide equal athletic opportunities for young women."

NCAA President Myles Brand was adamantly opposed to the use of the model survey method as well.

2010 (Obama Administration)

The OCR entirely rescinded the 2005 Title IX clarification in an announcement by Vice-President Joe Biden and Education Secretary Arne Duncan. That is, institutions can no longer use Internet or e-mail surveys to meet the third prong of the three-part test. In fact, the OCR reset compliance standards back to 1979 standards after the 1996 clarification.

Equity in Athletics Disclosure Act

*Enacted in 1994, the Equity in Athletics Disclosure Act (**EADA**) (20 U.S.C. § 1092) is yet another federal law which relates to Title IX. This one relates to transparency in administering college sports. It requires coeducational colleges and universities that receive federal funds and maintain an intercollegiate athletic program to prepare an annual report to the DOE on athletic participation, staffing, and revenues and expenses by men's and women's teams.*

Essentially this federal act was adopted to provide Congress and the general public with a snapshot of collegiate athletics participation by gender. The DOE

uses this information in preparing its required report to Congress on gender
GAO

General Accounting Office

Equity in Athletics Disclosure Act (EADA)

federal law requiring public disclosure of financial records of college and university records related to athletic expenditures ***EADA***

Equity in Athletics Disclosure Act

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equity in intercollegiate athletics. Such reports provide a valuable tool for assessing compliance with Title IX. Each university must complete numerous forms that provide public access to certain information.

Federal regulations require that the information, based on the previous reporting year, be available for inspection by students, prospective students, and the public by October 30 of each year. A table must be completed that lists sports participants (including walk-ons), operating expenses for men's and women's programs, recruiting expenses, scholarships awarded, revenues, and all coaching salaries. Some are concerned that some schools count participants for Title IX

purposes, but after submitting the required reports to the federal government they cut players from the teams. Students are encouraged to visit The Equity in Athletics Data Analysis Cutting Tool website which provides customized reports for most co-educational, post-secondary institutions in the United States.

▪ *NCAA and Gender Equity*

The NCAA considers Title IX compliance and gender equity as one of its basic purposes, and those involved in intercollegiate athletic must be continually cogni-zant of the purposes and effects of Title IX when administering college sports. The NCAA has been a major factor in promoting equitable support of men's and women's sports programs.

References to gender equity and avoiding gender bias are found in various places in the NCAA Manual including its own constitution (the first part of the NCAA Manual). This includes Bylaw 2.2.2, Cultural Diversity and Gender Equity, which states, "It is the responsibility of each member

institution to establish and maintain an environment that values cultural diversity and gender equity among its student-athletes and intercollegiate athletics department staff." Similarly, Bylaw 2.3.3, Gender Bias, succinctly states, "The activities of the Association should be conducted in a manner free of gender bias."

Senior Woman Administrator

*One of the most significant strides made by the NCAA in terms of gender was the mandatory establishment of the Senior Woman Administrator (**SWA**) position.*

The SWA is the highest ranking female in each NCAA athletics department and each NCAA membership conference. Each member institution is required to designate a SWA to participate in the management of the athletics department.

According to the NCAA's website NCAA.org, "The designation of SWA is intended to encourage and promote the involvement of female administrators in meaningful ways in the decision-making process in intercollegiate athletics. The designation is intended to enhance representation of female experience and perspective at the institutional, conference and national levels and support women's interests."

AIAW

*Students must recognize, however, that NCAA policies toward gender have not historically reflected today's principles. In fact, for much of the NCAA's existence, **SWA***

Senior Woman Administrator

AIAW

Association for Intercollegiate Athletics for Women

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women's sports participation was literally non-existent. Women did not even start competing in the NCAA until 1982, the first year that the NCAA had a women's basketball championship tournament. Prior to that, women's presence in intercollegiate athletic was inconsistent throughout the United States. Eventually the Association for Intercollegiate Athletics for Women (AIAW) was founded in 1971 to govern collegiate women's athletics in the United States, and to administer national championships. AIAW evolved out of the Commission on Intercollegiate Athletics, which was founded in 1967.

The AIAW was prominent, and even signed a television contract with NBC by 1980. However, after conflicts with the NCAA in the early 1980s, including Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 735 F.2d 577 (D.C.

Cir. 1984), in which the AIAW attempted to demonstrate (unsuccessfully) that the NCAA violated federal antitrust laws, the AIAW discontinued operation in 1983 and most member schools continued their women's athletics programs under the governance of the NCAA.

Football

*Football has created a considerable problem for compliance under Title IX. In Division I, members of the Football Bowl Subdivision (**FBS**) can offer up to 85*

full scholarships per year in football, while no similar sport exists on the women's side of the ledger if viewed from the first prong's substantial proportionality test.

As a result, when viewing participation opportunities strictly from a numerical point of view, this sport immediately occupies a substantial part of the analysis. As a result, many believe that unless women's football is added as an NCAA sport, men's football should be entirely excluded from any Title IX analysis.

There are no women's football programs at the intercollegiate level (other than club teams). Interestingly, women's flag football is a recognized varsity women's high school sport in Florida and Alaska. Still, how does an institution comply with the numerical equivalency in terms of participants and the financial responsibilities associated with Title IX when 85 scholarships may be awarded by any Division I-A (FBS) program for which there is no women's sports equivalent?

Such numerical inequity has been dealt with by many athletic departments in the most efficient way: by eliminating men's programs and adding women's programs.

This offsets imbalance in terms of proportionality. But is it equitable?

NCAA Scholarships

Not all athletic scholarships offered by NCAA member institutions are considered full scholarships. That is, many scholarships are partial scholarships, since the NCAA places what it calls equivalencies on certain NCAA sports. In baseball, for example, there can only be the equivalent of 11.7 scholarships offered per year, even though the maximum number of members on a team (the NCAA calls them counters) can be 27. This creates an interesting situation when comparing men's scholarship equivalencies to women's. Certainly, Title IX compliance coupled with the issue of football have led to the discrepancy in the number of scholarships that can be offered to women as compared to men.

Compare the maximum number of scholarships that can be offered in similar sports based upon the 2010–11 NCAA Manual:

FBS

Football Bowl Subdivision

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15.5.3.1.1 Men's Sports. *There shall be a limit on the value (equivalency) of financial aid awards (per Bylaw 15.02.4.1) that an institution may provide in any academic year to counters in the following men's sports: Cross Country/Track and Field*

12.6

Fencing

4.5

Golf

4.5

Gymnastics

6.3

Lacrosse

12.6

Rifle

3.6

Skiing

6.3

Soccer

9.9

Swimming and Diving

9.9

Tennis

4.5

Volleyball

4.5

Water Polo

4.5

Wrestling

9.9

15.5.3.1.2 Women's Sports. *There shall be a limit on the value (equivalency) of financial aid awards (per Bylaw 15.02.4.1) that an institution may provide in any academic year to counters in the following women's sports: Bowling*

5

Cross Country/Track and Field

18

Equestrian

5

Fencing

5

Field Hockey

12

Golf

6

Lacrosse

12

Rowing

20

Rugby

12

Skiing

7

Soccer

14

Softball

12

Squash

12

Swimming and Diving

14

Water Polo

8

Why in every comparable sport are there more scholarship equivalencies for women than men? Is it to off-set the numbers in football which receives 85 scholarships per year in Division I (FBS)? Some hope that subsequent interpretations of Title IX, federal legislation or some sort of compromise excludes the sport of *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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football from its purview. Others wish to add women's football. Students should consider the equity of excluding men's football alongside the feasibility of adding women's football—there is no clear answer to this issue.

Title IX Criticism

While fundamentally Title IX is designed to help prevent gender discrimination, the practical application of this law has generated vociferous discussion and debate as it continues to evolve. Many opponents to Title IX's application believe the law has turned into an illegitimate ***quota*** *system contributing to the systematic destruction of male sports programs throughout the United States. Over the decades, male sports programs have become targets of university compliance with Title IX*

because interpretations have focused on substantial proportionality. Historically speaking, sports programs for male student-athletes have been larger and better funded than female programs, so rather than expanding women's programs in order to comply with Title IX (which in some cases might not be feasible because of lack of interest) colleges have cut programs that served the interest of male student-athletes.

Male student-athletes whose programs have been terminated have sued under Title IX claiming that the fundamental purpose of Title IX was not to eliminate men's programs, and such termination amounts to discrimination. However, such claims have had little merit under most judicial decisions. In 1993, the men's swimming team at University of Illinois was cut while the women's was not. The men's fencing team and both diving teams were eliminated as well. As usual, cutbacks were due to financial reasons. Members of the men's team sued, claiming discrimination on the basis of sex. Both the trial court and court of appeals held that such decision making by the University of Illinois was acceptable under Title IX analysis, particularly since the men's overall participation in athletics was 76.6 percent, while the overall male enrollment was 56 percent.

Male Practice Players

Some have expressed outrage that male practice players are counted as women for Title IX reporting purposes if they practice for women's teams, calling this practice fraudulent. According to a New York Times article in 2011, while some consider this a loophole not envisioned by the statute or the OCR, the Department of Education has noted that men should be counted on women's teams if they receive coaching and practice with women. However, Russlynn Ali, Assistant Secretary for Civil Rights during the Obama administration, stated that men should not be counted as women

for any reason, and her office would never allow such a practice, though formal investigations remain infrequent. In essence, there is no clear-cut answer on this issue at the moment.

In 2006, James Madison University cut seven men's teams to comply with Title IX. A coalition of athletes, fans, and others sued to reverse the decision, but the lawsuit was dismissed. In 2011, the University of Delaware announced that it was changing its 100-year-old men's track and cross-country teams to club status. Somewhat odd, however, was that the school said they were ending the program out of concern that it might not remain compliant with Title IX in the future.

The members of the track team, in response, then filed a lawsuit with the OCR

quota

mandated proportional share often associated with Title IX analysis
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alleging discrimination and the university agreed to mediation to try to resolve the issue.

In a 2011 article written by Libby Sander in the Chronicle of Higher Education, statistics show that men's programs have been decimated over the years. Based upon her research provided by the NCAA, only 17 men's

gymnastics programs remain out of some 200 in the 1960s. Sander also demonstrated that from 1989–

2010 numerous other men's programs have vanished, either due to budget cuts and gender equity polices:

Net Losses in NCAA Men's Sports, 1989–2010

Wrestling

106

Tennis

72

Rifle

46

Gymnastics

36

Fencing

25

Water polo

21

Skiing

20

Swimming and diving

18

Source: National Collegiate Athletic Association

Another issue among opponents to Title IX is that men's revenue-sports such as football and men's basketball often provide funding for women's sports, which generate much less income. Football and men's basketball are referred to as revenue sports in NCAA lingo (and sometimes men's hockey), while all other sports are characterized as non-revenue or Olympic sports (e.g., wrestling, tennis, gymnastics). Is it fair, then, that women's programs continue to receive aid from men's programs for their very existence? Is it equitable that men's programs are cut to meet the proportionality test (first prong) of Title IX? Though such criticims seem reasonable, they are not usually considered valid one under a Title IX legal analysis.

"Contact Sports" Exception

Contact sports are an important yet infrequently discussed aspect of understanding Title IX. Under what is known as the ***contact sports exception*** *to Title IX, schools may actually discriminate (i.e., exclude) between the genders in boxing, wrestling, rugby, ice hockey, football, basketball and other sports …the purpose or major activity of which involves bodily contact (34 C.F.R. § 106.41(b)). In these sports alone, females may be excluded from participation on all male teams without having to give any justification whatsoever. However, once a female is allowed to compete in that particular sport at that particular institution, she must not be treated differently than any other person on account of her gender. However, what about sports such as field hockey, lacrosse, soccer and water polo? Certainly these sports are considered contact sports, even though they are not mentioned in the statute.*

contact sports

sports such as football, wrestling, and lacrosse that inherently involve hostile, even violent physical struggles as part of the game's rules *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Men Competing on Women's Teams

Controversies have surfaced nationally over men wanting spots on women's field hockey, volleyball, golf, lacrosse, and tennis teams. Some men attempt to compete on women's teams, especially when a comparable male sport is not offered by the college or university. Such exclusions, however, are usually upheld by the courts under the view that Title IX was meant to help the historically underrepresented sex.

Field Hockey

Field hockey is not specifically mentioned in the contact sports exception to Title IX and it has been analyzed quite differently depending upon the state jurisdiction. If it is considered a contact sport, then males can be excluded under federal law. There is great disparity in terms of local rules and policies, and state laws. In many cases, the individual school districts are left to make their own policies. Interestingly, field hockey is a sport that is played mostly by men around the world, but not in the United States. Some states say field hockey is a contact sport (which would allow exclusion based on gender). Others say it is not. Some allow men on women's teams. Others do not. There is simply no consensus among the states in which girls' high school field hockey is played as to whether boys should also be allowed to participate.

Massachusetts became the first state to declare the blanket exclusion of boys from girls' high school athletic teams unconstitutional in Attorney Gen. v. Mass.

Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284 (Mass. 1979). Boys have been excluded from participating in girls' field hockey in high school in Maine, New Jersey, and Rhode Island. It appears that boys may play on girls' teams in certain parts of Pennsylvania and the state of New York. According to a 2010 article which appeared in USA Today, there were 308 boys playing on girls teams in the United States during the 2009–10 school year.

In Williams v. Sch. Dist. of Bethlehem, 799 F. Supp. 513 (E.D. Pa. 1992), John Williams (age 14) wanted to play field hockey on his high school's girls team, but he was told prior to the season that he could not play or practice with the team.

He served as the team manager his freshman year, and his sophomore year he was allowed to practice. Williams brought his case based on Title IX, the Equal Protection and Due Process clauses of the U.S. Constitution, as well as under the Equal Rights Amendments of the Pennsylvania Constitution. After a trial, a federal judge in 1992 allowed him to play during his junior year because the court found that the refusal to allow John to play violated Title IX and the Equal Protection clause.

However, this decision was overruled by Williams v. Sch. Dist. of Bethlehem, 998

F.2d 168 (3d Cir. 1993), which held that field hockey was indeed a contact sport whose major activity involves bodily contact. Even expert affidavits in the original decision could not agree on whether field hockey was a contact sport. The Third Circuit also disagreed with the district court on the Title IX and Equal Protection clause claims. The Circuit Court reversed and remanded the case. A re-hearing was denied during the summer of 1993, the summer before his senior year. Williams'

petition to the United States Supreme Court was also denied.

Other cases worth exploring include B.C. v. Bd. of Educ., Cumberland Reg'l Sch.

Dist. , 531 A.2d 1059 (N.J. App. Div. 1980); Kleczek v. Rhode Island Interscholastic League, 612 A.2d 734 (R.I. 1992); and Me. Human Rights Comm'n. v. Me. Principals Ass'n, 1999 Me. Super. LEXIS 23 (Me. Super. Ct. Jan. 21, 1999). However, there still is no Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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clear-cut consensus on whether field hockey constitutes a contact sport. Maybe the statute itself should be amended, which would provide clarity for states and federal circuits rather allow continuing litigation to attempt to resolve the issue.

Women Competing on Men's Teams

According to the guidelines issued by the OCR, if a college has a men's team but no women's team in a given sport, female athletes must be allowed to try out for the team unless it is a contact sport. A few women have participated in football including Ashley Martin, the first woman to score a point in a Division I-AA football game (2002), in which she kicked two extra points for Jacksonville State University. Similarly, Katie Hnida became first woman to play in a Division I-A football game (University of New Mexico) in 2003.

At the high school level, in 2006, Michaela Hutchinson won the Alaskan state wrestling championships (103 lbs.) competing against the boys in a 1–0 decision.

Two of her brothers had won state titles before as well.

Mercer v. Duke University

In 1994, Duke University allowed Heather Sue Mercer to try out for the football team as a placekicker. Mercer was listed on the spring roster but was not allowed to attend a summer training camp or dress for the games. Mercer was later cut from the team, and she sued Duke University alleging that to treat her differently once she was on the team was a form of sex discrimination under Title IX. The contact sport exception would have allowed the coaching staff to exclude her from the team, not treat her differently after placing her on it.

After a storied legal history, in October 2000 a federal jury ordered Duke to pay $1 in actual damages and $2 million in punitive damages to Mercer. In 2002, however, the legal drama continued as the Fourth Circuit Court of Appeals vacated the punitive damages award and held that such damages may not be awarded in private actions. It did not help Mercer's cause that an intervening Supreme Court case, Barnes v. Gorman, 536 U.S. 181 (2002), concluded that punitive damages were not available in private causes of action under Title VI of the Civil Rights Act of 1964 which, according to the court, Title IX was modeled after.

Some have suggested that punitive damages should be awarded under Title IX

claims to serve as a more effective deterrent for violations of the statute but there has not been a definitive clarification by Congress or the courts, though the Barnes v. Gorman case is quite definite that they are not available. Punitive damages are allowed for a claim of a § 1983 action, however.

- ***Title IX: Prominent Cases***

Decades of interpretations of what Title IX really means have helped to explain what Congress supposedly intended 40 years ago. The greatest impact on understanding Title IX has been through cases brought by individual coaches and student-athletes suing their own institution for failing to comply with the federal law.

In a variety of cases brought against Illinois State University, Drake University, University of California, and California State University, the courts have ruled consistently that eliminating men's teams in order to attempt to achieve substantial *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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proportionality is not a violation of Title IX. In Neal v. Bd. of Trs., 198 F.3d 763, 770

(9th Cir. 1999), the Ninth Circuit Court of Appeals noted, "Every court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case)." The court provides two options: increasing opportunities for the underrepresented women, or decreasing them for the overrepresented men. It is up to the university how to proceed.

This could change if football is exempted from Title IX analysis, if the Supreme Court rules remarkably differently on a Title IX claim, if the OCR clarifies Title IX in a radically different way, or if the NCAA disbands the promotion of gender equity. This next section focuses on some of the other crucial cases which have helped to define the boundaries of the law.

Cannon v. Univ. of Chicago

When the Supreme Court held that a private right of action was available under Title IX actions in Cannon v. Univ. of Chicago, 441 U.S. 677 (1979), the gates began to open for a wave of lawsuits. This case involved an allegation by a woman that she had been excluded on the basis of her gender from participation in the medical education programs of respondent private universities including the University of Chicago and Northwestern University, and that these programs were receiving federal financial assistance at the time of her exclusion. The Supreme Court explored the legislative history of Title IX and believed that it was plainly apparent that Congress intended to create a private cause of action and that the whole statute was patterned after Title VI of the Civil Rights Act.

Grove City College v. Bell

Title IX (as it is interpreted today) suffered a huge—yet temporary—setback in the early 1980s involving a small, Christian, liberal arts college in Western Pennsylvania. In 1984, the United States Supreme Court granted a major victory for almost all collegiate athletic departments by holding that Title IX did not apply to collegiate athletic programs in Grove City College v. Bell, 465 U.S. 555 (1984).

The Supreme Court held that Title IX only applied to the specific programs that received federal funds. Since the athletic departments did not receive federal funds directly, it appeared they were exempt from compliance.

*Things changed just four years later when Congress enacted the Civil Rights Restoration Act of 1987 (**CRRA**) that legislatively reversed that decision. The CRRA held that Title IX applies institution-wide, and, therefore, college athletic departments are no longer immune from Title IX compliance. Grove City College remains one of a few U.S. colleges and universities (another is Hillsdale College in Michigan) to which Title IX is irrelevant because it refuses to accept federal financial aid of any kind, including federal grants, loans, and scholarships for students.*

CRRA

Civil Rights Restoration Act of 1987

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Cohen v. Brown University

This case is generally regarded as the most influential Title IX case ever to be decided. In 1991, Brown University announced that it was going to eliminate four sports: women's volleyball, women's gymnastics, men's golf, and men's water polo.

Brown University said the teams could still compete as ***club sports****, but it was not going to provide university funding due to financial pitfalls. At that time, Brown's student body was comprised of 52 percent male and 48 percent female students, though 63 percent of its student-athletes were male.*

Amy Cohen, a member of the gymnastics team, sued Brown University for its elimination decision. The federal district court in Providence, Rhode Island, held that Brown failed all three tests under Title IX and that the decision to eliminate the teams constituted a Title IX violation. In fact, the First Circuit Court of Appeals in Boston upheld the order injunction to reinstate the women's gymnastics and volleyball programs in 1993. The court recognized the significance of the decision in its conclusion, stating:

We need go no further. This litigation presents an array of complicated and important issues at a crossroads of the law that few courts have explored. The bea-con by which we must steer is Congress's unmistakably clear mandate that educational

institutions

not

use

federal

monies

to

perpetuate

gender-based

discrimination. At the same time, we must remain sensitive to the fact that suits of this genre implicate the discretion of universities to pursue their missions free from governmental interference and, in the bargain, to deploy increasingly scarce resources in the most advantageous way. These considerations, each of which is in service to desirable ends, are necessarily in tension in Title IX cases. Thus, there are unlikely to be ideal solutions to all the vexing problems that might potentially arise. This appeal exemplifies many of the difficulties inherent in Title IX litigation. We do not presume to say that the district court's interim solution is perfect, but it is fair and it is lawful. On the record compiled to date, the preliminary injunction requiring Brown to reinstate its women's volleyball and gymnastics teams for the time being came well within the encincture of judicial discretion.

We will not meddle. The preliminary injunction is affirmed, the temporary stay is dissolved, and the cause is remanded to the district court for further proceedings.

Cohen v. Brown Univ., 991 F.2d 888, 907 (1st Cir. R.I. 1993).

The case was appealed to the United States Supreme Court, which subsequently declined to hear the case in 1997. This case was in the courts for years though ultimately it settled out of court. Brown University was required to keep percentage disparity within

/

3.5 percent of the total of women undergraduates.

NCAA v. Smith

Renee Smith was an undergraduate women's volleyball player at St. Bonaventure University in Western New York state who graduated in two and one-half years and then enrolled in two different graduate school programs, one being law school. She attempted to play volleyball at another university, which violated NCAA transfer and eligibility rules at that time. The NCAA did not grant her a waiver, citing its bylaws that a student could only play as a post-graduate at the ***club sports***

non-varsity college or university teams that represent the university independently in competition and yet are not sponsored by the athletic department *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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same institution they played at as an undergraduate. Smith sued the NCAA alleging that its bylaws were violations of Title IX.

This case presented challenges for the courts. After all, the NCAA does not receive federal funds directly, even though almost all its member institutions do, and they pay money to be members of the NCAA. The Supreme Court in a unanimous decision held that dues payments do not raise the NCAA to the

level of a covered program or activity under Title IX, even though its member institutions must still comply with Title IX.

This case, Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999), exempted the NCAA from Title IX compliance as an organization. However, the NCAA remains a proponent of gender equity principles and changed its post-graduate transfer eligibility rules to allow a student-athlete to transfer to another school to participate with remaining eligibility under certain conditions as stated in Bylaw 14.1.9.1, One-Time Transfer Exception:

A graduate student who is enrolled in a graduate or professional school of an institution other than the institution from which he or she previously received a bacca-laureate degree may participate in intercollegiate athletics if the student fulfills the conditions of the one-time transfer exception set forth in Bylaw 14.5.5.2.10 and has eligibility remaining per Bylaw 14.2.

Franklin v. Gwinnett County Public Schools

The Supreme Court held that individuals can sue for and recover monetary damages for violations and attorney's fees when intentional gender discrimination intentional avoidance of Title IX compliance is proven. Christine Franklin, a high school student at North Gwinnett High School in Gwinnett County, Georgia, sued her school district, alleging that she was subjected to persistent sexual harassment by her coach Andrew Hill, and that the school officials knew about the harassment but made no efforts to stop it. Her allegations were supported and she was awarded damages by the Supreme Court. Until this decision, one could only get an injunction (sometimes referred to as equitable relief) as a Title IX remedy.

According to some, Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992) was the first to give Title IX real teeth.

Jackson v. Birmingham Board of Education

In Jackson v. Birmingham Bd. of Educ. 544 U.S. 167 (2005) Roderick Jackson, a girls'

high school basketball coach in Birmingham, Alabama, complained about disparate treatment between boys and girls equipment and locker rooms,

among other things. After complaining, Jackson was removed as the coach in 2001 and he sued.

In 2005, the Supreme Court in a 5–4 decision, held that there can be a private right of action for individuals who allege and reveal Title IX violations, even though they were not subject to sex discrimination themselves.

That is, individuals who accuse educational institutions of sex discrimination are protected from retaliation under federal law. From an employment perspective, Title IX individuals who complain about violations are protected from retaliation by superiors or administrators. The Court's reasoning was that Title IX mirrors Title VII, even though it is not explicit in the Title IX

statute.

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Communities for Equity v. MHSAA

*In a case that lasted a decade, the Michigan High School Athletic Association (**MHSAA**) refused to comply with the fundamental mandates of Title IX. This case demonstrates the best—and worst—of what the U.S. legal system has to offer. Like Cohen v. Brown in 1993, this case demonstrated the*

lengths to which some defendants will go to fight against Title IX interpretations and clarifications.

*The MHSAA is a private, non-profit corporation with 300,000 student-athletes at the high school and middle school levels in 14 boys' and 14 girls' sports. In 1998, two mothers in the Grand Rapids area questioned the scheduling of six girls' sports to play in seasons which were out of sync with the boys. For example, unlike most other states, girls in Michigan played basketball in the fall rather than in the winter like the boys. These mothers alleged that playing in a nontraditional season created significant disadvantages for the girls relative to the boys including, among other things, reduced exposure to college recruiters. With the help of Communities for Equity (**CFE**), a Michigan-based advocacy organization that serves as a voice for female athletes, they filed suit against the MHSAA alleging discrimination under Title IX, the Equal Protection Clause of the U.S. Constitution, and Michigan's own anti-discrimination law, the Elliott-Larson Civil Rights Act. In 2007, the United States Supreme Court denied certiorari to the MHSAA, which had repeatedly suffered legal defeats and was forced to change numerous girls and boys seasons in Michigan.*

However, the litigation still did not end. In 2008, the United States District Court in Kalamazoo focused on the amount of the award of reasonable attorney fees and costs. The court, by order of Senior District Judge Richard Alan Enslen, rendered its opinion in Cmtys. for Equity v. Mich. High Sch. Ath. Ass'n, 2008 U.S. Dist.

*LEXIS 25640 (W.D. Mich. Mar. 31, 2008). Enslen began his opinion with in bold face type font, "**When the game is complete, the loser should not complain about the rules**." The loser in this case was the MHSAA. Enslen's opinion noted that much of the plaintiff's billable hours were the results of the defense counsel's egregious tactics of harassment, intimidation, and rude, uncooperative, dilatory, and hostile litigation methods.*

After the decision, the Michigan media noted that the MHSAA had insurance policies which would indemnify it for costs in the event of a lawsuit. Unfortunately for the MHSAA, the decision to fight rather than comply resulted in a loss for more than the policies would cover. As a result of the

case, statewide girls volleyball switched from winter to fall, girls statewide basketball from fall to winter, girls'

tennis and boys' golf from fall to spring, girls' golf and boys' tennis from spring to fall. Upper Peninsula girls' soccer changed from spring to fall, and boys' soccer from fall to spring. In the end, the court awarded the class $4,429,117.13 in attorneys' fees and $131,144.80 in costs, for a total award of $4,560,261.93 with post-judgment interest calculated as well.

Consider how the state of Indiana dealt with a case somewhat similar to the Michigan case. Do you agree with the outcome?

MHSAA

Michigan High School Athletic Association

CFE

Communities for Equity

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▪ ***CASE 8***

Amber Parker et al., Plaintiffs, vs. Indiana High School Athletic et al., Defendants ***United States District Court for the Southern District III.***

DISCUSSION

of Indiana, Indianapolis Division

The Court previously dismissed the Title IX claim

October 6, 2010, Decided

against the IHSAA, see Docket No. 77, and on Septem-October 6, 2010, Filed

ber 27, 2010, the Court granted the School Defen-

OPINION BY: WILLIAM T. LAWRENCE

dants' partial motion for summary judgment on the

Plaintiffs' § 1983 claim. See Docket No. 126. Thus,

[…]

what remains to be resolved is the Plaintiffs' Title IX

The

Indiana

High

School

Athletic

Association

claim against the School Defendants and the Plaintiffs'

("IHSAA") is an Indiana not-for-profit corporation that

§ 1983 claim against the IHSAA.

administers interscholastic athletic competitions among its member schools. To this end, the IHSAA promulgates ***A. Title IX claim against the School Defendants***

rules and regulations for its members and their students.

Title IX provides, with some exceptions not relevant The IHSAA also sponsors season-ending tournaments,

here, that "[n]o person in the United States shall, on which it terms "Tournament Series Contests," for the the basis of sex, be excluded from participation in, be twenty sports that it recognizes. Although the IHSAA denied the benefits of, or be subjected to discrimina-schedules Tournament Series Contests, the scheduling tion under any education program or activity receiv-of all other games, which are known as "Season Con-

ing Federal financial assistance." 20 U.S.C. § 1681(a).

tests," is left to member schools. The IHSAA does not The Department of Education's athletic regulations

permit its members to schedule Season Contests on Sun-interpret Title IX and set forth the standards for

days. It also, with some limited exceptions not relevant assessing whether an institution's athletic programs here, does not allow its members to schedule either girls'

are in compliance with Title IX. The parties and the or boys' basketball teams to play more than two week-Court agree that under Chevron, U.S.A., Inc. v. Natural night1 Season Contests per week. Finally, the IHSAA dic-Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct.

tates when, and for how long, athletic seasons run. For 2778, 81 L. Ed. 2d 694 (1984), the Department of Edu-example, the IHSAA allows its members to schedule

cation's regulations are entitled to deference. "'The boys' basketball Season Contests "beginning on Monday, degree of deference is particularly high in

Title IX

week 21 of the IHSAA calendar, until the starting date of cases because Congress explicitly delegated to the

*the basketball sectional of the Boys' Basketball Tourna-agency the task of prescribing standards for athletic ment Series." Docket No. 109 at 6. Similarly, "[m]ember programs under Title IX.'" McCormick v. Sch. Dist. of schools may schedule girls' basketball Season Contests Mamaroneck, 370 F.3d 275, 288 (2d Cir. 2004) (quoting beginning on Monday, week 19 of the IHSAA [*5] calen-Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir.*

dar, until the starting date of the basketball sectional in 1993)).

the Girls' Basketball Tournament Series." Id. at 7.

The relevant regulation states:

Amber Parker is the mother of J.L.P., who previously played basketball for the Franklin County High School A recipient which operates or sponsors interscho-

("FCHS") girls' basketball team.2 From 2007 to 2009, lastic, intercollegiate, club or intramural athletics Parker also served as the head coach of the FCHS girls'

shall provide equal athletic opportunity for mem-

basketball team. Tammy Hurley is the mother of C.H., bers of both sexes. In determining whether equal

who currently plays for the FCHS girls' basketball team.3

opportunities are available the Director will con-

sider, among other factors:

Parker and Hurley brought this suit on behalf of their daughters, alleging that the School Defendants and the (1) Whether the selection of sports and

levels of

IHSAA violated Title IX of the Education Amendments

competition effectively accommodate the

of 1972 and the Fourteenth Amendment of the United States interests and abilities of members of both

Constitution 4 by scheduling girls' basketball games on sexes;

non-preferred dates and times. The gist of the Plain-

(2) The provision of equipment and supplies;

tiffs' claim is that the Defendants assigned boys' basket-

(3) Scheduling of games and practice time;

ball teams to play on preferred dates and times,

(4) Travel and per diem allowance;

typically Friday and Saturday evenings, more frequently (5) Opportunity to receive coaching and aca-than the Defendants assigned girls' basketball teams to demic tutoring;

play at these preferred times.

(6) Assignment and compensation of coaches

[…]

and tutors;

(continued)

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(7) Provision of locker rooms, practice and com-

regulation by comparing the availability, quality

petitive facilities;

and kinds of benefits, opportunities, and treat-

(8) Provision of medical and training facilities

ment afforded members of both sexes. Institutions

and services;

will be in compliance if the compared program

(9) Provision of housing and dining facilities

components are equivalent, that is, equal or equal

and services;

in effect. Under this standard, identical benefits,

(10) Publicity.

opportunities, or treatment are not required, pro-

vided the overall effect of any differences is

34 C.F.R. § 106.41(c) (2000). The first factor, "[w]hether negligible.

the selection of sports and levels of competition effectively accommodates the interests and abilities of mem-44 Fed. Reg. at 71,415. For each program component

bers of both sexes," id. § 106.41(c)(1), is associated with (e.g., equipment and supplies, scheduling of games

so-called effective accommodation claims. See Pederson and practice time, or travel and per diem allowance) v. Louisiana State Univ., 213 F.3d 858, 865 n.4 (5th Cir.

the 1979 Policy Interpretation lists the factors that 2000); Boucher v. Syracuse Univ., 164 F.3d 113, 115 (2d should be examined to determine compliance. With

Cir. 1999). Effective accommodation claims allege that respect to the scheduling of games and practice times the selection of sports or the number of opportunities the interpretation states:

for participation by female athletes are unequal. See Compliance will be assessed by examining, among

Boucher, 164 F.3d at 115. Factors two through ten are other factors, the equivalence for men and women

geared toward another issue—equal treatment. An

of:

example of an equal (or unequal) treatment claim is

(1) The number of competitive events per sport;

an allegation that a school provides "unequal scholar-

(2) The

number

and

length

of

practice

ship funding to varsity female athletes as compared to opportunities;

*varsity male athletes." Id. The [*9] Plaintiffs in this case (3) The time of day competitive events are*

assert an equal treatment claim against the School

scheduled;

Defendants based on the School Defendants' schedul-

(4) The time of day practice opportunities are

ing of girls' and boys' basketball games.

scheduled; and

A Policy Interpretation issued in 1979 by the Depart-

(5) The opportunities to engage in available pre-

ment of Health, Education, and Welfare's Office for

season and post-season competition.

Civil Rights5 and used by the Department of Educa-

tion's Office for Civil Rights explains how the Depart-44 Fed. Reg. at 71,416. The 1979 Policy Interpretation ment of Education interprets the Title IX regulations.

also states that the Department of Education's determi-This document, entitled Title IX of the Education

nation of compliance is based on:

Amendments of 1972; a Policy Interpretation; Title IX

a.

Whether the policies of an institution are dis-

and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec.

criminatory in language or effect; or

11, 1979) (hereinafter "1979 Policy Interpretation"), is b.

Whether disparities of a substantial and unjus-

given substantial deference by the courts. See Cohen, 991

F.2d at 896-97. Although the 1979 Policy Interpretation tified nature exist in the benefits, treatment,

"is designed specifically for intercollegiate athletics …

*services, [*12] or opportunities afforded male*

its general principles will often apply to club, intramu-and female athletes in the institution's pro-

ral, and interscholastic athletic programs, which are also gram as a whole; or

covered by the regulation." 44 Fed. Reg. at 71,413. The c.

Whether disparities in benefits, treatment,

1979 Policy Interpretation is divided into three sections, services, or opportunities in individual seg-which address: (1) compliance in financial

assistance ments of the program are substantial enough

*(scholarships) based on athletic ability; (2) compliance in and of themselves to deny equality of ath-in other program areas; and (3) compliance [*10]*

letic opportunity.

in meeting the interests and abilities of male and

female students. Id. at 71,414. Part two, compliance Id. at 71,417. What this means is that a disparity in in other program areas, corresponds to 34 C.F.R.

a single program component, such as scheduling,

§106.41(c)(2)-(10), and is relevant to the instant case.

can constitute a violation of Title IX if the disparity is

"substantial enough … to deny equality of athletic

The 1979 Policy Interpretation explains:

opportunity." Id. However, the 1979 Policy Interpreta-The Department will assess compliance with … the

tion does not require identical scheduling for boys' and general athletic program requirements of the

girls' sports. Moreover, a disparity that disadvantages *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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one sex in one area can be offset by a benefit to that Id. The district court concluded that the MHSAA's sex in another area. In the instant case the School

scheduling practices imposed a number of specific

Defendants have not provided the Court with any evi-

disadvantages to the girls' sports teams scheduled

dence that their female athletes receive better treat-during non-traditional seasons. These disadvantages

ment than their male counterparts so as to offset any were countered by very few potential advantages to

disadvantage resulting from the School Defendants'

the girls' teams. The court explained that the sched-basketball

scheduling

practices.

Accordingly,

the

uling practice deprived girls of "contemporaneous

Court must determine whether the disparity in the

role models, skills development, and team-building

scheduling of girls' basketball games is substantial opportunities." Id. Based on these disadvantages, the enough by itself to deny the Plaintiffs

equality of ath-district court concluded that the MHSAA "violated

letic opportunity.

and continues to violate Title IX by scheduling seasons The Plaintiffs cite McCormick, 370 F.3d at 275, and Com-of the sports at issue in the manner which it has." Id.

munities for Equity v. Michigan High School Athletic Ass'n, at 857.

178 F.Supp 2d. 805 (W.D. Mich. 2001), aff'd, 459 F.3d 676

Despite the Plaintiffs' arguments to the contrary the (6th Cir. 2006), in support of their argument that the instant case is not similar to either McCormick or Com-School Defendants' disparate scheduling of girls' and munities for Equity. In McCormick, the schools' schedul-boys' basketball games is significant enough to consti-ing of girls' soccer deprived girls of an opportunity to tute a stand alone violation of Title IX. However, the compete for a state championship. Boys were not

Court does not believe that either of these cases is anal-denied such an opportunity. In Communities for Equity, ogous to the instant situation.

the MHSAA scheduled only girls' sports out-of-season.

McCormick arose out of the scheduling of girls' high In the instant case the Plaintiffs play basketball during school soccer in New York. The majority of school

the "appropriate" season and they are able to compete districts scheduled girls' soccer in the fall and the for the state championship. The Plaintiffs' complaint is state championship was held in the fall. Nonetheless, that they are scheduled to play on non-preferred dates the defendant school districts—Pelham and Mamaro-more frequently than the boys' team. This does not

neck—scheduled their girls' soccer seasons in the

deprive the Plaintiffs of role models, inhibit their skills spring. As a result, girls who played soccer for Pelham development, or prevents team-building.

Unlike Com-or Mamaroneck could not compete in the state cham-

munities for Equity and McCormick, where the defen-pionship. McCormick, 370 F.3d at 280. Members of the dants'

conduct

affected

the

plaintiffs'

athletic

Pelham and Mamaroneck girls' soccer teams filed suit development and capped their ability for athletic

alleging that the schools' scheduling practices vio-

achievement, in the instant case the School Defen-

lated Title IX. Id. Following a trial, the district court dants' conduct does not hinder the Plaintiffs' develop-entered judgment for the schools and the plaintiffs

ment of basketball skills. In short, the disparity in appealed. The Second Circuit concluded that the

treatment in this case simply does not rise to the level scheduling disparity was significant enough to violate seen in either Communities for Equity or McCormick. The Title IX and accordingly reversed the lower court.

School Defendants' treatment of the Plaintiffs does

The appellate court was swayed by the fact that

not result in a disparity that is so substantial that it

"[t]he scheduling of soccer in the spring … places a denies the Plaintiffs equality of athletic opportunity.

ceiling on the possible achievement of the female soc-Accordingly, there is no violation of Title IX and the cer players that they cannot break through no matter School Defendants' motion for summary judgment is

how hard they strive. The boys are subject to no such ***GRANTED****.*

ceiling." Id. at 295.

B. Equal protection claim against the IHSAA

Similarly, in Communities for Equity, the Michigan High School Athletic Association ("MHSAA") scheduled

The Plaintiffs' Fourteenth Amendment Equal Protection

"athletic seasons and tournaments for six girls' sports claim against the IHSAA is brought pursuant to 42

during less advantageous times of the academic year

U.S.C. § 1983. "To be liable under 42 U.S.C. § 1983

than boys' athletic seasons and tournaments." 178

for violating the Fourteenth Amendment, an entity …

F.Supp. 2d at 807. By "less advantageous" the plaintiffs must be considered a 'state actor.'" Communities for meant that the girls' sports were "played in a non-Equity, 178 F. Supp. 2d at 846. In addition, "[t]o state a traditional season, i.e., a season of the year different Fourteenth Amendment claim, Plaintiffs must also allege from when the sport is typically played." Id. The plain-that Defendant treats high school boys differently from tiffs alleged that "the non-traditional season [was] a girls." Id. at 848. "Once Plaintiffs have established a disadvantageous time of the year to play the sport."

gender classification, the burden of justifying the

(continued)

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Chapter Five

classification shifts to Defendant, and the justification theory to hold the IHSAA liable in this situation. The must be 'exceedingly persuasive.'" Id. In other words, cases that the Plaintiffs cite deal with pretrial detai-in order to succeed, the Plaintiffs in the instant case nees, false arrests, and students subjected to sexual must establish that they suffered deprivation of a

harassment or bullying. None of these cases are anal-federally-recognized right (the Fourteenth Amendment) ogous to the present situation. Just because the Plain-perpetrated by a state actor (the IHSAA).

tiffs have allegedly suffered an injury does not mean The IHSAA does not challenge the Plaintiffs' assertion that they can hold the IHSAA liable. Before a state

that it is a state actor. And, based on the Indiana

actor's failure to act can give rise to legal liability, Supreme Court's decision in IHSAA v. Carlberg, 694

there must be a constitutionally recognized duty on

N.E.2d 222, 229 (Ind. 1997), it appears that the IHSAA the defendant to act. See Jackson v. Byrne, 738 F.2d is a state actor. Accordingly, the Court turns to the sec-1443, 1446 (7th Cir. 1984). Here, the Plaintiffs point ond prong of the § 1983 analysis and considers whether to no such duty on behalf of the IHSAA. Accordingly, the IHSAA has violated the Plaintiffs' Fourteenth Amend-the IHSAA's motion for summary judgment is

ment Equal Protection rights.

GRANTED.

The Plaintiffs concede that the IHSAA has not taken

CONCLUSION

any direct action against them. It is undisputed that For the foregoing reasons, the School Defendants'

the Plaintiffs' § 1983 claim stems from the scheduling Motion for Summary Judgment (Docket No. 82) is

of Season Contests. It is also undisputed that the

GRANTED. *The Plaintiffs' Motion for Summary Judg-IHSAA does not schedule either boys' or girls' basket-ment (Docket No. 92) is* ***DENIED***. *The Indiana High ball Season Contests. Although the IHSAA regulates*

School Athletic Association's Motion for Summary

how many weeknight games can be played each

Judgment (Docket No. 108) is ***GRANTED***.

week and the IHSAA ultimately controls the length

of the basketball season, these responsibilities are ***FOOTNOTES***

managed in an undisputedly even-handed and non-

1. The IHSAA defines a weekday as "a night game

discriminatory manner by the IHSAA.

when school is scheduled the next day." Docket

Apparently in recognition of the fact that the IHSAA No. 109 at 6-7.

has not taken any discriminatory action against them, 2. In July 2010, the Parker family relocated to

the Plaintiffs propose a novel theory that purports to Massachusetts. Accordingly, J.L.P. withdrew from

hold the IHSAA liable for its "deliberate indifference FCHS and no longer plays basketball for the

to gender-based discrimination." Docket No. 94 at 27.

school.

According to the Plaintiffs, despite the fact that the 3. After the Parkers decided to move out of state,

IHSAA was "warned in 1997 by [the Office of Civil

the Plaintiffs filed an unopposed motion to add

Rights] that some of its member schools may be

Hurley and C.H as plaintiffs. Docket No. 116.

engaged

in

discriminatory

scheduling

practices,

The Court granted the Plaintiffs' motion on July

IHSAA decided to look the other way." Id. at 28.

27, 2010. Docket No. 117.

And, in spite of a "January 24, 2009 article in the

Indianapolis Star … showing that these inequalities 4. The Plaintiffs' Fourteenth Amendment claim is persisted, and despite the fact that it regulates most brought pursuant to 42 U.S.C. § 1983.

other aspects of the scheduling of high school basket-5. The Department of Health, Education, and Wel-

ball competitions[,] [t]he IHSAA made a conscious

fare ("HEW") was the predecessor to the modern

choice to remain on the sidelines." Id. Thus, the Department of Education. In 1979, Congress split

Plaintiffs argue that "by failing to mandate gender

HEW into the Department of Health and Human

equality in the scheduling of basketball games during Services and the Department of Education. See

prime times through its otherwise expansive regula-

Department of Education Organization Act, Public

tory powers in accordance with its policy of deliberate Law Number 96-88, 93 Stat. 669 (1979) (codified

indifference, IHSAA is actually facilitating discrim-at 20 U.S.C. §§ 3401-3510). All educational func-inatory gender-based scheduling by its member

tions were transferred to the Department of Edu-

schools." Id.

cation, see 20 U.S.C. § 3441(a)(1), and all HEW

The problem with the Plaintiffs' argument is that

regulations in effect when the split occurred were

despite their rhetoric, they have not cited a single fed-duplicated by the Department of Education. See 34

eral case that supports using a deliberate indifference C.F.R. pt. 106.

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Sexual Harassment

Sexual harassment *is unwelcome conduct of a sexual nature. A significant number of claims by student-athletes, both male and female, have made this issue very important in intercollegiate sports. Sexual harassment is considered to be a form of sex (gender) discrimination prohibited by Title IX based upon numerous judicial decisions. Employees at colleges and universities, such as administrators, trainers, professors, counselors, and coaches, are also protected from discrimination under Title IX and on the*

basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964.

Sexual harassment might interfere with a student's academic performance and emotional and physical well-being if not addressed properly and timely. Sexual harassment can be male-female, female-male, female-female, and male-male. Sexual harassment may interfere with a coach's, trainer's or administrator's job performance and his or her emotional well-being. Since many college sports programs employ both male and female trainers and coaches, sexual harassment may be a prime area for litigation, particularly when it comes to locker room and training room (mis)behavior.

Recipients of false accusations have no recourse under Title IX or Title VII, though they may claim various tort theories including defamation (slander, libel), intentional interference with contractual relations, and intentional infliction of emotional distress. Claims of sexual harassment can be fierce, especially in the Internet era with various social media websites, and false claims may attempt to ruin a victim's reputation. However, there are numerous instances in which coaches or administrators have retained their jobs or rehabilitated their reputations subsequent to a thorough investigation which demonstrated fraudulent (or at best insufficient) claims of sexual harassment or discrimination. Unfortunately, defending disparaged reputations in the real or virtual world, even if claims or reports are untrue, can involve significant time and money.

Deliberate Indifference

Once a college or university becomes aware of a possible sexual harassment violation of Title IX, the institution must conduct a prompt investigation into the situation. An institution may expose itself to liability if the plaintiff shows that official's response demonstrates a ***deliberate indifference*** *to actual knowledge of discrimination.*

Whether a school's response to student-on-student actions rises to the level of misconduct prohibited by Title IX is to be judged by the totality of the circumstances.

In Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998), the Supreme Court held that a private right of action is allowed in sexual harassment cases involving a teacher and student. The Supreme Court held that a school district will not be liable under Title IX unless an official, who, at a minimum, has authority to address the alleged discrimination and to institute corrective measures has actual knowledge of the discrimination, and fails to adequately respond. Failure to respond must amount to deliberate indifference to the discrimination, now known as the deliberate indifference standard. The next cases explore allegations of sexual harassment and Title IX.

Sexual harassment

form of employment discrimination that consists of images or verbal or physical abuse sexual in nature and unwelcome

deliberate indifference

standard used by courts to determine the extent of possible liability for a defendant in addressing its response to an instance involving an allegation of sexual harassment *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Davis v. Monroe County Board of Education

The Supreme Court ruled in a 5–4 decision that a school board may be held liable for damages under federal law when the school has actual knowledge of student-on-student sexual harassment and fails to address the situation, demonstrating deliberate indifference to the action. The harassment must be so severe, pervasive, and objectively offensive, that it can be said to deprive the victim of access to the educational benefits or opportunities provided by the school. This case involved repeated harassment of a female fifth grader in a public elementary school. The Court made it clear that student-on-student harassment of the type described above is gender harassment for purposes of Title IX, and that a private right of action is extended for cases involving peer sexual harassment. Davis v. Monroe County Bd. of Educ., 526 U.S 629 (1999).

Simpson v. Univ. of Colorado

*Lisa Simpson and Anne Gilmore, both students at the University of Colorado (**CU**), contended that the university failed to take appropriate measures to protect them from sexual assault and sexual harassment by football players and football recruits during an official campus visit by recruits. The litigation stemmed from an off campus party in December, 2001.*

In Simpson v. Univ. of Colorado, 372 F. Supp. 2d 1229 (D. Colo. 2005) the federal trial court held that the information available to the CU officials did not constitute adequate notice that CU football players and recruits would sexually assault female university students as part of the recruiting program, or that those assaults would be aided or exacerbated by excessive alcohol use by players, recruits, and female students. However, the Tenth Circuit Court of Appeals did not agree with the trial court and reversed and remanded the case, giving it new life in Simpson v.

Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007). Eventually, CU settled out of court and Simpson was paid $2.5 million and Gilmore $350,000.

The incident sparked the resignation of several school administrators, the athletic director and head coach. In February 2004, Gary Barnett, the football coach, was suspended with pay after making disparaging comments about Katie Hnida, a former placekicker for the Buffaloes, who reported

being raped in 1999 by a Colorado player. In May, 2004, an investigative panel convened by the university's Board of Regents lambasted university officials for failing to monitor the recruiting process or to exercise enough oversight over the athletics program as a whole.

Then, in September 2004, the Rocky Mountain News reported that a grand jury had called the university's Board of Regents unqualified to supervise the football program, having created a culture that fostered inappropriate and potentially criminal behavior by athletes and recruits. This led to the resignation of CU's president Elizabeth Hoffman, Head Coach Gary Barnett, Boulder chancellor Richard Byyny, and the university's athletics director Richard Tharp.

Jennings v. Univ. of North Carolina

*Women's soccer coaches, including head coach Anson Dorrance, at the University of North Carolina at Chapel Hill (**UNC**) were alleged to have created a hostile environment for a former player by discussing team members' sexual activities. In 1998, Melissa Jennings (and later another former player Debbie Keller Hill) levied **CU***

University of Colorado

UNC

University of North Carolina

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the claims against the coach and UNC administrators. Hill reached a settlement with the university in 2004 for $70,000, but Jennings decided to pursue her claim in the courts.

After almost a decade of litigation, including several dismissals and appeals of the case from the Middle District of North Carolina, the Fourth Circuit Court of Appeals in 2007 decided to allow the case to proceed to trial in Jennings v. Univ. of North Carolina, 482 F.3d 686 (4th Cir. 2007). The entire case was settled, and Jennings received $385,000 and the coach issued an apology to all players. Important to this case was that the Fourth Circuit also held that UNC had actual knowledge of the alleged sexual harassment when Jennings met with the university's highest ranking lawyer, but did not take appropriate action to address the complaints. Violations of Title IX were alleged, and again the courts analogized Title IX to Title VII of the Civil Rights Act of 1964 when making their decisions.

Other Title IX Considerations

Cheerleading

In the last few years, there has been considerable confusion as to whether cheerleading is actually a sport in a variety of contexts. In Noffke v. Bakke, 760 N.W. 2d 156 (Wis. 2008), the Wisconsin Supreme Court affirmatively stated that cheerleading is a sport. Brittany Noffke filed suit after she was missed by her spotter Kevin Bakke. Noffke fell backwards and hit her head on the tile floor. There were no mats down and the coach was nearby supervising another group of cheerleaders. The three cheerleaders who were involved in this post-to-hands stunt, had not previously performed this stunt together. The court stated that cheerleading is a sport because a it is "[a]n activity involving physical exertion and skill that is governed by a set of rules or customs;…" The Noffke decision dealt with whether cheerleading was a sport, but in the context of a tort claim, not a Title IX claim.

Competitive Cheer

*However, what about the organized activities of competitive cheer and acrobats and tumbling? Incredible momentum has been gained in recent years by colleges and universities around the country who are pressing hard to officially recognize competitive cheer at the NCAA level. Students are encouraged to visit the website of the National Collegiate Acrobatics & Tumbling Association (**NCATA**).*

According to its website, "The Mission of the NCATA is to bring the sport of stunts and tumbling to NCAA emerging sport status and eventually to a fully sanctioned NCAA sport." Also, NCATA provides a nice summary of the similarities and differences between cheerleading, competitive cheer, and acrobatics and tumbling:

***Cheerleading**: A group of individuals (team) whose purpose is to support a university or school. This group leads the crowd on the sidelines, serves as ambas-sadors for the institution at public appearances, etc. A Cheerleading team may compete once or twice a year in a cheer competition format, however, the purpose of this team is to support. A cheerleading team may be co-ed or all female. These teams are also known as rally, sideline, and spirit group.*

NCATA

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***Competitive Cheer**: An evolution of cheerleading into a competitive sport.*

A competitive cheer team's purpose is to compete. There may or may not be some crossover with the cheerleading team, but the purpose of the team is to compete on behalf of a school/university or all-star gym. A competitive cheer team competes in a 'competition format' where a team will perform a 2 min 30 second routine being scored on a variety of categories that range from skill execution to look of uniform. The scoring varies from competition to competition. A competition can have any number of teams. College club teams fall into this category along with all-star teams. Competitive Cheer can also be co-ed.

***Acrobatics and Tumbling**: An evolution of the all-female portion of competitive cheer. The purpose is to compete on behalf of a university. There is no cross over with competitive cheer or cheerleading teams. NCATA teams are recognized and treated as true sports at their respective universities and are subject to the same benefits as other NCAA sports within the athletic department. NCATA teams compete in a meet format against 1-3 other teams with a standardized scoring system nationwide. NCATA teams are in compliance and held to the same standards as other sports (i.e. GPA, eligibility, seasons, recruiting guidelines) NCATA teams compete between 6-8 times a year. With a chance to qualify for post season play. Statistics are collected on each athlete throughout the year to name All-Americans, etc.*

The OCR considers an activity to be a sport if: 1) it is based primarily on athletic ability, 2) it is limited to a defined season, 3) participants must prepare for and engage in competition, and 4) it is administered by the athletic department.

*Under this definition, competitive cheer can be considered a sport depending on the specific circumstances (such as university administration), and cheer scholarships can be counted for compliance with Title IX. Of vital importance to the OCR is whether the activity has been recognized as part of an intercollegiate athletic organization. In 2010, two organizations, NCATA and USA Cheer launched initiatives to help encourage the NCAA to classify competitive cheer as an **emerging***

***sport**, a term used by the NCAA most often in the context of new sports for women such as sand volleyball, which was officially added for the 2011 NCAA season. At least 20 states now recognize competitive cheer as a sport, but the NCAA has yet to follow officially.*

In 2003, the University of Maryland proclaimed that competitive cheer is a sport and awarded their squad varsity sport status. Seton Hall University added it in 2010. The University of Kentucky has not added it as a sport, but awards full in-state tuition to competitive cheer team members. The University of Oregon calls it Stunts and Gymnastics. At least 10 NCAA schools sponsor it as of 2010, but there is no real organized competition or schedule. Ultimately, the legal battle being waged is whether competitive cheer can count as a sport for Title IX substantial proportionality purposes.

Biediger v. Quinnipiac University

*Inevitably, the issue of whether competitive cheer can count as a sport worked its way into a federal courtroom. In 2010, in Biediger v. Quinnipiac Univ. the U.S. District Court for the District of Connecticut addressed this issue and whether **emerging sport***

phrased used by NCAA to describe a new sport added to its official list of sanctioned sports

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the sport could count as a varsity sport for purposes of gender equity under Title IX. The lawsuit concerned Quinnipiac University's plans to cut three of its sports teams (women's volleyball, men's golf and men's outdoor track) and to create competitive cheer as a new varsity sport for their 2009–10 season. Five of the women's volleyball players and their coach brought this lawsuit alleging the decision to eliminate the volleyball team violated their Title IX rights.

The court noted that the NCAA did not recognize it as a sport. Still, it did find that the purpose of the squad was to compete rather than to entertain, and this was consistent with other varsity teams. The team also followed applicable NCAA rules as applied to other varsity sports. However, the fatal flaw for this court was that even though in September 2009 Quinnipiac helped to establish NCSTA (now called NCATA) with seven other universities, NCSTA was only a loosely defined unincorporated association with no clear governance, structures, strategy or progressive system of competitions. Judge Stefan R. Underhill ruled against Quinnipiac, but did provide some advice. He stated:

In deciding that competitive cheer is not presently a Title IX sport, I do not mean to minimize the experience shared by the Quinnipiac competitive cheer team. It is unquestionable that the Quinnipiac competitive cheer members engaged in meaningful efforts and activities during the 2009–10 season—efforts and activities that this decision cannot diminish or take away. But what those students experienced was not the genuine opportunity to participate on a varsity team, which is the standard for counting athletes under Title IX. In reaching my conclusion, I also do not mean to belittle competitive cheer as an athletic endeavor. Competitive cheerleading is a difficult, physical task that requires strength, agility, and grace. I have little doubt that at some point in the near future—once competitive cheer is better organized and defined, and surely in the event that the NCAA recognizes the activity as an emerging sport—competitive cheer will be acknowledged as a bona fide sporting activity by academic institutions, the public, and the law. As the evidence in this case demonstrates, however, that time has not yet arrived. For that reason, Quinnipiac may not yet count the members of its competitive cheer team in order to prove its compliance with Title IX. Biediger v. Quinnipiac Univ., 728 F.

Supp. 2d 62, 117-18 (D. Conn. 2010).

While Quinnipiac's attempt to include competitive cheer as a varsity sport for Title IX purposes failed in 2010, momentum to support the sport is seems to be on their side. It will be interesting to see how the NCAA and, if necessary, the courts continue to explore how Title IX and competitive cheer can fit into the substantial proportionality test.

▪ ***Employment Law and Gender Issues***

Equal Pay Act of 1963

*Women coaches, trainers, and administrators have increasingly sued colleges and universities for gender discrimination under the Equal Pay Act (**EPA**) found at 29*

U.S.C. § 206 (d). This act requires all employers subject to the Fair Labor ***Equal Pay Act of 1963***

federal law mandating, with some exceptions, that all who perform substantially the same work must be paid equally

EPA

Equal Pay Act

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*Standards Act (**FLSA**) to provide equal pay for men and women performing similar work. If a female employee sues under the EPA, she must prove that her employer paid her less than a male for substantially equal work. Crucial to this analysis, however, is that exceptions in the statute are made for differences in pay based upon an established seniority system, a merit system, a system that measures earnings by quantity or quality of production, or any other differential based upon a legitimate factor other than sex.*

Universities can pay female coaches (or coaches of female teams) substantially less if it can be shown that their jobs are not equal, which usually is the case. For example, one of the most successful male or female basketball coaches of all-time, Pat Summit (University of Tennessee Lady Vols) became the first female basketball coach to earn over $1 million per year. She coached for 32 previous years before she reached this mark in 2006. Meanwhile, a few of the salaries of football assistant coaches around the country far exceeded hers at that time.

Stanley v. Univ. of Southern California

In Stanley v. Univ. of S. California, 178 F.3d 1069 (9th Cir. 1999), coach Marianne Stanley's contract had expired and contract negotiations for a renewal were contentious and unsuccessful. Stanley attempted to obtain a preliminary injunction that would keep her as the coach of the women's basketball team, claiming violations of the Equal Pay Act and Title IX (and a couple of California state discrimination laws as well). Her efforts were rejected by both the federal district court in 1993 and the Ninth Circuit Court of Appeals in 1995, which ultimately held that her unequal pay was based upon factors other than sex.

The Ninth Circuit focused on whether the relative experience of Stanley as the coach of the women's basketball team and George Raveling, the coach of the men's basketball team at that time, was sufficiently different to justify a disparity in compensation. The court observed that Coach Raveling had 31 years of coaching experience, had twice been named national coach of the year, twice been named PAC-10 coach of the year, was regarded as one of

the best recruiters in the nation, was an Olympic coach, had 9 years of marketing experience, and was the author of books on basketball. In contrast, Coach Stanley had 17 years of experience, had never coached an Olympic team and was not an author. Thus, the differences between the two were real and formed the basis of a legitimate non-discriminatory reason to pay them differing salaries. Because there was no discrimination, Stanley's claims failed.

Family and Medical Leave Act

*Enacted in 1993, the Family and Medical Leave Act (**FMLA**) applies to organizations which have 50 or more employees and is found at 20 U.S.C. § 2601 et seq. To be eligible for FMLA leave, an individual must meet the following three criteria:*

- *Be employed by a covered employer and work at a worksite within 75 miles of a place which that employer employs at least 50 people; **FLSA***

Fair Labor Standards Act

Family and Medical Leave Act (FMLA)

*1993 federal law that guarantees employees unpaid time off from work for childbirth, adoption, and medically related emergencies **FMLA***

Family and Medical Leave Act

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▪ Have worked at least 12 months (which do not have to be consecutive) for the employer; and

▪ Have worked at least 1,250 hours during the 12 months immediately before the date FMLA leave begins.

In essence, an eligible employee can take family leave for: (1) the birth of a child; (2) the adoption of a child; (3) the placement of a child with the employee for foster care; or (3) the care of a child, spouse, or parent who has a serious health condition (29 U.S.C.A. § 2612). A serious health condition of an employee or an employee's family member is a physical or mental condition that requires: 1. inpatient care in a hospital, hospice, or residential medical care facility, or 2. continuing treatment by a health care provider (29 U.S.C.A. § 2611(11)).

Substance abuse problems may qualify as serious health conditions, but FMLA leave must be taken for treatment of these problems. An employee returning from family or medical leave is entitled:

1. to be restored to the position held when the leave commenced, or 2. to be restored to an equivalent position (29 U.S.C.A. § 2614(a)(1)).

In sports law, there have been relatively few FMLA lawsuits, but certainly it remains to be seen how it impacts athletes, coaches, and administrators at all levels of sports. Since student-athletes are not employees, however, the FMLA as written does not apply to them.

Pregnancy

Along the same lines as the FMLA, pregnancy in sports is infrequent yet interesting issue. In fact, the NCAA even has a specific provision, Bylaw 14.2.1.3, Pregnancy Exception, which allows female student-athletes to petition for one extra year of eligibility as a hardship waiver and states, "A member institution may approve a one-year extension of the five-year period." That is, female student athletes can apply for a waiver in this circumstance in order to have six years to compete in four seasons (instead

of five to compete in four). It is generally well-established that a university and its athletic department should have in place a pregnancy policy to deal with female student-athletes, coaches and others in the event the situation presents itself.

Brady v. Sacred Heart University

*Tara Brady, a former starting center and women's basketball player at Sacred Heart University (**SHU**) settled a federal lawsuit in which she accused SHU of dismissing her from her team and rescinding her scholarship because she became pregnant. Brady claimed that SHU had violated her civil rights under Title IX.*

She claimed that she notified her coach and that a few days later she was told that her pregnancy would be a distraction and that her scholarship was being rescinded.

*Brady's lawsuit brought pregnancy and student-athletes into national discussion. In 2007, the subject was revisited after allegations surfaced involving the University of Memphis and Clemson University and female student-athletes who **SHU***

Sacred Heart University

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claimed that they were forced to sign a waiver acknowledging that pregnancy could affect their student-athlete scholarship.

Eric Butler

While a maternity hardship waiver is in the NCAA Manual, there is no comparable paternity waiver. In Butler v. Nat'l Collegiate Athletic Ass'n, 2006 U.S. Dist. LEXIS

61632 (D. Kan. 2006), Eric Butler, a student-athlete on the football team at the University of Kansas, was denied an extra year of eligibility to deal with the birth of his daughter by both the NCAA and a federal district court, which refused to grant a temporary restraining order. Butler filed suit in the district court of Kansas, claiming violations of the Equal Protection clause (via 42 U.S.C. § 1983) and Title IX. Butler eventually transferred to Washburn University, a Division II school in Topeka, Kansas.

▪ Other Gender Issues

This section addresses some of the other gender-related legal issues that students should be competent to discuss in this arena. Students should explore the following subjects in greater detail on your own. Notice that not all the issues address gender in the same way.

Gender-Exclusive Clubs

*Augusta National Golf Club in Georgia, the course which has held The Masters golf tournament each year since 1934, awarding the famous green jacket to the victor, is a private club that excludes women from being members. While women are allowed to play as guests, the club refuses to allow women as members. In 2002, women's rights activist Martha Burk publicly challenged the club to admit its first female member. From 2000–2005, Dr. Burk served as Chair of the National Council of Women's Organizations (**NCWO**).*

Burk's criticism drew attention to discrimination in private clubs throughout the United States against women, reminiscent of the public pressure directed at Shoal Creek Country Club (Birmingham, Alabama) to ammend its policy

and allow non-whites to join its membership in 1990, the same year that Augusta National Golf Club allowed its first African American member.

Connecticut

No doubt in response to the public criticism related to discriminatory practices at golf country clubs, some states have attempted to outlaw discriminatory practices at private clubs. The Connecticut legislature enacted an anti-discrimination statute in 1997 which states, inter alia,

(a) For the purposes of this section, "golf country club" means an association of persons consisting of not less than twenty members who pay membership fees or dues and which maintains a golf course of not less than nine holes and (1) receives payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers or (2) holds a permit to sell alcoholic liquor under chapter 545.

NCWO

National Council of Women's Organizations

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(b) No golf country club may deny membership in such club to any person on account of race, religion, color, national origin, ancestry, sex, marital status

or sexual orientation.

(c) All classes of membership in a golf country club shall be available without regard to race, religion, color, national origin, ancestry, sex, marital status or sexual orientation. CONN. GEN. STAT. § 52-571d (2011)

Some states, such as New Jersey, have enacted statutes that withhold liquor licenses from country clubs that do not comply with anti-discrimination (human rights) statutes. Others, such as California, have outlawed discriminatory practices in any place of public accommodation which has been interpreted to include country clubs as business establishments. California's Unruh Civil Rights Act states: (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. CAL. CIV. CODE § 51 (2011) States including Kentucky, Maryland, Minnesota, and Michigan have statutes and anti-discrimination laws which have applied in the context of private golf clubs as well. At the federal level, Title VII exempts private clubs from its jurisdiction despite objections by proponents of equality.

Women in the Men's Locker Room

During the 1977 World Series, MLB Commissioner Bowie Kuhn prohibited Melissa Ludtke from interviewing players in the locker room. In Ludtke v. Kuhn, 461 F.

Supp. 86 (S.D.N.Y. 1978), a federal judge ruled that male and female reporters such as Melissa Ludtke should have had equal access to the New York Yankees locker room because their operations involved a public stadium, though the Yankees were a private entity.

Similarly, in 1979, the Fort Myers News-Press battled the NFL's Tampa Bay Buccaneers to gain equal access for sports reporter Michele Himmelberg. Later in the season, Himmelberg was notified that all reporters would be banned from the locker room and instead all were moved to a designated

*interview area. Himmelberg became a co-founder of the Association for Women in Sports Media (**AWSM**).*

Women in the Training Room

NFL Quarterback Peyton Manning, his father Archie, author John Underwood, and publisher HarperCollins Publishers, Inc., were sued for defamation in May, 2002 by Jamie Ann Naughright (formerly Jamie Whited), a University of Tennessee assistant trainer at the time. She claimed that Manning's characterization of her in the book Manning: A Father, His Sons and a Football Legacy as having a "vulgar mouth" is false and cost her a subsequent job. She challenged Manning's version of a mooning-incident in college in 1996 alleging a more offensive act occurred in the training room.

Prior to that case, Naughright had become the first female associate trainer in the University of Tennessee's history. However, in 1997 she agreed to leave the University of Tennessee as part of a $300,000 lawsuit settlement related in part to the 1996 incident as well as 33 other claims, including sexual harassment, naming various trainers, administrators, and coaches in the lawsuit.

AWSM

Association for Women in Sports Media

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Oddly, the University of Tennessee is one of two athletic departments in the country with separate men's and women's athletic departments, as of 2011 (the other is the University of Texas). However, after Tennessee men's athletic director resigned in 2011, the women's athletics director Joan Cronan took charge over both programs on an interim basis. Still, students should consider whether maintaining separate departments at a state institution sends the wrong message that separate but equal is okay?

Women as Referees

Women have made strides as referees and umpires, but relatively slowly and not without struggle. Notably, the NBA hired Violet Palmer and Dee Kantner as officials in 1997. Sarah Thomas is the only female referee in major college NCAA football (Southwestern Athletic Conference) and she also refereed the 2009 Little Caesar's Pizza Bowl.

In 2007 Ria Cortesio was the only female umpire out of 293 in professional baseball holding her rank only at the Double-A level. On March 29, 2007, she became the first woman since Pamela Postema in 1989 to work a Major League exhibition game, serving alternately as the first and third base umpire in a spring training game between the Chicago Cubs and Arizona Diamondbacks. She retired from the sport in 2007 after being denied a promotion to the Major League.

Umpire Postema sued MLB alleging gender discrimination involving the selection of Major League umpires. Postema v. National League of Prof'l Baseball Clubs, 998

F.2d 60 (2d Cir. 1993). She made it only to the Triple-A level. Her suit was settled out of court, but gave exposure to the role of women referees in professional sports. Postema later authored a book in 2003 (with Gene Wojciechowski), You've Got to Have Balls to Make It in This League: My Life As an Umpire.

Negative Recruiting and Homophobia

In 2005, Jennifer Harris, a former Penn State University women's basketball player, filed a federal discrimination lawsuit with the assistance of the

*National Center for Lesbian Rights (**NCLR**) against head coach Rene Portland. The lawsuit accused Portland of discrimination based on race, gender and sexual orientation. Harris alleged that Portland asked her to change her appearance to look more feminine.*

Also named in the lawsuit were athletic director Tim Curley and the university itself. Harris transferred to James Madison University.

An internal university review found that Portland created a "hostile, intimidat-ing, and offensive environment," she was fined $10,000, required to attend diversity training sessions, and placed on zero tolerance for future violations of the nondiscrimination policy. The lawsuit eventually settled, and Portland resigned in 2007. The 2009 documentary Training Rules discussed, among other things, the issues at Penn State involving Portland and Harris.

*Harris' lawsuit brought concerns over the use of **negative recruiting** and*

homophobia** in intercollegiate sports to the forefront, both of which are more **NCLR

National Center for Lesbian Rights

negative recruiting

method of discouraging a prospective student-athlete from attending a competitor's institution by strategically exposing controversial information about the coaching staff or university

homophobia

general term used to describe a fear or animosity related to associating with homosexuals

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often than not discussed in the context of women's sports. That is, coaches (and others) as part of the university recruiting process use homophobia in women's sports to deter a recruit from attending other institutions competing for their athletic skills. Often words such as dykes, lesbians, gay, and butch are used as part of the negative recruiting process. Some believe that the cumulative effect of these manifestations of homophobia creates an unsafe and unproductive environment for gay and straight student-athletes alike. This might violate state laws or university policies related to discrimination related to sexual orientation.

The NCAA has deferred punitive measures for the maintaining or creating discriminatory environments on college campuses, including those that fail to address discrimination based upon sexual orientation, to the NCAA member institutions themselves and their legal counsel. However, the NCAA does address the issue of sexual orientation in Bylaw 2.6, The Principle of Nondiscrimination, which states: The Association shall promote an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its governance policies, educational programs, activities and employment policies including on the basis of age, color, disability, gender, national origin, race, religion, creed or sexual orientation. It is the responsibility of each member institution to determine independently its own policy regarding nondiscrimination.

*Whether due in part due to the Portland situation or not, the Women's Basketball Coaches Association (**WBCA**) Code of Ethics (2010), Principle II-Professional Responsibilities (2), now states that members must "Avoid*

negative recruiting by refraining from derogatory and/or slanderous statements about other institutions, coaches, administrators or players, including remarks based on race, religion, gender or sexual orientation."

In some instances, claims of discrimination based upon sexual orientation or homophobia prove to be without merit as it runs its course through the judicial system.

Pink

In 2005, Erin Buzuvis raised issues of gender discrimination and homophobia to the national level as a professor at the University of Iowa law school when she declared that the tradition of the use of the color pink throughout the visiting team's football locker room (including lockers, walls, and urinals) promoted negative stereotypes about women. The original rationale for painting the locker room pink was to psychologically soften the opposing team. Professor Buzuvis believed that the locker room should be repainted, and that by continuing to use pink the university was perpetuating harmful negative stereotypes about women. Many professors and students followed Buzuvis' call to end the practice of the pink locker room, including fellow University of Iowa law school professor at that time Jill Gaulding who declared, "I want the locker room gone," but it remains pink today.

Gender-Specific Language

Language, names, and terminology are important tools in establishing a culture of equality, and certain words can be or become offensive. For example, some suggest the word lady should be eliminated entirely. At the University of Tennessee, one might claim that the use of the term Lady Vols is pejorative. At Syracuse University, all teams now are referred to as the Orange rather than the Orangemen. At the ***WBCA***

Women's Basketball Coaches Association

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University of Southern California, the women's teams are now often referred to as the Women of Troy as opposed to the men's teams which are referred to as the Trojans.

Lawsuits, particularly in California, claim that the Ladies' Night (or Ladies'

Day) promotions for baseball teams or tennis events are discriminatory, since they apparently discriminate against men. Meanwhile, others say they promote negative stereotypes about women. Students should consider how names and language reinforce or challenge the way we perceive gender.

Suggestive Cheerleading

Definitely related to gender is the concern that some coaches, school administrators and even state lawmakers have raised over short skirts and quite revealing tops by high school cheerleaders and younger counterparts. The sexualization of young girls, critics say, reinforces harmful gender roles in which women are valued only as objects of sexual desire rather than for ability or talent. Some school districts in Georgia have policies which limit suggestive gestures and outline appropriate attire for cheerleaders, band members, drill teams, and pep squads. The state of Texas consistently considers whether to pass a law prohibiting suggestive performances by cheerleaders, drill teams or dance teams.

Transgender

While discussions, opinions, laws, and lawsuits often stem from allegations of discrimination based upon gender, the issue of gender itself has been

problematic for years. As many recall from high school biology, women have two "X" chromosomes, men have an "X" and a "Y." However, sometimes it is not so clear. In 2006

at the Asian Games, 800 champion Santhi Soundarajan of India was stripped of her medal after failing a gender test. Spanish hurdler Maria Jose Martinez Patino was disqualified in the 1980s because she had a "Y" chromosome.

*Issues about gender and transgender individuals (those who have undergone sex change operations, also known as sexual reassignment) have forced the International Olympic Committee (IOC) to develop its existing transsexual policy. The international track and field sports federation, International Association of Athletics Federations (**IAAF**), recently became the first to adopt rules regarding hyperan-drogenism, the overproduction of male hormones in women.*

Transgender participants include female-to-male transgender members, such as George Washington University former women's basketball player, Kye "Kay-Kay" Allums, and male-to-female athletes such as tennis player Rene Richards (formerly known as Richard Raskind), Canadian cyclist Kristen Worley, and Danish golfer Mianne Bagger. Richards, in fact, had to sue in order to be able to compete in the 1977 U.S. Open and other female professional tennis tournaments in Renee Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267 (1977).

*Similarly, 57-year-old Lana Lawless, a former police officer who went through gender reassignment surgery in 2005, sued the Ladies Professional Golf Association (**LPGA**) in 2010 under California's civil rights law claiming that the female at birth policy was unconstitutional. Lawless had won the Women's World Long-Drive Championship in 2008. The LPGA swiftly changed its female at birth policy in 2010, and reached a settlement with Lawless in 2011.*

IAAF

International Association of Athletics Federations

LPGA

Ladies Professional Golf Association

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Semenya

South Africa's track and field federation was requested to conduct a gender verifi-cation test on 18-year-old, 800 meter runner Caster Semenya amid concerns she did not meet the requirements to compete as a woman at the 2009 World Championships, where she set the fastest time that year. The test requires a physical medical evaluation, and includes reports from a gynecologist, endocrinologist, psy-chologist, an internal medicine specialist, and an expert on gender. Some reported that tests showed she was a hermaphrodite (also known as intersex); however Semenya was completely cleared to compete by IAAF.

▪ ***The Future of Title IX and Gender Issues***

in Sports

At one time, the most debated sports law issue involving girls and women in sports was whether or not private country clubs could exclude women (and others) from joining the club. Title IX and its litigious history, allegations of negative recruiting and homophobia, insensitive uses of language and

controversial names, the debate over whether competitive cheer is a sport, the legitimacy of condescending pink locker rooms at state-funded institutions, and now issues related to transgender and intersex athletes continue to provide challenges for courts, the government, the NCAA, and society in general.

Questions Remain

This is a remarkable time for discussions of gender issues in sports law. For example, if there the majority of students on college campuses today are women (according to the New York Times in 2011 women make up 57 percent of undergraduate students), should men's sports be cut accordingly to less than half of the funded activities? Are men now the underrepresented sex according to Title IX? Should the contact sports exception be clearly defined to include or exclude soccer, lacrosse, and field hockey? Should Congress to amend Title IX to exclude football entirely from the substantial proportionality test? Should women's football be established as an NCAA emerging sport?

Is it possible that men and women really are different in their interest in competing on varsity sports? Is it possible that larger cultural changes are necessary to see more equity in sports? Is it possible that the substantial proportionality test's pure numbers analysis has outlived its usefulness since its inception in 1979?

What might measure gender equity in its place? Is it possible that today's athletic directors do or do not engage in deliberate attempts to circumvent the NCAA's commitment to gender equity and Title IX's mandate for equity? Many questions remain unanswered.

- ***Summary***

Compliance with Title IX requires a commitment to equity. There is no doubt that Title IX has had a positive influence on women's sports in the United States, though Title IX is not just for women. Title IX grew out of Title VII of the Civil Rights Act of 1964. Title IX's original intent has been challenged on numerous *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic*

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occasions due to universities choosing to reduce men's athletic programs while simultaneously expanding women's programs.

Three tests are used to determine whether an educational institution is in compliance with Title IX: the substantial proportionality, history of expansion, and effective accommodation tests. It is important to accept that Title IX is more than words. Its continuous evolution reflects socio-political changes in U.S. society.

Numerous other laws have had an impact in the arena of women and sports.

Acts such as the Equal Pay Act, the Equity in Athletics Disclosure Act, and the Family and Medical Leave Act continue to affect sports law. In recent years, gender and transgender individuals continue to generate questions for doctors, lawyers, participants, and governing bodies at all amateur and professional levels.

Athletic directors, employers, human resource managers and others must take allegations of violations of Title IX and other civil rights-related statutes seriously.

Having training sessions for employees over the plethora of gender-related issues is vital to ensure compliance and reduce risk of liability.

▪ ***Key Terms***

club sports *non-varsity college or university teams that represent the university independently in competition and yet are not sponsored by the athletic department*

contact sports *sports such as football, wrestling, and lacrosse that inherently involve hostile, even violent physical struggles as part of the game's rules* ***deliberate indifference*** *standard used by courts to determine the extent of possible liability for a defendant in addressing its response to an instance involving an allegation of sexual harassment*

Department of Health, Education and Welfare (HEW) *former federal agency originally charged with enforcing Title IX provisions* ***effective accommodation*** *test under Title IX that determines whether the interests and abilities of the underrepresented gender have been fully and effectively accommodated by the present state of the athletic program* ***emerging sport*** *phrased used by NCAA to describe a new sport added to its official list of sanctioned sports*

Equal Pay Act of 1963 *federal law mandating, with some exceptions, that all who perform substantially the same work must be paid equally* ***Equity in Athletics Disclosure Act (EADA)*** *federal law requiring public disclosure of financial records of college and university records related to athletic expenditures*

Expansion Test *synonym for history of expansion test* ***Family and Medical Leave Act (FMLA)*** *1993 federal law that guarantees employees unpaid time off from work for childbirth, adoption, and medically related emergencies*

gender equity *concept associated with Title IX, evaluating whether equal opportunities to participate in intercollegiate athletics are available to both men and women*

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history of expansion (test) *test under Title IX on whether a collegiate institution can show a history of continuing practice of program expansion for the underrepresented gender*

homophobia *general term used to describe a fear or animosity related to associating with homosexuals*

Interests Test *characterization of third prong of Title IX analysis to determine whether a full and effective accommodation of interests has been demonstrated* ***Laundry List*** *colloquial expression used to describe the various factors which should be compared when determining compliance with Title IX*

negative recruiting *method of discouraging a prospective student-athlete from attending a competitor's institution by strategically exposing controversial information about the coaching staff or university*

Office of Civil Rights (OCR) *federal agency that enforces Title IX provisions* ***Proportionality Test*** *synonym for substantial proportionality test which provides for a safe harbor based upon a comparison of the number of male to female participants*

quota *mandated proportional share often associated with Title IX analysis* ***roster management*** *alternative expression for Title IX compliance* ***safe harbor*** *compliance with substantial proportionality test and allows for full, clear-cut protection from a discrimination claim for a violation of Title IX*

sexual harassment *form of employment discrimination that consists of images or verbal or physical abuse sexual in nature and unwelcome* ***substantial proportionality*** *test under Title IX that reviews whether*

intercollegiate level participation for male and female students is provided in numbers substantially proportionate to respective enrollments ***Title IX of the Education Amendments of 1972*** *federal law prohibiting gender discrimination in athletic programs at institutions that receive federal funds*

- ***Acronyms***

AIAW *Association for Intercollegiate Athletics for Women* ***AWSM*** *Association for Women in Sports Media*

CFE *Communities for Equity*

CRRA *Civil Rights Restoration Act of 1987*

CSC *College Sports Council*

CU *University of Colorado*

DOE *Department of Education*

EADA *Equity in Athletics Disclosure Act*

EPA *Equal Pay Act*

FBS *Football Bowl Subdivision*

FLSA *Fair Labor Standards Act*

FMLA *Family and Medical Leave Act*

GAO *General Accounting Office*

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HEW *Department of Health, Education and Welfare* ***HHS*** *Department of Health and Human Services*

IAAF *International Association of Athletics Federations* ***IOC*** *International Olympic Committee*

IWF *Independent Women's Forum*

LPGA *Ladies Professional Golf Association*

MHSAA *Michigan High School Athletic Association* ***NAGWS*** *National Association for Girls and Women in Sport* ***NCATA*** *National Collegiate Acrobatics & Tumbling Association* ***NCLR*** *National Center for Lesbian Rights*

NCWO *National Council of Women's Organizations* ***NGWSD*** *National Girls & Women in Sports Day* ***NOW*** *National Organization for Women*

NWLC *National Women's Law Center*

OCR *Office of Civil Rights*

SHU *Sacred Heart University*

SWA *Senior Woman Administrator*

UNC *University of North Carolina*

WBCA *Women's Basketball Coaches Association*

WSF *Women's Sports Foundation*

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- ***Discussion and Review Questions***

1. *Why was Title IX enacted?*

2. *Have the goals of Title IX been met?*

3. *Is it fair to terminate men's sports programs to meet the requirements of Title IX?*

4. *If women can participate on men's teams, should men be allowed to compete on women's teams?*

5. *Does the Equity in Athletics Disclosure Act provide a valuable service to the public?*

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6. *How might the Family and Medical Leave Act affect women sport participants and women coaches?*

7. *Should football be excluded from the Title IX analysis? Why or why not?*

8. *Do you think that Title IX should be re-written rather than continually interpreted by courts and the OCR?*

9. *Do you think that football should be added as a varsity women's sport in the NCAA?*

10. *Is the word "lady" condescending to women such as in Lady Vols?*

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CHAPTER SIX

Disabilities

and Sports

After reading this chapter you will be able to:

1. Attempt to define the term disability.

2. Describe various federal laws related to disabilities generally and how they relate to sports law.

3. Discuss the issues related to maximum age rules in high school sports including the majority and minority state positions on the subject matter.

4. Explore the impact of the Casey Martin decision on accommodations for disabilities.

5. Explain the role of the EEOC in dealing with claims of disabilities.

6. Discuss disability issues related to the NCAA and participation in NCAA sanctioned events.

7. Explain whether or not alcoholism is largely considered a disability under federal law.

8. Discuss the conditions to which the ADA does not apply.

9. Explain the similarities or differences between the Paralympics and Special Olympics.

10. Discuss some of the important cases involving high school sports and disabilities.

▪ *Introduction*

Persons with disabilities are able to compete in sports with much more acceptance and frequency than in years past. Several federal laws have affected how society considers and accepts individuals with disabilities in sports. Federal and state programs also encourage persons with disabilities to overcome those physical challenges. Internationally, remarkable changes

in the acceptance of athletic competitors with disabilities have driven the Paralympic Games to new heights.

What constitutes a disability, however, is not entirely clear and interpretation of that term continues to evolve. How disabilities affect the eligibility of professional athletes in sports is an area of continued interpretation and uncertainty. Though physical disabilities may be more easily seen, mental and learning disabilities are addressed under current disability laws as well.

There has not been much litigation involving persons with disabilities in sport until recently. Compliance with federal disability laws can be quite technical, and it is one of the few areas of sports law in which the government actively enforces the relevant laws. This is similar to the way in which the OCR and the DOE are involved in Title IX interpretation, as discussed in the previous chapter.

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Chapter Six

▪ *Relevant Statutes*

There are three primary relevant statutes related to persons who have disabilities in sports. Students should become familiar with the fundamental similarities and differences of each:

1. The Rehabilitation Act of 1973

2. The Americans with Disabilities Act of 1990

3. Individuals with Disabilities Education Act

These laws and their respective terms overlap. They are often used simultaneously to address claims of disability status as part of a lawsuit, for example.

- ***The Rehabilitation Act of 1973***

The Rehabilitation Act of 1973 (29 U.S.C. § 791 et seq.) applies to public institutions that receive federal funding such as colleges, universities, and other public school districts. In essence, this act prohibits discrimination on the basis of disability in programs conducted by federal agencies: in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act of 1990 (ADA), discussed here shortly.

Section 504

Understanding § 504 of the Rehabilitation Act is very important. The Office of Civil Rights (OCR) enforces § 504 in programs and activities that receive federal financial assistance from the Department of Education (DOE). The regulations implementing § 504 in the context of educational institutions appear at 34

C.F.R. § 104. Each federal agency has its own set of § 504 regulations that apply to its own programs, and each agency is responsible for enforcing its own regulations.

§ 504 of this Act states:

No otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance….

A person is considered disabled under §504 if he or she: 1. has a physical or mental ***impairment*** *that substantially limits one or more major life activities;*

Rehabilitation Act of 1973

precursor to Americans with Disabilities Act and states that no person with a disability may be excluded from participation in, be denied the benefits of, or be discriminated under any program or activity receiving federal financial assistance ***impairment***

diminishment of physical or mental capabilities

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2. has a record or history of such an impairment;

3. is regarded as having such impairment if he or she: a. has a physical or mental impairment that does not substantially limit a major life activity but is treated by the appropriate institution as having such a limitation (e.g., a student who walks with a limp);

b. has a physical or mental impairment that substantially limits a major life activity only as result of the attitudes of others towards such impairment

(e.g., a student who is obese); or

c. has no physical or mental impairment but is treated by the appropriate institution or governing body as having such impairment (e.g., a student who tests positive with a disease but has no physical effects from it) (34 C.F.R. § 104.3 (j)).

Section 504 may also be enforced through private lawsuits. It is not necessary to file a complaint with a federal agency before going to court.

FAPE

*Section 504 regulations also require a school district to provide a free appropriate public education (**FAPE**) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability.*

Under § 504, a school district must provide regular or special education and related aids and services designed to meet the student's individual educational needs as adequately as the needs of non-disabled students are met.

- ***The Americans with Disabilities Act***

of 1990 (ADA)

The ADA (42 U.S.C. § 12101 et seq.) is recognized as a powerful non-discrimination law for individuals with disabilities. Students of employment law or business law are probably more familiar with this disability law than any other. Though the ADA is often applied in the employer-employee relationship, it also applies to public facilities like public schools and other government entities, and to privately owned businesses and services that provide public accommodations regardless as to whether they receive federal funding. Certainly, the ADA is very similar to the Rehabilitation Act of 1973, but the ADA focuses more on employment issues and places of public accommodation such as arenas and stadiums.

To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual

with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.

ADA Amendments Act (ADAAA)

*The ADA Amendments Act (**ADAAA**) was signed by President George Bush on September 25, 2008 and became effective January 1, 2009. The ADAAA is not retroactive, however; it applies only to discriminatory acts that occur on or after **FAPE***

free appropriate public education

ADAAA

ADA Amendments Act

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*January 1, 2009. The **Equal Employment Opportunity Commission (EEOC)** established new regulations to become effective on May 24, 2011.*

The ADAAA makes it easier for individuals to establish their protections under the ADA in response to several Supreme Court decisions that limited the protection of the ADA to individuals with specific diseases. The ADA's

definition of disability was unchanged by the ADAAA, however the ADAAA states that this definition of disability must be interpreted in favor of broad coverage.

As of 2011, physical or mental impairments are now defined as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine, and also any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Major life activities has also been expanded to include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

According to the EEOC, specific types of impairments should easily be concluded to be disabilities. The impairments include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

ADA Titles

The ADA is divided into five parts or Titles. Titles I and III are the most relevant to sports law.

Title I–Employment

This Title applies only to employers that have 15 or more employees. It prohibits discrimination in recruitment, hiring, promotions, training, pay,

social activities, and other privileges of employment. Individuals may file a lawsuit with Title I claims in federal court only after they receive a right-to-sue letter from the EEOC.

Title II–Public Services

*This Title prohibits discrimination in public institutions and school districts, for example. There is an exception for bona fide private clubs. Complaints are filed with the Department of Justice (**DOJ**).*

EEOC

The Equal Employment Opportunity Commission

Equal Employment Opportunity Commission (EEOC)

Federal agency responsible for enforcing

federal antidiscrimination laws

DOJ

Department of Justice

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Title III–Public Accommodations and Services Operated by Private Entities

This Title prohibits discrimination in some private institutions (including private schools) and any place of public accommodation. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs.

Transportation services provided by private entities are also covered by Title III. Public accommodations must remove barriers in existing buildings where it is possible to do so without much difficulty or expense, given the public accommodation's resources. Complaints of Title III violations may be filed with the DOJ. It is unclear whether Title III of the ADA should be applied to public and private Internet websites as well. Title III may also be enforced through private lawsuits. It is not necessary to file a complaint with the DOJ (or any federal agency), or to receive a right-to-sue letter before going to court.

Title IV-Telecommunications Relay Services

*Title IV addresses telephone and television access for people with hearing and speech disabilities or impairments. It requires common carriers (telephone companies) to establish interstate and intrastate telecommunications relay services (**TRS**) at all times. The Federal Communications Commission (**FCC**) has set minimum standards for TRS services.*

Title V-Miscellaneous Provisions

This section includes provisions which are designed to assist the interpretation and enforcement of the ADA including items such as awarding attorney's fees and the relationship of the ADA to other state and federal laws.

Reasonable Accommodation

*Just as in § 504 of the Rehabilitation Act, the ADA requires employers and others to make **reasonable accommodations** for a qualified individual with a known physical or mental disability. The ADA does not require employers and others to make accommodations that pose an **undue hardship**, often defined as being significantly difficult or expensive. In sports law, such accommodations include stadium viewing and seating, access ramps, and restroom areas.*

If a reasonable accommodation poses an undue hardship to an employer, it need not be implemented. Undue hardship is evaluated by assessing various factors including the nature and cost of the accommodation, the overall financial resources of the facility and of the business, and the impact the accommodation places on the operation of the facility or program.

TRS

telecommunications relay services

FCC

Federal Communications Commission

reasonable accommodations

*adaptations or adjustments employers must make to accommodate the interests of a person with disabilities without undue hardship **undue hardship***

analysis under ADA that would provide a defense for an employer that must pay excessive costs to accommodate a person's disability
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Not Covered

The following are not considered disabilities under the ADA even after the ADAAA: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Pregnancy is not an impairment and therefore cannot be a disability per se.

Drug and Alcohol Addiction

Alcoholism and drug addiction are considered disabilities under the ADA.

However, if such persons affect others during the employment relationship, then they are likely not covered under the act. This has presented conflicts for professional sports leagues when use of certain drugs is a violation of a condition precedent to participation, whether as a matter of an individual contract, a collective bargaining agreement, or a violation of a league-wide personal conduct policy.

Rehabilitated drug users or people who are currently participating in a drug rehabilitation program are protected under the ADA because they are regarded as having an impairment that substantially limits one or more major life activities under the ADA. Recovering alcoholics and drug users also fall into this category.

Current illegal drug users are not protected under the ADA. An employer may refuse to hire an applicant or may fire an employee because that person is currently using illegal drugs.

Maddox v. Univ. of Tennessee

At the intercollegiate level, the issue of alcoholism as a disability was raised in Maddox v. Univ. of Tennessee, 62 F.2d 843 (6th Cir. 1995). In this case, former assistant coach Robert Maddox sued for wrongful termination alleging a violation (discrimination) of the ADA due to his alcoholism. Maddox was arrested for driving while intoxicated (DWI). Unbeknownst to the university, Maddox had a prior history of alcohol-related arrests.

The university demonstrated that Maddox failed to properly inform it of his alleged disability on his application for employment which specifically addressed the issue. The university also said they fired him not for his disability but for his arrest, which set a bad example for others and was considered egregious conduct.

As discussed in Chapter 2: Sports Contracts, good contract drafters would likely provide a morals clause to deal with Maddox's situation in today's legal environment at the very least.

Risks to Self and Others

The EEOC has interpreted the ADA and § 504 of the Rehabilitation Act to provide a defense to a discrimination claim if the accommodation would expose the disabled individual or others to a significant risk of substantial harm to their health or safety. If there may be a risk to other competitors, a waiver may be considered unreasonable and unenforceable. (29 CFR § 1630.2(r)). For example, what if a student is allowed to participate with a special wheelchair that accommodates that individual's interests, but the chair itself poses a danger to other competitors?

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▪ ***The Individuals with Disabilities Education Act*** *The Individuals with Disabilities Education Act (**IDEA**), formerly called the Education for all Handicapped Children Act of 1975 (20 U.S.C. §§ 1400 et seq.), requires public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs. In this way it is quite similar to the Rehabilitation Act. It governs special education through high school. It applies to students ages 3 to 21*

who are identified as eligible under one or more of 13 categories of disabilities. It does not apply to colleges and universities. The requirements for FAPE under IDEA are more detailed than those under § 504 of the Rehabilitation Act.

*To determine eligibility for special education, the student must first be evaluated. A formal, written Individual Education Plan (**IEP**) should be established for each student in order to afford possible recovery under this act. If parents disagree with the proposed IEP, they can request a due process hearing and a review from the state educational agency, if applicable in that state. They also can appeal the state agency's decision to state or federal court.*

Having a fundamental understanding of the major disability laws is a prerequisite to moving forward with the sports law cases or incidents. The next sections explore the specific application of disability laws and similar concerns in the various environments and contexts in sports law.

▪ ***High School***

High school athletic associations within the United States consistently maintain strict eligibility and transfer rules in order to participate in sports as an extracurricular activity. Enforcement of these rules is of paramount concern in order to maintain an honest and competitive balance among public and private school sports programs. In some cases, parents or

coaches will intentionally move, transfer, or hold back a student alleging a learning disability, when the motive is really to gain an athletic advantage and possibly an athletic scholarship to college. There has been a significant amount of litigation involving disabilities and eligibility rules in high school sports.

Public high school athletic associations have consistently been found to be indirect recipients of federal funds. Therefore, just like public colleges and universities, these associations are subject to a § 504 claim under the Rehabilitation Act, the ADA, and the IDEA. When the rules are modified for a person with a disability, such modification is referred to as a waiver and is usually done on a case-by-case basis. The decision to offer a waiver considers whether the waiver places an undue burden on the athletic program or association.

Individuals with Disabilities Education Act (IDEA) *federal law mandating that all children with*

disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs ***IDEA***

Individuals with Disabilities Education Act

IEP

Individual Education Plan

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Chapter Six

Waivers

Whether or not a student is granted a waiver based upon a disability can be a highly volatile situation for parents, coaches and administrators. As mentioned, participation and eligibility rules are designed to promote competition, to level the playing field, to avoid potential safety concerns (such as a very large player), and to avoid fraudulent claims of a disability to gain a competitive advantage.

If a student or parent disagrees with the decision of a state or local athletic association to grant a waiver, to what degree should courts get involved? In theory, courts are only to intervene in such matters if the decisions are arbitrary or capricious.

In general there are three categories of concerns with regard to disabilities in high school sports:

1. Learning disabilities

2. Physical disabilities

3. Age issues (maximum age participation rules, also known as age 19 rules) In high school sports, many cases have dealt with eligibility questions brought by a learning-disabled athlete who could not play due to an age eligibility (maximum age) rule. When reading the following material, ponder whether participation in high school sports is considered a privilege or a right.

Age Limits and Eligibility

Age is not usually considered to be a disability. Every state high school athletic association has an age limit to prevent older students and high schools from having an unfair physical advantage when it comes to competition in sports. What happens, however, when a student with a

disability takes longer to graduate, and his or her age exceeds the state high school athletic association's limit for eligible competition?

Maximum Age/Age 19 Rules

Age 19 rules *exclude students who turn age 19 before some designated date (usually the start of high school in August or September) from participating in interscholastic athletic activities. This rule allows for waivers, but only in special cases.*

Ultimately, a claimant's success in a legal challenge to an age 19 rule hinges on a judicial determination of whether the rule is essential to the program.

Even if a student has repeated grades due to a learning disability, they still may have a competitive advantage over their classmates due to physical maturity. Some students are, of course, already more physically developed than their peers during their last year in high school. State high school athletic associations have consistently offered that the age 19 rule is legitimate because it ensures the safety of younger athletes, reduces a competitive advantage that could be gained by using older athletes, and encourages the ideals of amateur and fair competition.

Eight-Semester Rule

In some cases, the focus is not on age but rather the number of semesters a high school student can participate in a certain sport or sports in general. This is ***age 19 rules***

also known as maximum age rule, it is a policy established by a local school districts or state-wide high school athletic association which provides that a student must be excluded from participation in high school sports if they turn 19 before a specific calendar date as they are deemed to be too old to play

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sometimes known as the eight-semester rule. Unlike in the age 19 rules cases, the courts deciding maximum participation rule cases have more readily accepted the arguments that these rules are essential to ensuring student safety and maintaining incentives to advance students' education over competitive advantage in sports.

Waivers can be granted, but only in special cases such as for medical reasons.

Majority Decisions

The majority of state courts side with the high school athletic associations on these participation issues, and have denied students' claims for extended time to play. As mentioned, the state high school athletic associations have uniformly argued that an age 19 rule is essential because it serves three purposes: 1. to ensure the safety of younger athletes;

2. to reduce the competitive advantage to teams using older athletes; and 3. to discourage students and coaches from intentionally delaying education for athletic purposes.

Courts in both Michigan and Missouri have supported the principle of maximum age rules. In Michigan, one must be 18-years-old or younger on September 1.

Sandison

In Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995), the federal district court granted an injunction to students Ronald Sandison (Rochester Adams High School) and Craig Stanley (Grosse Pointe

*North), both cross-country and track runners who had learning disabilities. The Michigan High School Athletic Association (**MHSAA**) was enjoined from enforcing its age limitation on the students' participation when the court decided that the MHSAA is subject to the requirements of § 504 and the ADA.*

However, the Sixth Circuit Court of Appeals reversed the district court decision and ruled in favor of the MHSAA, also holding that the issue of participation was moot because the respective athletic seasons had ended. The Court of Appeals concluded that the boys did not meet the age requirement because of their birth dates, not because of their learning disability. It also questioned whether the students could have succeeded in their ADA claims against the MHSAA.

McPherson

*In McPherson v. Michigan High Sch. Athletic Ass'n, Inc. 119 F.3d 453 (6th Cir. 1997), the Sixth Circuit Court of Appeals denied a waiver request by Dion McPherson of Huron High School who experienced significant difficulties in high school and was only identified with attention deficit/hyperactivity disorder (**ADHD**) at the beginning of his ninth semester in high school. The MHSAA convinced the court that the maximum age rule was "essential to preserving the philosophy that students attend school primarily for the classroom education and only secondarily to participate in interscholastic athletics." It also successfully argued that it would have given the Ann Arbor schools an advantage over other districts.*

Pottgen

*In Pottgen v. Missouri State High Sch. Activities Ass'n. , 103 F.3d 720 (8th Cir. 2007), Edward Leo Pottgen wanted to participate on his school's baseball team. Pottgen **MHSAA***

Michigan High School Athletic Association

ADHD

attention deficit/hyperactivity disorder

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had been held back for two years in elementary school due to a learning disability.

The Eighth Circuit Court of Appeals found that the age 19 requirement was essential and agreed with the MSHSAA (which had lost at the district court level) that a waiver of this age requirement "would constitute a fundamental alteration in the nature of the baseball program." The court went on to say that the age 19 rule did not violate either the federal ***Americans with Disabilities Act*** *(****ADA****) or § 504*

of the Rehabilitation Act.

Minority Decisions

A minority of courts and jurisdictions have rejected the premise behind the age 19

rule altogether and have adopted an individualized analysis approach to the issue.

These states include Connecticut, Florida, and Pennsylvania. In these cases the courts have used a waiver approach based on such individualized factors as the student's size, ability, and resulting competitive advantage.

Dennin

In Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663

(D. Conn. 1996), vacated as moot, 94 F.3d 96 (2d Cir. 1996), a 19-year-old student with Down Syndrome sought to enjoin the enforcement of an age limitation rule which would have prevented him from participating on his high school swim team.

Because of his special needs, he spent an additional year in middle school. Participation on the swim team was specified in his individualized education program (IEP).

The area's athletic conference bylaws rendered ineligible a high school student who turned age 19 before September 1. However, the Dennin court granted an injunction holding that he was entitled to a reasonable accommodation under various federal statutes including the IDEA, § 504 of the Rehabilitation Act, and the ADA. Dennin was entitled to a waiver of the age rule (i.e., a reasonable accommodation) because it would not fundamentally alter the athletic program or impose an undue burden. The court also determined that the sole reason the student was 19 and still in school was the existence of his disability. The Second Circuit Court of Appeals declined to review the decision because the swim season was over and the issue in this case was now moot.

Johnson

In Johnson v. Florida High Sch. Activities Ass'n, Inc., 899 F.Supp. 579 (M.D. Fla. 1995), Dennis Johnson contracted meningitis at nine months old, resulting in his loss of hearing. Because of this disability, his parents delayed his enrollment in kindergarten by one year. Dennis fell another year behind when the school system decided that he must repeat the first grade. Dennis took special education classes from the second grade until his sophomore year in high school and was provided with an interpreter and a note taker.

In high school, Dennis joined the football and wrestling teams at Boca Ciega High School in Pinellas County. However, the athletic association in his

district had an age 19 rule which provided that one had to be 18 before August 31. He petitioned for a waiver, was denied, and asked for an injunction in accordance ***ADA***

Americans with Disabilities Act of 1990

Americans with Disabilities Act (ADA) of 1990

federal law imposing obligations on employers

and other providers of public transport, telecommunications, and public accommodations to accommodate those persons with disabilities

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with the ADA, claiming the rule constituted a form of discrimination. The district court granted an injunction and held that the Florida High School Activities Association must determine, on a case-by-case basis, that waiving the rule would undermine its purposes of safety and fairness. The court found that the student was not larger than the other football players and that his participation did not raise safety concerns. This court also determined that the student was also of average ability level with no more experience than the other players. As a result his participation did not provide undue competitive advantages in wrestling and football and was not the result of an attempt to gain a competitive edge. Thus, the purpose of the rule was satisfied.

It should be noted that the judgment of the district court was vacated and the case was remanded as moot by the appellate court in Johnson v. Florida High Sch. Activities Ass'n, 102 F.3d 1172 (11th Cir. 1997). This often occurs in high school disability cases like Johnson because the student has often graduated once the case reaches the appellate court and they render a decision. However, the impact of the decision and its importance and relevance to age 19 rules is still significant.

A similar decision was rendered in Cruz v. Pennsylvania Interscholastic Athletic Ass'n, Inc., 157 F.Supp.2d 485 (E.D. Pa. 2001) in which the waiver of the age 19

*rule was granted to Luis Cruz, a special education student. His attorneys alleged (and coaches agreed) that waiving the Pennsylvania Interscholastic Athletic Association (**PIAA**) maximum age rule gave him no competitive advantage, was not a safety risk, did not displace other athletes, and was a positive influence though a marginal athlete.*

The following case demonstrates how Virginia dealt with an age 19 issue in 2010. The decision was challenged in federal district court. Consider whether you agree with the court's analysis.

▪ ***CASE 9***

*Steven Adam Sisson, Plaintiff, v. Virginia High School League, Inc., Defendant **United States District Court for the Western District of** obtain a waiver of the age rule, Sisson filed this action **Virginia, Roanoke Division***

*under 42 U.S.C. § 1983, asserting violations of his rights **December 14, 2010, Decided***

to due process and equal protection. The case is pres-December 14, 2010, Filed

ently before the court on the plaintiff's motion for temporary restraining order and preliminary injunction.

OPINION BY: GLEN E. CONRAD

For the reasons stated during the hearing on Decem-

OPINION

ber 10, 2010, and for those that follow, the plaintiff's motion will be denied.

MEMORANDUM OPINION

The plaintiff, Steven Adam Sisson, is a senior at Eastern ***Factual Background and Procedural History***

Montgomery High School in Montgomery County,

When Sisson was in the third grade, he was identified Virginia. Under the eligibility rules promulgated

as having a specific learning disability in reading

by the defendant, Virginia High School League

and writing with an auditory processing deficit.

("VHSL"), Sisson is one-day too old to participate in Although his grades were average, Sisson's parents

League-sponsored athletic activities, because he turned elected for him to repeat the third grade at the recom-19 on July 31, 2010. After unsuccessfully attempting to mendation of his private elementary school. After

(continued)

PIAA

Pennsylvania Interscholastic Athletic Association

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Sisson completed the seventh grade, his parents moved criterion A and that he would suffer an undue hardship him to a public school in Montgomery County that

if the age rule was not waived.

could better accommodate his particular academic

The application was subsequently forwarded to Tom

needs.

Zimorski, the deputy director of the VHSL. Zimorski

During his freshman year at Eastern Montgomery High

ultimately declined to follow the district committee's School, Sisson played football, baseball, and basketball recommendation and denied the waiver request on sev-at the junior varsity level. He then played the same eral grounds. Specifically, Zimorski found that no

sports at the varsity level during his sophomore and waiver criterion had been met, that the data provided junior years. As early as his freshman year, Sisson

by Sisson was insufficient to support a waiver, and that learned that he might not be eligible to play high

no undue hardship had been identified.

school sports during his senior year because of his age Sisson appealed the deputy director's decision to the and date of birth.

VHSL's executive committee. The executive committee

The VHSL, of which Eastern Montgomery is a member,

heard the matter via telephone conference on May 12, has adopted thirteen regulations addressing the eligi-2010, and ultimately voted to deny Sisson's request for bility of individual students to participate in League-a waiver.

sponsored activities. One of those regulations, the so-Sisson then appealed to an independent hearing offi-

called "age rule," states that a student shall not have cer, the final level of review under the VHSL rules. The reached the age of 19 on or before the first day of

hearing officer considered the materials submitted by August of the school year in which he wishes to com-Sisson and conducted an in-person hearing on May 28, pete. Sisson turned 19 on July 31, 2010 and, thus, is 2010. By letter dated June 1, 2010, the hearing officer one-day too old under the rule.

denied the request for a waiver. Although the hearing The VHSL regulations permit students to apply for a

officer found that criterion A may apply as a result of waiver of the age rule. According to the rules governing Sisson's documented learning disability, the officer eligibility appeals, a waiver will be considered:

determined that a waiver was not necessary to avoid

an inequity or prevent an undue hardship.

A. For the student who experienced a delayed start

or interruption in his/her educational progres-

Nearly six months later, on November 30, 2010, Sisson sion due to a significant disability. Disabled per-filed the instant action against the VHSL, alleging that sons shall be defined as those, who by reason of

he was deprived of due process and equal protection as one or more of the following conditions, are

a result of being denied a waiver of the age rule. The unable to receive reasonable benefit from ordi-follow day, Sisson filed a motion for temporary restrain-nary education: long-term physical impairment

ing order and preliminary injunction. In the motion, or illness, significant limited intellectual capac-Sisson requests an order requiring the VHSL to permit ity, significant identifiable emotional disorder,

him to participate in interscholastic athletic programs identifiable perceptual or communicative disorand competitions.

der, or speech disorders; or

DISCUSSION

B. For a non-native language speaking student

placed in a lower grade than his/her age

[…]

would dictate when first enrolling in a new

Having carefully reviewed the record in this case and school; or

the applicable case law, the court concludes that Sisson C. For the foreign student in refugee status.

has failed to establish that he is entitled to preliminary injunctive relief. First, Sisson has failed to demonstrate The rules further provide that a waiver will not be con-that he is likely to succeed on the merits of his claims.

sidered "[i]f the student repeats a grade after making As the court explained during the hearing on the

grades satisfactory for promotion to the next level."

instant motion, the facts of this case do not give rise Sisson applied for a waiver of the age rule in March of to a viable due process claim. In order to claim the 2010. The application was signed by his high school

procedural protections of the Due Process Clause of the principal, who opined that Sisson experienced an inter-Fourteenth Amendment, a complainant must establish ruption in his educational progression due to a disabil-that he has been deprived of life, liberty, or property.

ity and, thus, that he was eligible for a waiver under Bd. of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, criterion A, set forth above.

33 L. Ed. 2d 548 (1972). While Sisson contends that he Sisson's application was first reviewed by the local dis-has a protected property interest in playing interscho-trict committee, which recommended granting a

lastic athletics, he does not cite any legal authority that waiver. The committee found that Sisson satisfied

supports the notion that such interest exists. In the only Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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case cited by Sisson, Goss v. Lopez, 419 U.S. 565, 95 S. Ct.

FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 729, 42 L. Ed. 2d 725 (1975), the United States Supreme 113 S. Ct. 2096, 124 L. Ed. 2d 211(1993).

Court held that an Ohio law, which mandated free

In this case, the court questions whether Sisson will be public education and required residents to attend

able to satisfy either of the first required elements—

school, gave those students a property interest in public that he was treated differently from others with whom education that could not be taken away without due

he was similarly situated or that any unequal treatment process. In this case, however, the issue is not whether was the result of intentional discrimination. As the Sisson has a protected right to public education, but VHSL noted during the hearing on Sisson's motion,

whether he has a legitimate claim of entitlement to

eligibility decisions require an examination of facts play high school football, basketball, and baseball.

and circumstances that are often unique to each stu-

Because this court and others have rejected the notion dent who applies for a waiver. In Sisson's case, it is that students have a constitutionally protected interest undisputed that he suffers from a learning disability.

in participating in interscholastic athletics, the court However, he was not required to repeat a grade as a

concludes that Sisson's due process claim has little to result of the disability, or otherwise held back at the no likelihood of success on the merits. See

Equity in direction of school officials. Instead, Sisson's parents Athletics. Inc. v. Dep't of Educ., 675 F. Supp. 2d 660

elected for him to repeat the third grade to improve (W.D. Va. 2009) (dismissing the plaintiff's claim that his chances of academic success, even though his

students had a protected property interest in playing grades would have permitted him to be promoted to

intercollegiate sports); see also Seamons v. Snow, 84

the next grade. Given this distinguishing factor, it will F.3d 1226, 1235 (10th Cir. 1996) (emphasizing that the be difficult for Sisson to establish that he was similarly Court had interpreted Goss v. Lopez "to speak only in situated, in all relevant respects, to students who were general terms regarding the 'educational process,'"

granted waivers of the age requirement, or that the

and that "the innumerable separate components of

denial of his application was the result of purposeful the educational process, such as participation in athlet-discrimination.

ics and membership in school clubs, do not create a

property interest subject to constitutional protection"); Moreover, as previously explained, there is no funda-Davenport v. Randolph County Bd. of Educ., 730 F.2d 1395, mental right to participate in interscholastic athletics, 1397 (11th Cir. 1984) ("This court has held that the and "the Supreme Court has held that the disabled

privilege of participating in interscholastic activities are not a suspect class for purposes of an equal protec-must be deemed to fall … outside the protection of

tion challenge." Bowers v. NCAA, 475 F.3d 524, 554 (3d due process."); Brindisi v. Regano, 20 F. App'x 508, 510

Cir. 2007) (citing City of Cleburne v. City of Cleburne Living (6th Cir. 2001) (holding that the plaintiff "has neither a Center, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d liberty nor a property interest in interscholastic athlet-313 (1985)). As a result, any differential treatment is ics subject to due process protection").

subject only to the deferential "rational basis" standard Sisson's equal protection claim is premised on the

of review. Under this standard, a defendant's action assertion that students like him, who apply for a waiver will be upheld as long as "there is any reasonably con-of the age rule on the basis of a disability, are treated ceivable state of facts which could provide a rational less favorably than foreign students who apply for

basis for the [unequal treatment]." Beach Communica-waivers. While this claim presents a closer question tions, 508 U.S. at 313. Given the current record, and than Sisson's due process claim, the court nonetheless in light of the foregoing principles, the court is unable has serious doubt as to its likelihood of success. To to conclude that Sisson's equal protection challenge prevail on an equal protection claim, a plaintiff

has a strong likelihood of success.

"must first demonstrate that he has been treated dif-The court is also unable to conclude that Sisson will ferently from others with whom he is similarly situated suffer irreparable harm in the absence of preliminary and that the unequal treatment was the result of

injunctive relief. As previously stated, Sisson has been intentional or purposeful discrimination." Morrison v.

aware of his eligibility problems since his freshman year Garraghty, 239 F.3d 648, 654 (4th Cir. 2001). If the of high school, and his last administrative appeal from plaintiff makes this showing, "the court proceeds to the denial of his waiver application concluded on June determine whether the disparity in treatment can be

1, 2010. Nonetheless, Sisson waited until November 30, justified under the requisite level of scrutiny." Id. In 2010 to file the instant action. The court agrees with this regard, a decision "that neither proceeds along the VHSL that such delay militates against a finding suspect lines nor infringes fundamental constitutional of irreparable harm. See Quince Orchard Valley Citizens rights must be upheld against an equal protection

Ass'n, Inc. v. Hodel, 872 F.2d 75, 80 (4th Cir. 1989) challenge if there is any reasonably conceivable state ("Although a particular period of delay may not rise of facts that could provide a rational basis for [it]."

to the level of laches and thereby bar a permanent

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injunction, it may still indicate an absence of the kind associate with the school's athletic teams. While it is of irreparable harm required to support a preliminary understandable that he would like to actually partici- injunction.") (internal citation and quotation marks pate in competitive sporting events sponsored by the omitted).

VHSL during his final year of high school, it is difficult In addition, other courts, when faced with similar cir-to conclude that he will be irreparably

harmed if he is cumstances, have rejected the notion that a student suf-unable to do so.

fers "irreparable harm" by not being permitted to

participate in interscholastic athletics. See, e.g., Dziewa ***CONCLUSION***

v. Pa. Interscholastic Athletic Ass'n, 2009 U.S. Dist. LEXIS

*In closing, the court is not unsympathetic to Sisson's 3062, at *17 (E.D. Pa. Jan. 16, 2009) ("This court, as well plight and likely would have granted him a waiver if it as other federal courts, have previously and consistently had been responsible for making the decision. How-held that ineligibility for participation in interscholastic ever, in light of the legal standards governing Sisson's athletic competitions alone does not constitute irrepa-federal claims and the instant motion, the court is*

rable harm."). In this case, Sisson had the opportunity unable to conclude that he is entitled to the extraordi-to play football, baseball, and basketball for Eastern nary remedy of preliminary injunctive relief. Accord-Montgomery during his first three years of high school, ingly, his motion for temporary restraining order and and it appears from the record that he continues to

preliminary injunction must be denied.

No Pass, No Play Rules

Both athletic associations and local school districts have established academic requirements for participation in high school sports. Under minimum credit rules, students must earn a minimum number of credits during the preceding marking period. In accordance with ***no pass, no play*** *rules, students may be excluded from participation for failure to earn passing marks or a satisfactory cumulative grade-point average.*

Physical Disabilities

There are some examples of where physical disabilities (as opposed to learning disabilities) are the heart of the issue.

Bobby Martin

*Consider, for example, the inspirational example of Bobby Martin, a high school student from Dayton, Ohio. He has no legs as a result of his Caudal Regression Syndrome in which his body ends at his pelvis, but played football on the varsity team in 2005 using his arms to run. During a game in September of that year, officials told him at halftime that he violated the rules because he did not have thigh pads, knee pads or shoes. Martin had played in his team's previous three games as a member of the punt return squad. The Ohio High School Athletic Association (**OHSAA**) ultimately allowed him to play.*

Tatyana McFadden

*In 2006, Columbia, Maryland high school student Tatyana McFadden trained and competed as a wheelchair competitor in track and field. She was paralyzed from the waist down due to spina bifida. McFadden's skill is and was exemplary. She is **no pass, no play***

interscholastic rules which require a minimum grade point average or a minimum credits earned in order to be eligible to participate in high school sports.

OHSAA

Ohio High School Athletic Association

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an elite, world class Paralympian and had won a silver and a bronze medal at the 2004 Paralympics in Athens, Greece. Nonetheless, her school would only allow her to compete in an Exhibition race. She sued Howard County Public Schools for discrimination and a settlement was reached so she could compete. In the settlement agreement, the parties agreed that McFadden would race alongside students without disabilities (also known as able-bodied competitors), but she would only be scored against other female athletes using wheelchairs.

*However, the Maryland Public Secondary Schools Athletic Association (**MPSSAA**), the governing body for interscholastic athletics in Maryland, established a scoring policy under which team points for wheelchair race events would not be awarded. Since very few schools competed in wheelchair racing, the track association decided that it would be an unfair competitive advantage for the athlete's school. At a state meet in 2006, McFadden was actually disqualified for allegedly pacing a teammate by following her in the wheelchair and encouraging her to run at a particular pace during the race.*

The winning time was thrown out as a result in a controversial decision.

Ultimately, in 2007 a federal judge opined that while she could participate in high school events as a wheelchair competitor (i.e., a wheeler), she could not earn points for her team. The judge determined that this did not amount to discrimination under the ADA in McFadden v. Grasmick, 485 F.Supp.2d 642 (D. Md. 2007). The court denied the preliminary injunction because it found that McFadden was not being discriminated against because of her disability. The court found that the MPSSAA had a legitimate

"40% Rule" that only awarded team points in an event in which at least 40 percent of the high schools actually participate. Since there were only three wheelers in the state at that time, her event did not meet the requirement for team points.

- ***CASE 10***

Tatyana McFadden, Plaintiff v. Nancy S. Grasmick, et al., Defendants
United States District Court for

discriminate against her, as a student-athlete who

the District of Maryland

uses a wheelchair, because their rules and protocols ***May 12, 2007, Decided***

for assigning team points in statewide track and field competition precludes her from earning points for

OPINION BY: ANDRE M. DAVIS

her team.

Plaintiff, Tatyana McFadden,1 instituted this action pur-McFadden is a junior at Atholton High School ("AHS") suant to § 504 of the Rehabilitation Act of 1973, 29

in Howard County. McFadden has spina bifida and has

U.S.C. § 794,2 Title II of the Americans with Disabilities been paralyzed from below her waist since early child-Act, 42 U.S.C. §§ 12101, et seq. ,3 and 42 U.S.C. § 1983, hood. As a result of walking on her hands to get

seeking declaratory and injunctive relief in respect to around, she developed strength in her upper body.

the manner in which defendants, state educational offi-She now uses a wheelchair for mobility and by all

cials and their agents and designees, operate the state-accounts is a highly skilled, indeed, "world class" and wide system of track and field competition in Maryland.

Olympic, wheelchair racer ("a wheeler"), competing

On May 9, 2007, the court conducted a hearing on

in several events. Plaintiff is eligible for the interscho-plaintiff's motion for a preliminary injunction. For the lastic athletic program and is a full member of the AHS

reasons set forth within, plaintiff's motion for a prelim-track team.4

inary injunction shall be denied.

AHS is a member of defendant Maryland Public

I.

Secondary Schools Athletic Association ("MPSSAA")

McFadden's claim is a singular one: she contends

and competes in statewide track and field tournaments that, as described herein, defendants unlawfully

as a class 2A school. MPSSAA sets standards for

(continued)

MPSSAA

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competition to which all public schools must adhere in to a reality." In conducting its review of practices and order to engage in interscholastic athletics.

policies concerning wheelchair track events, the Work-Between 2005 and the present, defendant MPSSAA,

group reported the results of a National Federation of acting through its Executive Director, defendant

High School survey:

Edward Sparks, has moved somewhat fitfully toward

▪

full integration of wheelchair racers in interscholastic 23 of 34 state high school associations reported

track and field competitions. (For some time, wheel-

having no wheelchair competition in track and

chair athletes have been allowed to compete in, and

field;

▪

to earn team points in, certain field events, i.e.,

4 of the 9 states reported having wheelchair ath-

discus and shot put.) Plaintiff and her mother have

letes compete against one another at the state

advocated vigorously to move the evolution of that

meet;

▪

process more rapidly. Plaintiff's mother has corre-

2 states reported providing events for wheelchair

sponded at length with Sparks regarding the relevant ahtletes as exhibitions;

▪

rules and policies, often and understandably expressing 1 state reported allowing athletes using wheel-her dissatisfaction and frustration with the slow prog-chairs to participate with non-disabled athletes in

ress that has been made.

shorter events; such as the 100 and 200 and 400

meter events; and

In particular, plaintiff's mother has advocated strongly

▪ *1 state allows athletes in wheelchairs to compete*

for a change in the scoring policies: (1) she asked to with other students during the regular season,

make a presentation to the MPSSAA; (2) she offered to but none have met the qualifying times to enter

bring wheelchair racing experts to meet with state offi-the state meet.

cials; (3) she asked to pay the costs of training for state personnel; and (4) she offered to arrange visits with Based in part on the report of the Workgroup, in Feb-paralympic coaches and to provide names of persons

ruary 2007, MPSSAA added 12 wheelchair racing

who could be consultants.

events to the 2007 Spring Tournament, which is sched-On March 13, 2006, counsel for defendants confirmed

uled for late May 2007. There will be six races for boys that McFadden would be recognized as a full member

and six for girls. Each wheeler may compete in up to of her school's team under the relevant rules and that four events, the same limit applicable to non-wheelers.

the State Education Department was committed to

These events will be held at the Regional Tournament eliminating barriers for student with disabilities. Specif-from May 17 through May 20, and in the State Tourna-

ically, the Department committed to examining its pol-ment from May 24 through May 26. The evidence mar-

icies and eliminating barriers that exist for students shaled by the parties suggests that two male wheelchair with disabilities.

racers are (or may be) eligible to compete, but that Pursuant to that undertaking, in the 2006 state competi-McFadden, alone, is eligible to compete in the girls'

tions, a wheelchair race was conducted for the first time in races. The plan provides that all of the wheelchair

Maryland, a 400 meter event. Defendants promoted this races will be conducted on a statewide basis, rather event as an opportunity for MPSSAA "to gain experience than on a class basis. (In other words, the 188 second-in wheelchair racing." McFadden participated in four ary schools in Maryland are divided into four classes, track events at the 2006 regional and statewide track 1A, 2A, 3A, and 4A, based on the number of students

and field tournaments. However, McFadden's name,

attending a school. Except in wheelchair race events, a unlike the names of other students, was not announced student (and her team) competes only against students as she crossed the finish line during her race events, and in his or her class. Wheelchair racers (there are only her name was not illuminated on the score board when three in the state) compete as a "class" without earning she finished her races. Nor was McFadden permitted to points for her or his team.)

earn points for her team in any of these races.

It is with this background that MPS SAA decided that in Following this "experiment" with wheelchair racing,

order to "ensure competitive fairness and equity in

the State Superintendent of Schools and the Secretary team scoring, team points for wheelchair race events of the Department of Disabilities established a "Work will not be awarded." In other words, the scoring pol-Group to Review the Participation of Students with Dis-icy, i.e., that wheelers are not eligible to earn points for abilities In Athletics." After eight months, the Work-their teams, remains in place from 2006. This decision group issued a comprehensive report, which included

prompted McFadden to file this action and to seek a

recommendations to the State Board of Education,

preliminary injunction.

designed to "move inclusion of all eligible and inter-Defendants defend their decision to assign no team

ested students with disabilities in athletics from a goal points based on the wheelchair races as fully consistent *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Disabilities and Sports

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with MPSSAA's general policy regarding "new team

championships, arguably the most important part of

events." When a "new team event" is added to state-

the season.

sanctioned tournaments, the results of such an event This state of affairs unequivocally imposes an intangible do not earn team points in the determination of team injury on McFadden that is real and substantial. Partic-championships until high schools representing at least ipation in scholastic athletic endeavors has been held 40% of the jurisdictions in a particular class participate to be a critical part of educational programs in civil in that event during the regular and post season (here-rights cases. Swann v. Charlotte-Mecklenburg Bd. of Ed., inafter, "the 40% Rule").

402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971) (rec-Defendants point to recent applications of the 40%

ognizing that segregated athletic programs and extra-Rule in respect to diving and pole vaulting competi-

curricular activities were among the most important

tions. As to diving, in the last few years, a handful of indicia of a racially segregated system); Brenden v.

high schools in one class of schools added diving events Independent School Dist., 477 F. 2d 1292 (8th Cir. 1973) to

their swimming team's repertoires.

However,

(recognizing that discrimination in high school inter-because too few schools than those needed satisfy the scholastic athletics is discrimination in education)(sex 40% Rule provided competitors in diving competitions, discrimination claims).5

diving competitors at schools participating in the state swimming championships did not earn points for their ***Harm to the Defendants***

teams, although diving events, denominated as "exhibi-Any direct harm to defendants from the granting of the tions," were made a part of the statewide swimming

requested injunction is indisputably minimal. Indeed, competition. A similar application of the 40% Rule

defendants' principal contention in this case is that resulted when changes in high school pole vault rules awarding team points based on the participation of

resulted in a dramatic reduction in the number of

wheelchair racers is actually a desirable goal; defen-schools participating in that event.

dants' difficulty is simply that they have not yet figured On March 28, 2007, the National Federation of High

out how to do it in a fair and equitable manner.

Schools (NFHS) conducted a survey regarding how

Unquestionably, the record shows that defendants rec-wheelchair races were scored. Only two of the 23

ognize that allowing athletes who use wheelchairs to responding states allowed team points for wheeler

score points for their teams will contribute to defen-race results. Two other states, Iowa and Oregon, condants' important educational program objectives, e.g., duct wheelchair races but do not award team points in building fine character and developing good citizen-wheelchair racing events.

ship skills, including those which come from exposure to, and the normalization of, differences. It is anoma-McFadden seeks a prohibitory injunction forbidding

lous, therefore, to argue that to mandate team scoring defendants from declining to award her "one point"

for wheelchair racers would be harmful to defendants for the successful completion of her events at the up-when in fact it is something they already contemplate.

coming state competitions.

On the other hand, the defendant officials, who are

II.

sued only in their official capacities, are also the "vir-

[…]

tual representatives," cf. Irwin v. Mascott, 370 F.3rd 924, 929 (9th Cir. 2004); Klugh v. United States, 818 F.2d 294, ***Harm to the Plaintiff***

300 (4th Cir. 1987), of the many individual, non-The first factor to consider is whether there will be disabled high school track and field athletes whose

irreparable harm to plaintiff if preliminary injunctive opportunities to experience the "thrill" of a team vic-relief is not granted. That is clearly the case here. If tory may be unfairly diminished if care is not taken to plaintiff is not permitted to earn points for her team ensure that the few teams with wheelchair athletes are when she is otherwise eligible to do so, she will be a not given an unwarranted advantage in the quest for

"member" of the track team, but only in "spirit." She team championships. Defendants emphasize that only

will have been denied the opportunity to score points two schools in Maryland have wheelchair racers; none or, as she argues, "add value" from her contribution to other than AHS has a girl wheeler. Thus, there is the the team effort, as other team members do. She prac-potential that if McFadden is awarded even one point tices and trains hard as does any other member. She

(she is eligible to earn four points under her county's has participated in numerous track meets during the

model) for her participation in the 2007 tournaments, regular season and, under her county's rule, earned

her school could be named team champion, or other-

points for her team. Yet, defendants, as the responsible wise rank higher in team standings, on a basis that is state-level officials, have not formulated a point system unfair to non-disabled individuals at other schools.6

that would permit her to do so in this Spring's state (Recall, as well, that one other Howard County high

(continued)

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school has two male wheelers; thus, their team stands whether McFadden will be able to show at trial that she to gain up to eight "extra points" if each boy partici-is being treated less favorably on account of her disability.

pates in the maximum of four events and defendants

Put differently, the question is whether the constraints are ordered to award team points for wheelchair

on McFadden's ability to earn points for her team dif-racers.)

fer in any material, legally cognizable way from the constraints on the opportunity of similarly situated

Success on the Merits

students. The court is constrained to answer that ques-The balance of harms analysis is extraordinarily close.

tion "no."

The court finds, however, that the balancing of harms, The essence of unlawful discrimination is disparate

to plaintiff on the one side in denying the injunction, treatment of two similarly situated individuals on the and to defendants and to the individual, non-disabled, basis of a prohibited characteristic, usually a group-student-athletes competing in team track and field

based characteristic. Defendants argue strenuously

events at schools other than AHS, in granting the

that there is no discrimination here by virtue of their injunction, tips in favor of the plaintiff. Therefore, it facially neutral 40% Rule. As mentioned above, defen-would be enough to justify the issuance of a prelimi-dants award team points for track and field events only nary injunction for the court to find that plaintiff has when schools representing 40% of the students in a

raised questions so serious, substantial, and doubtful as particular class participate in an event. Thus, say defen-to make them fair ground for litigation. Rum Creek Coal dants, given the limited participation in wheelchair rac-Sales, Inc., 926 F.2d at 359. For the reasons set forth ing at the statewide competition, McFadden is treated herein, however, the court concludes that, despite the no differently than is any student at any school who balance of harms favoring plaintiff, the likelihood of participates in an event with insufficient participation.

plaintiff's success on the merits of her claims is sufficiently attenuated that the extraordinary remedy of a McFadden argues that the 40% Rule is at best arbitrary preliminary injunction is not justified.

and is not an established standard in the field of high school athletics. McFadden argues that the survey

Plaintiff's claims are brought under the ADA and the results of the National Federation of High School Ath-Rehabilitation Act.7 A plaintiff seeking relief for viola-letic Associations demonstrates that there are no stan-tions of either the ADA or the Rehabilitation Act must dard practices in this area, and she emphasizes that establish a prima facie case by showing that: "(1) she there are already states that allow wheelchair points to has a disability, (2) she is otherwise qualified to receive be counted. These states clearly do not think they are the benefits of a public service program or activity, and creating an unfair playing field, but they may only

(3) she was excluded from participation in or denied replace one "inequity" with another.8

the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of her

McFadden also asserts that the 40% Rule would oper-

disability." Constantine v. George Mason University, 411

ate as a justification to forever exclude her and other F.3d 474, 498 (4th Cir. 2005) (citing Baird v. Rose, 192

wheelchair racers because they will always be minorities F.3d 462, 467-70 (4th Cir. 1999), and Doe v. University of and are unlikely ever to reach the required minimum.9

Md. Med. Sys. Corp., 50 F.3d 1261, 1264-65 & n. 9 (4th It is true, of course, that one aim of the disability rights Cir.1995)). Plainly, McFadden has a disability and she is statutes at issue in this case is to protect those with that

"qualified" because she has met all of the conditions set particular "minority" status because they have been his-forth by defendants for participation in its athletic pro-torically stigmatized and excluded. Manifestly, the

grams, and she, in fact, participates. As discussed above, number of people in a minority group should not

she is a full member of the track team. Moreover, for determine whether a single member's rights are worthy purposes of the Rehabilitation Act, there is no dispute of vindication. Cf. Horner v. Kentucky High School Athletic that defendants are recipients of federal funding. It is Assoc., 43 F. 3d 265, 273 (6th Cir. 1994)(noting that, to the third element of her claims that I now turn.

while relying on the interest of member schools in a sport "might appear to be gender-neutral, it is a

McFadden has couched her claim at times as one pre-

method that has great potential for perpetuating

senting the "denial of a benefit" and/or the denial of gender-based

discrimination")

(sex

discrimination

"full and meaningful participation" in defendants' edu-claims), op. after remand, 206 F.3rd 685 (6th Cir.), cert.

cational program insofar as she is not allowed to earn denied, 531 U.S. 824, 121 S. Ct. 69, 148 L. Ed. 2d 34

points for her team. Nevertheless, she expressly agreed (2000).

at the hearing on the motion for preliminary injunc-

tion (and in her post-hearing memorandum) that, at

In this case, however, the minimum percentage

bottom, this is a discrimination case. As to likelihood of requirement embodied in the 40% Rule is neutral in

success on the merits, therefore, the dispositive issue is intent and in effect, and, as applied by defendants to Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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Disabilities and Sports

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withhold team points from McFadden's performances

Badgett v. Alabama High School Athletic Asso., No. 2:07-works no unlawful discrimination against her. Plaintiff CV-00572-KOB (N.D.Ala., May 3, 2007), see supra n. 3, focuses on the stark and undeniable difference in treat-the court persuasively reasons that there are inherent ment accorded her as contrasted with the ability of

and relevant differences between the class of wheelers non-wheelers to earn points for their teams, but a

and the class of non-wheelers that education officials are proper analysis must bore down more deeply into the

entitled to consider in operating a fair and equitable sys-intent and effect of the 40% Rule.

tem of racing competition designed to identify team

First of all, McFadden has erroneously interpreted the rankings:

40% Rule as requiring that 40% of Maryland secondary By asking for her individual points to count toward

schools must have wheelers before wheelers may earn

her team's total in the able-bodied track and field

team points. In fact, as disclosed in the affidavit of division, Miss Badgett is asking the court to equate defendant Sparks, this is not so. In discussing the appli-wheeling with running and jumping despite the fact

cation of the 40% Rule, Sparks affirms as follows:

that wheeling is a distinct discipline. See Bd. of Educ. Of Generally, new sports and events are added to the

Carlstad-East Rutherford Reg'l High Sch. Dist., Bergen Regional and State Tournaments after a minimum

County v. New Jersey State Interscholastic Athletic Ass'n, of 40% MPSSAA member schools participate in

*1994 WL 702330, at * 16 (N.J. Admin. June 21,*

the sport event on the varsity level during the reg-

1994)("The 'essential nature' of racing a wheelchair ular season and at district tournaments. This

is different from the 'essential nature' of running.

means that when a sufficient number of local school They are distinctly different athletic activities.").

systems adopt a new sport or event at the varsity level Id. at 12. Cf. Shepard v. United States Olympic Committee, that comprises the equivalent of 40% or 75 of the

464 F.Supp.2d 1072, 1087 (D.Colo. 2006) ("The USOC's 186 member schools, the event can be elevated to

Paralympic program, with its attendant differences in the statewide tournament level. Currently, only

perks and privileges compared to the USOC's Olympic

Howard County offers wheelchair racing during the reg-program, exists to provide disabled individuals with ular season, comprising 12 of the 75 minimum schools participation opportunities fundamentally premised

needed to elevate the event to the State championship on and defined by the disabilities Plaintiffs argue can-competition.

not lawfully form the basis for separate treatment.

Defs' Exh. P 3, 22 (emphases added). In other words, There

is

an

unavoidable

non

sequitur

to

the

even though Howard County is the only jurisdiction

assertion."); and see id. at 1094 ("[T]he benefits Plain-offering varsity wheelchair racing, and even though

tiffs seek are not of access to the Olympic experience only two schools in Howard County have competitors

or participation in elite athletics, but of the quality of in wheelchair racing, defendants will count all of

their experience as Paralympians compared to the

Howard County's 12 secondary schools toward the

experience of non-disabled Olympians. [The caselaw

40% minimum needed to "elevate" wheelchair racing

cited by plaintiffs] does not get them there.").

to an event for which team points are awarded. Thus, it Although McFadden does not contend that she is

is not the case, as McFadden contends, that the 40%

legally entitled to race against non-wheelers, the effect Rule will require that fully 40% of all of the state's sec-of her theory of discrimination is the same as if she ondary schools have wheelchair racers before wheelers were so contending. In other words, in seeking treat-will be permitted to earn points for their teams. In this ment identical to non-wheelers in respect to the ability light, as applied to wheelchair racing, as few as three to earn team points (although, within the context of more large school systems (e.g., Montgomery County,

Maryland interscholastic athletics, she is a "class of with 25 schools; Baltimore County, with 24 schools; and one") she is both accepting that wheelers are different, Baltimore City, with 19 schools) need offer varsity

e.g., they compete only against other wheelers, while at wheelchair racing, at no more than one or two schools, the same time, she would disavow the reality of the very before wheelers statewide may satisfy the 40% Rule as difference that enables wheelers to compete (against interpreted by defendant Sparks.

only each other) in the first place. This will not wash.

What is equally fundamental, moreover, is the fact that See id. at 1093 ("Where factors such as disability or sex wheelchair racers simply do not compete against non-render individuals unable to participate without a sep- wheelers, and therefore the dichotomy set up by

arate program or participation opportunity, the ques-McFadden—between the incidents of team participa-

tion becomes one of the effectiveness or equality of tion by wheelchair racers, on the one hand, and non-the separate benefit and not that the creation of the wheelchair racers on the other hand, is not an apt

separate participation opportunity itself is tantamount one. In refusing to award team points for wheelers in to unlawful discrimination.").

(continued)

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Chapter Six

In sum, it is not likely that, upon a full review of the 3. Section 12132 of Title 42 of the United States Code merits of McFadden's claims, the court will be per-provides:

suaded that it is discriminatory under the disability rights Subject to the provisions of this subchapter, no

statutes for defendant to maintain a difference in the qualified individual with a disability shall, by rea-opportunity of wheelchair racers, in contrast to nonson of such disability, be excluded from participa-

wheelchair racers, to earn points for teams, where all tion in or be denied the benefits of the services,

but a small number of teams are significantly under-

programs, or activities of a public entity, or be

represented in the distinct class of competitors of

subjected to discrimination by any such entity.

which McFadden is the sole member: wheelers. Accord-

42 U.S.C. § 12132.

ingly, plaintiff's minimal likelihood of success on the 4. In a case filed in 2006, McFadden v. Cousin, No: merits of her claims weighs heavily against her.

AMD 06-648 (D.Md.), McFadden sued Howard

The Public Interest

County officials under the same statutes at issue

The final factor, the public interest, is evenly balanced here, seeking the right to participate in races along-in this case. While it is clearly in the public interest to side non-wheelchair racers (so-called "mixed races"

provide for "full and meaningful" participation of per-because, although racing at the same time, wheelers

sons with disabilities in secondary school athletic pro-and non-wheelers do not compete against each

grams, it is equally true that the public interest is other). After a hearing on McFadden's motion for

furthered when responsible educational officials,

a preliminary injunction, the court granted the

faced with a clash of interests among students, are

motion and she has been permitted by local and

afforded the time and opportunity to conduct a delib-state authorities in Maryland (including defendants

erate and comprehensive evaluation of how best to

here) to race alongside non-disabled racers. In addi-reconcile those conflicting interests. Manifestly, this tion, in negotiations with Howard County officials,

is true so long as they are acting in a way that is con-McFadden reached agreement on how individual

sonant with their obligations not to exclude, stigma-and team points would be awarded based on her

tize, or diminish the contributions of disabled

participation in races sanctioned by the County.

students and are, to the contrary, undertaking to

The instant case results from McFadden's inability

broaden opportunities for fuller and more meaning-

to persuade state track and field officials to adopt ful participation by disabled students. That test is sat-the Howard County points system, or any other sys-

isfied here.

tem, permitting her to earn points for her team.

Notably, in the recent case of Badgett v. Alabama ***III.***

High School Athletic Asso., No. 2:07-CV-00572-KOB

McFadden is a remarkable young person for and in

(N.D.Ala., May 3, 2007), the court had before it

whom the entire community should feel boundless

both of the issues presented by McFadden in the

pride and admiration. Her diligence, determination,

two cases she has instituted in this court: whether

hard work, and yes, even her advocacy, are noble and

"mixed racing" is required by disability rights laws, inspiring. Nevertheless, her quest for the extraordinary and whether wheelers must be awarded team points.

remedy of a preliminary injunction does not satisfy the In Badgett, Judge Bowdre, in denying a motion for long-standing criteria applicable to such efforts.

preliminary injunction filed by a high school wheel-

Accordingly, for the reasons set forth herein, the

chair track and field athlete, concluded that defen-

motion for preliminary injunction is DENIED.

dants did not violate the ADA or the Rehabilitation

Act in refusing to permit mixed racing or in refusing ***FOOTNOTES***

to award team points based on the performance of

1. Plaintiff filed suit by her mother as next friend, wheelchair athletes.

but the record shows that she is 18 years old.

5. Under regulations issued on the authority of the

2. Section 794(a) provides in pertinent part: Rehabilitation Act, equal opportunity in athletic

No otherwise qualified individual with a disabil-

endeavors is an essential component of equality

ity in the United States … shall, solely by reason

of opportunity in educational programs. See 34

of her or his disability, be excluded from the

C.F.R. §§ 104.37, 104.34.

participation in, be denied the benefits of, or

6. McFadden's response to this argument is that not

be subjected to discrimination under any pro-

infrequently, there are several events in which not

gram or activity receiving Federal financial

every school furnishes a participant and so such

assistance

teams cannot gain points in those events. That is

29 U.S.C. § 794(a).

the nature of team events. All teams have strengths

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and weaknesses. As McFadden contends, even with

team championships of last two years would have

well-established sports programs, there will be

been affected by the inclusion of points for

teams that do not have participants in particular

McFadden.

events. It is an overstatement, at best, to argue

7. It is clear that plaintiff's § 1983 claim is simply that all schools must have equal scoring opportu-redundant of her other two claims. She does not

nities, if that means that the ephemeral "level play-assert an equal protection violation.

ing field" requires the exclusion of uniquely

8. The record shows that the two states that award

qualified contestants. The record shows that

team points to wheelchair racers tweak their stan-

among the four classes of schools in Maryland,

dards in ways that simply shift what McFadden

there are relatively small schools that compete,

describes as unfair treatment. For example, Louisi-

within the same class, against much bigger schools.

ana recognizes an "outright" team champion and

The teams from these smaller schools are, on aver-

a "co-champion," the later designation given to the

age, at a competitive disadvantage because they

team

with

wheelchair

racers.

Even

plaintiff

draw from a smaller pool of athletes.

acknowledges that such practices hardly achieve

Thus, a team's success depends on a number of

the "equality" that she seeks in this action.

factors that are beyond the ability of education offi-9. The percentage of high school students receiving

cials acting in good faith to do anything about. A

special education services and who have orthopedic

team member with a disability, if that person is oth-impairments is a little more than .38% (thirty-eight erwise eligible, arguably could be counted as one of one-hundredths of one percent). As of the 2005

those factors, just as a student with extraordinary

MSDE census, there were 107 high school students

ability could be the "X factor" for his or her school.

with orthopedic impairments enrolled in special edu-

Although it is possible that McFadden's points

cation services in Maryland, or an average of .38% of could allow her team to win a championship or oth-the student population, for grades 9-12. "Maryland

erwise rank ahead of other teams, it would not nec-

Special Education/Early Intervention Services Cen-

essarily be as a result of any "unfair" advantage, any sus Data and Related Tables," October 28, 2005, avail-more than the presence of a uniquely talented bas-

able at http://www.marylandpublicschools.org/NR/

ketball center or football quarterback provides an

rdonlyres/85E7723B-CB82-46B0-AD4B-EAD45A69

"unfair" advantage to her or his school. Plaintiff

B4F2/9627/sped07.pdf. Students in wheelchairs

also notes, anecdotally, that if Howard County's

make up only a fraction of these students.

scoring model were adopted, none of the state

As a direct result of McFadden's efforts and with assistance from the Maryland Department of Disabilities, the Maryland State Department of Education, and members of the Maryland disabilities community, the state passed the 2008 Maryland Fitness and Athletic Equity Act for Students with

Disabilities. With the passage of the legislation, that state and its agencies will work with local school jurisdictions to improve policies and implement improvements to adaptive physical education and interscholastic athletic participation.

*At the Beijing Olympics in 2008, three Maryland Paralympic athletes including McFadden traveled to China as members of the U.S. Paralympic team to compete in the Paralympic Games. McFadden earned four medals (three silver, one bronze). At the 2011 International Paralympic Committee (**IPC**) Athletics World Championships in Christchurch, New Zealand, McFadden won five medals in five events, four of which were gold.*

- ***NCAA***

*As you are well aware by now, the NCAA is the most significant organization in terms of regulating the academic standards of student-athletes at the **IPC***

International Paralympic Committee

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post-secondary (intercollegiate) athletic level. The NCAA makes it clear that the word student is of vital importance in its role as administrator of collegiate sports eligibility for student-athletes. The NCAA has numerous eligibility rules for acquir-ing and maintaining academic eligibility in order to participate in college sports.

Considerations related to disabilities have been addressed for both physical and learning disabilities. Again, when reading the following material, ponder whether participation in college sports is a privilege or a right.

Physical Disabilities

*In Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1997), Nicholas Knapp, a basketball player with a heart defect, was prevented from practicing and playing with the Northwestern University basketball team after his condition was further diagnosed by a team physician. Northwestern had received notice of his condition after Knapp suffered sudden cardiac death during a pick-up basketball game in his high school gym in September, 1994, prior to signing his National Letter of Intent (**NLI**) in November that year. Fortunately, after the successful use of elec-tric shock treatment to revive him, doctors then implanted a cardioverter-defibrillator in his abdomen.*

Knapp sued for the right to play at Northwestern and prevailed at the district court level, but Seventh Circuit Court of Appeals reversed and held that Northwestern University not only did not violate the Rehabilitation Act, but it also held that and that playing college basketball was not a major life activity under the Act.

Northwestern honored Knapp's scholarship and the Big Ten Conference re-classified Knapp as a medical non-counter, so he did not count against the total number of scholarship limits.

Learning Disabilities

The NCAA has been subject to numerous lawsuits regarding initial eligibility standards for its student-athletes. Some claim that such academic standards are too rigid for persons with learning disabilities. Others have claimed that the formulas used to determine whether or not a recruit meets initial eligibility standards actually discriminates and has a disparate impact (i.e., unintentional discrimination) against non-whites. A brief history of a few cases is worth exploring. In recent years, the NCAA has slightly raised the core-course requirements in high school from 14 to 16 classes. It has also

mandated that such core-courses be earned in the first eight semesters of high school.

Fortunately for the NCAA, it appears that federal laws do not directly apply to it as an organization, even though they certainly apply to its member institutions based upon the case law. In Matthews v. NCAA, 79 F.Supp.2d 1199 (E.D. Wash.

1999), a Washington federal district court ruled that the ADA does not apply to the NCAA or the PAC-10 (now known as the Pac-12) athletic conference directly.

Cureton I

In Cureton v. National Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 1999), plaintiffs sued the NCAA in 1997 on behalf of minority student athletes who claimed that the NCAA's Proposition 16 violated the regulations to Title VI of the Civil Rights Act of 1964. Specifically, the Cureton plaintiffs alleged a Title VI violation based on ***NLI***

National Letter of Intent

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Disabilities and Sports

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the theory that Proposition 16 creates a disparate impact on racial minorities and was, therefore, racially biased. The district court concluded

that Proposition 16's disparate impact on African-American athletes violated the regulations to Title VI and the trial court permanently enjoined the continued enforcement of Proposition 16. The court determined that Proposition 16 adversely impacted minority athletes at the front-end of the eligibility process, even though it recognized that the purpose behind the rule was to raise student-athletes graduation rates.

The Third Circuit Court of Appeals reversed the trial court and remanded with instructions for the entry of judgment for the NCAA. In the court's analysis, the Title VI regulations did not apply to the NCAA because the NCAA did not exercise controlling authority over its member institutions' ultimate decision about a student-athlete's eligibility to participate in collegiate athletics. Then, almost one year later in an unrelated case, the Supreme Court held that Title VI creates no private right of action for disparate impact, contrary to the plaintiffs' allegations in Cureton I. In fact, the court stated, "Title VI itself directly reaches only instances of intentional discrimination" in Alexander v. Sandoval, 532 U.S. 275

(2001).

Then in Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267 (3d Cir. 2001), or Cureton II, after remand, the plaintiffs moved to either amend their complaint or to have the judgment altered so as to add a claim of intentional discrimination based on the NCAA's adoption and enforcement of Proposition 16. The district court denied the motion and noted that requiring the NCAA to address this intentional discrimination claim would essentially require it to re-litigate the entire case again.

Consent Decree

Ultimately, DOJ settled with NCAA in a consent decree regarding initial-eligibility requirements for students with learning disabilities which required certain language in its bylaws. The decree acknowledged that the NCAA does not waive its position that it is not a place of public accommodation and therefore Title III of the ADA does not apply to it, nor does the NCAA admit liability under the ADA.

As a direct result of consistent, persistent and convoluted litigation related to NCAA initial eligibility requirements, the NCAA Manual has specific language dealing with persons with disabilities. In essence, much deference is given to the educational institutions themselves and to doctors who may diagnose someone with a learning disability.

NCAA Bylaw 14.02.4, Education-Impacting Disability, states, "An education-impacting disability is a current impairment that has a substantial educational impact on a student's academic performance and requires accommodation." The NCAA can grant waivers if necessary, including for how many hours a student must take or pass in order to be eligible to play. This waiver is outlined in NCAA Bylaw 14.1.8.3.4, Student-Athletes with Education-Impacting Disabilities, which states, "The Progress-Toward-Degree Waivers Committee (see Bylaw 21.7.5.1.3.2) may waive the 12-hour requirement for a student-athlete when objective evidence demonstrates that an institution defines full-time enrollment for that student-athlete to be less than 12 hours to accommodate for the education-impacting disability."

Diploma Mills

Some have expressed concerns about the process and legitimacy of characterizing prospective student-athletes as having a learning disability when their academic records are reviewed by the NCAA and its Clearinghouse (now referred to as the Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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Eligibility Center) to determine eligibility. The Eligibility Center reviews 77,000

prospective student-athletes for eligibility each year. Some high schools have been called diploma mills, accused of essentially handing out unearned degrees to individuals, including prospective student-athletes, so they can meet the NCAA's initial eligibility standards. Many of these schools are private high schools. Consider Bylaw 14.3.1.2.5, Courses for Students with Education-Impacting Disabilities, which states:

High school courses for students with education-impacting disabilities may be used to fulfill the core-curriculum requirements, even if such courses appear to be taught at a level below the high school's regular academic instructional level (e.g., special education courses), if the high school principal submits a written statement to the NCAA Eligibility Center indicating that the courses are substantially comparable, quantitatively and qualitatively, to similar core course offerings in that academic discipline and the courses appear on the high school's list of approved core courses. Students with education-impacting disabilities still must complete the required core courses and achieve the minimum required grade-point average in the core curriculum. The fact that the title of a course includes a designation such as "remedial," "special education," "special needs," or other similar titles used for courses designed for students with education-impacting disabilities does not, in and of itself, disqualify a course from satisfying core-curriculum requirements.

Much of the issue is focused on college coaches who are more concerned with recruiting a talented athlete than with minimal educational standards. It has been suggested that some of these coaches, particularly in football and men's basketball, have intentionally pressured others to characterize the prospective student-athlete as learning disabled in order to circumvent the rules. Again, however, much deference is given to high schools and its member institutions to control and monitor such characterizations as the numbers continue to increase steadily.

Florida State University

This Tallahassee-based university continues to be at the forefront of scandals of all kinds, including allegations which have surfaced in recent years over academic fraud in general. These allegations include the potential abuse of learning disability (LD) diagnoses in order to circumvent traditional college academic standards.

One former learning specialist at FSU claimed in an Outside the Lines (OTL) report by ESPN in 2009 that some student-athletes were simply not college material and instead demonstrated the competency of someone at the elementary school level.

Clustering

In an attempt to raise graduation rates and stem the rising tide of criticism as to whether student-athletes are actually athlete-students, the NCAA adopted stricter academic and eligibility rules as part of its major academic reform legislation of 2002. The NCAA adopted a graduation success rate (GSR) that it claimed more accurately measured that rate at which Division I student-athletes graduate. Similarly, the NCAA compiles Academic Progress Rates (APRs) for individual teams for the previous six years. The APR awards one point per semester for those student-athletes who remain in school or graduate, and another for maintaining academic eligibility. Starting in August 2010, the NCAA affixed APR score to coaches themselves.

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These changes to NCAA academic standards have resulted in a new set of ethical dilemmas. Some claim that student-athletes with poor academic performance fraudulently seek disability status in order to obtain greater accommodation under NCAA bylaws. Some are concerned about an effect called ***clustering****, a situation in which student-athletes tend to major or minor in certain academic fields or take certain classes which appear to be less rigorous than others and might allow an easier path to academic eligibility and graduation. Concerns over academic fraud and dishonest claims of learning disabilities have led to additional issues as well for the NCAA and some of its member institutions. So ill-prepared are some prospective student-athletes that some characterize them as special-admits rather than student-athletes with learning disabilities.*

- ***Professional Sports***

Accommodating Physical Disability

*In 1998, golfer Casey Martin sued the Professional Golfers Association of America (****PGA****) Tour for disallowing him to use a cart when traveling from hole to hole during his rounds of golf. PGA rules prevent the use of a golf cart on its tour to force the golfers to add the physical endurance of walking as part of the game.*

*Though Martin was not suing a particular golf course, he was asking the court for an injunction to allow him to have the special use of a golf cart when traveling between holes during a round of golf due to Klippel-Trenaunay-Weber (****KTW****) syndrome, a disease that impairs his ability to walk. KTW syndrome obstructs blood flow from his right leg to his heart.*

The PGA is a private tour and receives no funds from the state or federal governments, however many of its matches are played on golf courses that are considered public courses. Should the ADA apply to this circumstance and Mr. Martin be allowed to use a cart when others may not? If so, argued the PGA, the fundamental rules of golf would change, and this could open the floodgates of litigation to all professional sports that use public facilities.

Martin's claim actually reached the Supreme Court of the United States. In PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001), the court overruled and

vacated a similar case Olinger v. United States Golf Ass'n, 205 F.3d 1001 (7th Cir. 2000), which had disallowed the use of the cart by Fred Olinger, who had a degenerative hip condition known as bilateral avascular necrosis. The Supreme Court, in a 7-2 decision, ruled that Martin using a golf cart did not and would not constitute a fundamental alteration to the game of golf. According to the court, the PGA Tour leased public golf courses and therefore became an operator under the statute found under Title III of the ADA.

It should be noted that golf carts were used at times in Qualifying-school (i.e., Q-school) and on the Senior Tour as well. In 2001, Nike established the Casey Martin Award to honor an individual with a current disability as defined by the Department of Justice who has pursued their sport of choice to a level of ***clustering***

term used to describe academic fields or majors which tend to be user-friendly particularly to or among student-athletes

PGA

Professional Golfers Association of America

KTW

Klippel-Trenaunay-Weber

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success despite challenges, or someone who has taken a personal or public stand to support athletes with disabilities. Martin retired in 2006 and remains the head golf coach at the University of Oregon.

Fundamental Alteration

The Supreme Court in the Martin decision held that using a golf cart did not amount to a fundamental alteration to the game of golf. Ask any golfer, however, whether using a cart provides an advantage and you are likely to get a much different answer. The theory of fundamental alteration of a game took on new meaning in Massachusetts when Stephen Kuketz, a paraplegic and nationally ranked wheelchair racquetball player, sued a fitness club to participate in the club's "A" league (the most competitive division) with the accommodation that he be permitted two bounces of the ball while footed players received only one bounce. The two-bounce rule was a standard modification of racquetball rules for games between two wheelchair opponents.

The general manager of the club, Roslyn Petronelli, told Kuketz that he would not be allowed to play in the men's "A" league citing safety concerns. However, she offered him two alternatives: he could play in a lower-level league under the one-bounce rule or he could play in a wheelchair league that she would assist him in organizing. Kuketz declined both offers.

In Kuketz v. Petronelli, 821 N.E.2d 473 (Mass. 2005), the Supreme Judicial Court ruled that two bounces would, in fact, fundamentally alter the nature of the standard rules of the game of racquetball, and was not a reasonable accommodation under federal or state law for games between wheelchair and footed players. Citing the Martin decision, the Kuketz opinion noted that Title III of the ADA contemplates three inquiries: whether the requested modification is reasonable, whether it is necessary for the disabled individual, and whether it would fundamentally alter the nature of the competition. Because Kuketz's requested modifications required the waiver of an essential rule of competition, the lower court decision was affirmed, noting that the law does not require modifications that change the fundamental rules of the sport.

Substance Abuse

In 1992 an arbitrator reinstated the New York Yankees pitcher Steve Howe, after the MLB commissioner had suspended Howe for life for repeated drug use. Complaints about suspension for substance abuse raise question about personal responsibility for illegal conduct and protections afforded under federal labor laws such as the ADA. The ADA maintains that alcoholics and drug addicts are protected under the act, provided they are able to perform the essential functions of the job.

However, what if drug and alcohol addiction violate the league's anti-drug policy or personal conduct policy as a matter of labor law such as in a collective bargaining agreement? Should the EEOC allow these claims to begin with? Questions remain unanswered in professional sports with regard to disabilities and drugs.

Roy Tarpley

Roy Tarpley was the seventh person drafted overall in the 1986 draft. In 1989 he failed NBA drug tests and the NBA suspended him indefinitely. Then, during the 1989–90 season, Tarpley was arrested for DWI and resisting arrest. He also dealt with several knee injuries and then was arrested yet again for DWI. The NBA Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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suspended him again. Tarpley was suspended for life from the NBA after failing his third drug test in accordance with the Continental Basketball Association (CBA)'s anti-drug program. He traveled to Greece and played professionally there, but in 1994 Tarpley applied for reinstatement to the NBA.

Having been granted reinstatement, the Dallas Mavericks signed him to a 6-year $20 million contract. He then failed yet another drug test during the 1994–95 season, was kicked out of the league, and forfeited the remaining money owed on his contract. He then returned to Greece. He applied for reinstatement again to the NBA in 2003 to no avail and ended up playing in the Continental Basketball Association from 2003–2006. At that time, Tarpley was 41-years-old.

In August 2007, the EEOC allowed Tarpley to sue the NBA for having been thrown out of the NBA as a result of his addiction to drugs and alcohol. The EEOC said that this was a potential violation of the ADA and attempted, unsuccessfully, to mediate the dispute. The case was settled privately in 2009.

Odell Thurman and Torrie Cox

Odell Thurman (Cincinnati Bengals) and Torrie Cox (Tampa Bay Buccaneers) followed in Tarpley's footsteps and filed complaints with the EEOC. Thurman missed a drug test, was suspended for four games, and was then arrested for DUI for which his suspension was increased to one year. After applying for reinstatement, he was denied by the NFL.

In 2007, Tampa Bay's cornerback Torrie Cox was been suspended without pay for the season's first four games for violating the NFL's substance abuse policy.

Cox had a history of alcohol problems, and had been previously arrested twice for driving under the influence.

Facilities

Title III of the ADA states that: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the

goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation." 42 U.S.C. § 12182(a). There have been a few cases involving allegations of discrimination for those with physical disabilities at college and professional stadiums, which are considered places of public accommodation. Most of these cases settle out of court. In some instances the government and the courts have to get involved to resolve the issues.

Seating

The ADA applies to stadium design, seating and access. In fact, it requires that 1 percent must be reserved disabled fans known (the one-percent rule). The rule only applies to stadiums built or altered (renovated) after 1991.

In 2007 Michigan Paralyzed Veterans of America sued the University of Michigan because its planned $226 million renovation only included adding 76 wheelchair-accessible seats to the stadium, less than the 1 percent required by the ADA. Because Michigan Stadium was built in 1927, 65 years before the ADA went into effect, it was exempt from those regulations until this planned alteration, which far exceeded minimal repairs. Both the DOJ and the DOE became involved in the settlement. The DOE criticized access for disabled attendees involving the stadium facilities including bathrooms, concessions, merchandise stands and Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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parking lots. The University of Michigan settled in 2008 in federal court and expanded their plans to include 329 permanent wheelchair-accessible seats.

Closed-Captioning

Federal regulations state that "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.03(c).

In 2006, three hearing-impaired Washington Redskins fans filed a lawsuit, with the help of the National Association of the Deaf, against Pro Football, Inc. (the corporation that owns and operates the Redskins) and WFI Stadium (the corporation that owns and operates FedEx Field). They alleged violations of Title III of the ADA at the Landover, Maryland facility. They alleged violations of the ADA by not captioning the Jumbotron and video monitors at the stadium. Almost immediately after filing the original lawsuit, FedEx field made some changes to accommodate the hearing impaired. However, the lawsuit moved forward.

*The district court held that the ADA required the defendants to provide auxiliary aids for the aural content broadcast over FedEx Field's public address (**PA**) system, including music lyrics in Feldman v. Pro Football, Inc. , 579 F. Supp. 2d 697*

(D. Md. 2008). The decision was upheld on appeal by the Fourth Circuit Court of Appeals, which noted that the district court's holding rested in part on the fact that defendants were not providing plaintiffs with access to the lyrics to music played over the stadium's PA system. The appellate court agreed that attending football games was more than a football game, it was an entertainment experience in which the music plays a significant role in Feldman v. Pro Football, Inc., 2011 U.S.

App. LEXIS 6188 (4th Cir. 2011).

In 2011, a hearing-impaired season ticket holder at the University of Kentucky sued the university on the same grounds so that closed-captioning would be placed on the scoreboards at their Commonwealth Stadium. This was similar to the lawsuit filed against The Ohio State University which

resulted in a 2010 settlement under which OSU posts captions to announcements on the scoreboards.

Blackout Rule

In Stoutenborough v. NFL, 59 F.3d 580 (6th Cir. 1995), the Sixth Circuit Court of Appeals upheld the NFL's 72 hour rule (the blackout rule) in which a local broadcast of the home team is not televised unless the stadium is sold out. It held that a telecast of a professional football game is not subject to the provisions of ADA, which requires closed-captioning of public service announcements, since what is televised is not a public service, is not funded with public dollars, and is not provided by a public entity. Thus, it was not actionable under the ADA under any Title of the Act, especially since the blackout applied to everyone, not just those with or without disabilities.

Olympics and Disabilities

As demonstrated in the Michigan Stadium and FedEx Field examples, there are numerous advocacy groups willing to fight for equal access and rights to sporting events under the ADA. There are also many other disability-related advocacy groups that are specific to sports in general including Disabled Sports USA, ***PA***

public address

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Dwarf Athletic Association of America, National Disability Sports Alliance, U.S.

Association of Blind Athletes, USA Deaf Sports Federation, and Wheelchair Sports USA. Students should be aware of these groups and others who advocate for and promote participation in sports at various levels.

Special Olympics

The Special Olympics were founded for persons with intellectual disabilities in 1968 by Eunice Kennedy Shriver, President John F. Kennedy's sister. The first International Special Olympics was held in Chicago that same year, and has usually been held in the United States since.

*The Special Olympics are almost as big as the actual Olympics in terms of numbers of participants. It is the only outside organization that the International Olympic Committee (**IOC**) has given permission to use the word Olympics in its name, and all participants receive medals. The Special Olympics are held at the state level year-round, though in 2006 the Special Olympics held their inaugural National Games in Ames, Iowa (Iowa State University).*

Paralympic Games

*The Paralympic Games that are sponsored by the United States Olympic Committee (**USOC**) in accordance with the Ted Stevens Olympic and Amateur Sports Act (**TSOASA**). Indeed, there is a National Paralympic Committee, an official Paralympic Division of the USOC, and the USOC-sponsored Paralympic Military Program. The International Paralympic Committee (IPC) is the international representative organization of elite sports for athletes with primarily physical disabilities. The first Paralympic Games were held in 1960 in Rome, and now immediately follow the Olympic Games in the same host city each year, having started that tradition with an agreement in 2001.*

The Paralympic Games have six classifications: amputee, cerebral palsy, spinal cord injuries, intellectual disabilities, visual impairment, and a group

for all other conditions. The 2005 documentary Murderball showcases competitors from the U.S.

Quad Rugby Team who compete in the 2002 World Championships and 2004

Paralympic Games in Athens, Greece.

Hollonbeck

In Hollonbeck v. United States Olympic Comm. , 513 F.3d 1191 (10th Cir. 2008), wheeler athletes Scot Hollonbeck, Tony Inguez, and Jacob Heiveil alleged that the USOC should be giving Paralympians the same health insurance, grants, living expense stipends and opportunities as able-bodied Olympians. The Tenth Circuit Court of Appeals determined that that ADA and § 504 of the Rehabilitation Act does not require the USOC to afford Paralympic athletes equal access to certain athlete support programs that are available to Olympic and Pan American athletes.

The court rejected the claims and found no statutory support. The District Court for the District of Colorado had dismissed both the ADA and § 504 claims, and the Supreme Court denied certiorari as well.

IOC

International Olympic Committee

USOC

United States Olympic Committee

TSOASA

Ted Stevens Olympic and Amateur Sports Act

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Chapter Six

Oscar Pistorius

*In May, 2008, South African runner Oscar Pistorius (a.k.a. Blade Runner) a double-amputee sprinter was allowed to compete in his bid to qualify for the 2008 Beijing Olympic Games. The Court of Arbitration for Sport (**CAS**) overturned a ruling by the International Association of Athletics Federations (**IAAF**) that had barred him from competing because of the use of his carbon-fiber prosthetic racing blades, also known as cheetahs. Although eligible to compete, he did not qualify for the South African team and did not make the Olympic qualifying time for that event.*

There remains heated debate as to whether Pistorius' blades actually give him an advantage over able-bodied athletes. The IAAF believed that if he gained an advantage at any point in the race due to the use of the blades that it was unfair to other able-bodied runners. Should he make it to the London Olympic Games in 2012, Pistorius would become the first amputee sprinter to compete in an Olympics. He first competed in the Paralympic Games in Athens in 2004, where he won gold in the 200 meter and bronze in the 100 meter.

Do you feel the CAS ruling demonstrate a reasonable accommodation? What if Pistorius ends up winning a medal someday?

▪ ***Summary***

Persons with disabilities in sports present interesting contemporary issues for amateur and professional athletes, including coaches and school administrators. The three federal acts (the Rehabilitation Act of 1973, the

Americans with Disabilities Act, and the Individuals with Disabilities Education Act) have afforded disabled persons with more consideration when competing in sports than ever before. All of the federal laws have noteworthy exceptions and have been the subject of interpretation by the courts.

Tatyana McFadden's effort to compete as a wheeler in high school track and field led to the enactment of Maryland's law devoted to assist students with disabilities. The Supreme Court's decision in Casey Martin's case has provided more guidance for lower courts when interpreting rules related to disabled persons and the rules governing sports. The Special Olympics and Paralympic Games have invited legal questions and public attention to disabilities in sport.

▪ Key Terms

age 19 rules *also known as maximum age rule, it is a policy established by a local school districts or state-wide high school athletic association which provides that a student must be excluded from participation in high school sports if they turn 19*

before a specific calendar date as they are deemed to be too old to play ***Americans with Disabilities Act (ADA) of 1990*** *federal law imposing obligations on employers and other providers of public transport, telecommunications, and public accommodations to accommodate those persons with disabilities* ***CAS***

Court of Arbitration for Sport

IAAF

International Association of Athletics Federations

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clustering *term used to describe academic fields or majors which tend to be user-friendly particularly to or among student-athletes*

Equal Employment Opportunity Commission (EEOC) *Federal agency responsible for enforcing federal antidiscrimination laws*

impairment *diminishment of physical or mental capabilities* ***Individuals with Disabilities Education Act (IDEA)*** *federal law mandating that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs*

no pass, no play *interscholastic rules which require a minimum grade point average or a minimum credits earned in order to be eligible to participate in high school sports.*

Rehabilitation Act of 1973 *precursor to Americans with Disabilities Act and states that no person with a disability may be excluded from participation in, be denied the benefits of, or be discriminated under any program or activity receiving federal financial assistance*

reasonable accommodations *adaptations or adjustments employers must make to accommodate the interests of a person with disabilities without undue hardship* ***undue hardship*** *analysis under ADA that would provide a defense for an employer that must pay excessive costs to accommodate a person's disability*

▪ ***Acronyms***

ADA *Americans with Disabilities Act of 1990*

ADAAA *ADA Amendments Act*

ADHD *attention deficit/hyperactivity disorder* ***CAS*** *Court of Arbitration for Sport*

DOJ *Department of Justice*

EEOC *The Equal Employment Opportunity Commission* ***FAPE*** *free appropriate public education*

FCC *Federal Communications Commission*

IAAF *International Association of Athletics Federations* ***IDEA*** *Individuals with Disabilities Education Act* ***IEP*** *Individual Education Plan*

IOC *International Olympic Committee*

IPC *International Paralympic Committee*

KTW *Klippel-Trenaunay-Weber*

MHSAA *Michigan High School Athletic Association* ***MPSSAA*** *Maryland Public Secondary Schools Athletic Association* ***NLI*** *National Letter of Intent*

OHSAA *Ohio High School Athletic Association*

PA *public address*

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PGA *Professional Golfers Association of America* ***PIAA*** *Pennsylvania Interscholastic Athletic Association* ***TRS*** *telecommunications relay services*

TSOASA *Ted Stevens Olympic and Amateur Sports Act* ***USOC*** *United States Olympic Committee*

▪ Cases

Austin v. Cornell Univ., 891 F. Supp. 740 (N.D. N.Y. 1995) Baisden v. West Virginia Secondary Schs. Activities Comm'n, 5 68 S.E.2d 32 (W.Va. 2002) Bombrys v. City of Toledo, 849 F. Supp. 1210 (N.D. Ohio 1993) Bowers v. NCAA, 9 F.Supp.2d 460 (D.N.J. 1998); Bowers v. NCAA, 475 F.3d 524 (3d Cir. 2007) Butts v. NCAA, 751 F.2d 609 (3d Cir. 1984)

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Buchanan, 848 S.W.2d 298 (Tex. App. 1993) Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840 (7th Cir. 1999) Western Airlines v. Criswell, 472 U.S. 400 (1985)

▪ *Discussion and Review Questions*

1. *How has the Americans with Disabilities Act affected sports?*

2. *Should alcoholism be considered a disability under the act? Why or why not?*

3. *How might sports rules change if reasonable accommodations are given to certain sports participants with disabilities and not others?*

4. *Should the NCAA rewrite or modify its rules with regard to college entrance exams for persons who have learning disabilities?*

5. *Do you think professional athletes would be successful in suing their league or team for a violation of the ADA if they could demonstrate that they were cut from the roster or suspended from the league due to drug use or abuse?*

6. *Should someone with a communicable disease (but who has no physical signs of the illness) be disallowed from playing in a contact sport?*

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7. *Do you think that the NFL blackout rule is passé and should be revoked given that we live in the era of the Internet, smartphones, etc.?*

8. *Describe the role, history and purpose of the Special Olympics.*

9. *Has the Paralympic Games provided sufficient opportunities for elite athletes to compete in a sufficiently organized way?*

10. *Do you think that Oscar Pistorius should be entitled to compete with able-bodied athletes, though he uses carbon-fiber prosthetics?*

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CHAPTER SEVEN

Drugs and Sports

After reading this chapter you will be able to:

1. Describe the differences between performance-enhancing drugs and illegal (street) drugs.

2. Discuss the constitutional issues of drug testing in high school, college, and professional sports.

3. Describe the arguments on both sides of whether drug testing should be used at all in sports.

4. Discuss the role of the World Anti-Doping Agency ***(WADA)*** *in the war on drugs.*

5. Explain what state action means.

6. Compare and contrast the differences among the several professional sports league drug testing program penalties.

7. Describe the various federal laws concerning sports-related drugs.

8. Discuss the physiological effects of the various types of performance-enhancing drugs, including designer steroids.

9. Discuss changes in the use and regulation of anabolic steroids in recent years.

10. Give examples of prominent athletes who have been involved in doping-related incidents.

▪ *Introduction*

Drug use by athletes has been a controversial issue for many years. Some athletes use artificial stimulants to give them a competitive physical and mental advantage over their opponents. The use of performance-enhancing drugs can actually be traced to the ancient Olympic Games where athletic prowess was rewarded with fame and fortune, just like today. Other athletes use illegal, nonperformance-enhancing drugs and are often punished accordingly and in the public eye when caught.

Only relatively recently has it become generally accepted that drug testing in high school, college, and professional sports serves a legitimate and beneficial societal need to not only win the war on drug use in U.S. society, but also to create a level playing field for competition. Legal issues concerning drug testing are related to the common law right to privacy and due process protections against illegal searches and seizures under the Fourth Amendment to the Constitution. The Fourth Amendment is particularly of interest since testing usually involves an analysis of a sample from a competitor's urine or blood.

WADA

World Anti–Doping Agency

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Chapter Seven

Preliminary Considerations

*Before proceeding, however, students should ponder why leagues and organizations test for drug use (also known as **doping** in the international context) in the first place. After all, some argue that drugs should be allowed in sports and that regulating their use is counterproductive, costly and unnecessary. Some of the preliminary questions to consider regarding drug testing include: Is it to ensure fair competition?*

Is it to promote integrity in society?

Is it a financial issue, because only those who can afford to can buy them?

Is this a role model issue?

Is this a governmental control issue?

Is it a health or safety issue?

Studying drug issues in sports law also requires an understanding of the language and acronyms of drugs and drug testing. While at times it may appear that a degree in chemistry or biology is better served to study this

subject, the goal of this chapter is to offer a fundamental structure for further research and inquiry. It also attempts to offer a discussion of the various types and classifications of drugs in a basic sense. Some of the more prominent legal decisions are offered.

It is also important to note that drug testing is a game of cat-and-mouse in which players, chemists, governing bodies and governments continuously attempt to outsmart each other in the development, testing, classification, and regulation of ***performance-enhancing drugs (PEDs)****. There may be no more dynamic area of sports law than the study of drugs and its legal and regulatory environment.*

▪ *Constitutional Framework*

When the government or a governmental entity such as a public school or public college desires to test a student-athlete for drugs, this constitutes state action. In those instances in which the government (state) desires to invade the physical privacy of athletes by testing their urine or blood for drugs, U.S. athletes have had constitutional safeguards that allow a challenge to such a test. However, numerous legal challenges to such drug testing policies in sports have failed. Over time, the courts have essentially given support to the use of mandatory, suspicionless testing in sports.

There is no state action for private sports leagues and organizations and therefore Fourth, Fifth, and Fourteenth Amendment issues are generally not applicable in such context. Instead, permission to test is established by contract and usually requires consent to such policies (including appeals) as a condition of participation whether at the amateur or professional levels both nationally and internationally.

doping

international word for the use of performance-enhancing drugs
performance-enhancing drugs (PEDs)

drug or substance ingested, injected, or inhaled by an athlete to increase muscle growth, repair, or development or any substance used to decrease the effects of fatigue

PEDs

performance enhancing drugs

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Fourth Amendment

If a governmental agency tests an athlete (or anyone) for drugs, it must comply with the ***Fourth Amendment*** *of the U.S. Constitution. This amendment protects private citizens against unreasonable searches and seizures by the government.*

Such protection is vital to all citizens, protecting them from unacceptable conduct on the part of the government or its officers or agents. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

While most sports participants now appreciate that being tested for drugs is part of the prerequisite for competition, numerous cases have reached trial

and appellate courts to determine whether or not an individual student-athlete has a legitimate expectation of privacy when it comes to drug testing.

Fifth Amendment

Another constitutional consideration for drug testing of athletes is the ***Fifth Amendment****, which provides:*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Indeed, the Fifth Amendment covers a variety of topics. In the context of drug testing, the most common use of the Fifth Amendment involves the ***Due***

Process *clause. This means, for example, that a student-athlete should be granted a process for a hearing and appealing a positive drug test, if they so desire, when state action is involved. Occasionally, Fifth Amendment becomes involved during a criminal prosecution related to drug possession or drug testing when that perpetrator refuses to be a witness against himself after the government charges him with a crime, or the government is involved in an investigation. This is also referred to as the amendment against self-incrimination in a criminal case.*

Fourth Amendment

amendment to the United States Constitution prohibiting the government from conducting a search of a person's body or home without the individual's consent, a warrant, or a contract; referred to as the "search and seizure" warrant ***Fifth Amendment***

the requirement for a "due process" hearing before a person's life, liberty, or property is taken away; this amendment to the United States Constitution also provides the right against self-incrimination

Due Process

right to a hearing before a person's life, liberty, or property is taken away, usually by the government

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Fourteenth Amendment

To ensure that no state makes a law that might abridge the rights of a citizen granted to it by the federal government, especially those found in the first ten amendments known as the ***Bill of Rights****, Congress enacted the* ***Fourteenth Amendment*** *that extends all federal rights to individual state constitutions: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.*

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In other words, no state may make a law that abridges (i.e., takes away) the right of a citizen granted to it by the federal government under the ***Equal Protection*** *clause.*

The Fifth and Fourteenth Amendment protections are often enforced through 42

U.S.C. § 1983 civil rights actions, which must demonstrate there was state action in the first place.

After recognizing the similarities and differences between the Fourth Amendment (search and seizure), Fifth Amendment (due process, self-incrimination), and the Fourteenth Amendment (equal protection), students must appreciate that drug testing at the international level is based upon contract and most often in accordance with the policies established by the World Anti-Doping Agency (WADA), not the U.S. Constitution.

Privilege or Right

Student-athletes' attempts to challenge dismissal from participation in sports due to a positive drug test have not been successful under a Fourth, Fifth, or Fourteenth Amendment argument. Courts have refused to recognize participation in sports as a property right for the athlete. It is almost always considered a privilege rather than a right to participate in secondary and post-secondary sports as demonstrated by age 19, maximum participation and no pass, no play rules discussed in the previous chapter.

Quasi-State Action

Some sports organizations such as private state high school athletic associations are characterized as hybrid associations, also known as quasi-state actors, because they are not technically part of the state government but act in a regulatory way. Still, to determine whether any state action might be involved when it comes to drug testing issues, courts often will look to see the degree of any nexus between the state government and the private entity association. The issue for courts is often whether these private organizations should actually be considered to be an arm of the state (thereby affording constitutional protection to students) or whether they are
Bill of Rights

first 10 amendments to the Constitution

Fourteenth Amendment

prohibition against states abridging the rights guaranteed under the United States Constitution

equal protection

clause in the Fourteenth Amendment that states that the government must treat a person or class of persons the same in similar circumstances ***quasi-state action***

Characterization of a private sports organization such as a statewide high school athletic association which technically is not a branch of state government but oversees and administers rules and regulations involving state actors such as public high schools calling in to question whether constitutional protections should apply to member schools and individual participants *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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separate, non-governmental agencies whose actions afford no constitutional protections particularly when it comes to drug testing in interscholastic sports.

The NCAA is not considered a state actor in a legal context after the outcome in NCAA v. Tarkanian, 488 U.S. 179 (1988), though most of its members are state actors because they are publicly funded universities. Additionally, the Supreme Court held that the United States Olympic

Committee ***(USOC)*** *is not a state actor in San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S.*

522 (1987). In fact, the USOC is considered to be a private entity though it was federally chartered by Congress.

- ***Privacy Issues***

Privacy rights have long been an issue in U.S. jurisprudence. At one time, the legitimacy of the now-routine search of a person's home or automobile by a police officer, for example, were hot topics in privacy law. Likewise, requiring a test of a person's urine, blood or hair as a prerequisite for employment or participation in sports was litigated in the context of privacy. As discussed in previous chapters, however, the world has changed considerably with regard to privacy rights in general. No doubt, the impact of the events on September 11, 2001, the advent of the Internet search engines, and the participation among social media sites such as Facebook have contributed to the evolution of how privacy is perceived today.

Still, there are several fundamental privacy laws worth exploring.

FERPA

The Family Educational Rights and Privacy Act of 1974 ***(FERPA)*** *(20 U.S.C. §*

1232g; 34 CFR Part 99), also known as the ***Buckley Amendment****, applies primarily in the context of student education records. This is the law which prevents public display of grades in a classroom, for example. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education* ***(DOE)****. FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Then, students to whom the rights have transferred are referred to as eligible students.*

Normally FERPA is not considered controversial as long as an earnest effort is made to keep student educational records private. FERPA might become

an issue if a student-athlete were to be suspended for poor grades, misconduct or other reasons, and the media and others were to seek access to such information. Some have claimed that high school and college athletic departments hide behind FERPA to keep the general public from misconduct by student-athletes, in essence creating a veil of secrecy. Similarly, schools will proudly broadcast high student GPAs on radio, television and the Internet, but if a student-athlete is ineligible for a game the school might say that he was suspended for "failing to meet the obligation of a student-athlete" rather than "his GPA is below 2.0."

USOC

United States Olympic Committee

FERPA

Family Educational Rights and Privacy Act of 1974

Buckley Amendment

also known as the Family Educational Rights and Privacy Act of 1974

(FERPA), which protects student academic records

DOE

Department of Education

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Chapter Seven

HIPAA

The Health Insurance Portability and Accountability Act ***(HIPAA)*** *involves medical privacy. It was passed by Congress in 1996 (29 U.S.C. § 18) and amended both the Employee Retirement Income Security Act* ***(ERISA)*** *(29 U.S.C. § 1182(a)(1)), and the Public Health Service Act (42 U.S.C. § 6(a)). It serves many purposes, including to improve portability and continuity of health insurance coverage in the group and individual markets; to combat waste, fraud, and abuse in health insurance and health care delivery; and to protect the privacy of personal health records by protecting the security and confidentiality of health care information.*

HIPAA has the Privacy Rule, which grants rights for health information and sets rules and limits on who can look at and receive health information whether elec-tronically, in writing, or verbally. The Security Rule protects health information in electronic form and requires entities covered by HIPAA to ensure that protected health information is secure.

For a short while, reporting specific injuries by student-athletes during practice or competition seemed to violate HIPAA and created controversy among athletic departments and training staffs around the country. However, the NCAA thereafter instituted Student-Athlete Authorization/Consent for Disclosure of Protected Health Information ***(PHI)*** *forms, which are usually signed by student-athletes without reservation. Though it is entirely voluntary, signing the form gives institutions permission to publish and report physical injuries. It is offered to each student-athlete at the beginning of each academic year. NCAA Manual, Bylaw 14.1.6, Student-Athlete Health Insurance Portability and Accountability Act (HIPAA) Authorization/Buckley Amendment Consent Form—Disclosure of Protected Health Information, states:* ***14.1.6.1 Content and Purpose****. Each academic year, a student-athlete may voluntarily sign a statement in a form maintained by the Committee on Competitive Safeguards and Medical Aspects of Sports and approved by the Legislative Council in which the student-athlete authorizes/consents to the institution's physicians, athletics directors and health care personnel to*

disclose the student-athlete's injury/illness and participation information associated with the student-athlete's training and participation in intercollegiate athletics to the NCAA and to its Injury Surveillance Program (ISP), agents and employees for the purpose of conducting research into the reduction of athletics injuries. The authorization/consent by the student-athlete is voluntary and is not required for the student athlete to be eligible to participate.

▪ ***Regulatory Environment***

The legal aspects of drug testing in sports can be categorized into four regulatory environments. These include:

I. ***Interscholastic*** *high school or state drug testing policies.*

II. ***Intercollegiate*** *policies, which include the NCAA's List of Banned Substances.*

III. ***Olympic Movement*** *policies using the services of the World Anti-Doping Agency (WADA), which provides the Prohibited List of drugs.*

HIPAA

Health Insurance Portability and Accountability Act

ERISA

Employee Retirement Income Security Act

PHI

Student–Athlete Authorization/Consent for Disclosure of Protected Health Information ***Interscholastic***

high school environment

Intercollegiate

college and university environment

Olympic Movement

the overall environment associated with the Olympic Games *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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*IV. Professional sports leagues which use drug testing policies established by private contracts known as collective bargaining agreements (**CBA**).*

Before exploring these categories, there are a few other items worth mentioning. Students should be familiar with federal laws related to drugs, organizations which are proactive in testing for drugs, and a few of the major categories of drugs.

Federal Laws

The following is a brief summary of some of the most important federal laws governing drugs in the United States. Students should become comfortable with the differences between them, and how these laws evolved over time. It should be noted that the Clean Sports Act was a bill introduced in Congress in 2005 designed to establish federal minimum drug testing standards for the major professional sports leagues, but it never became law.

Controlled Substances Act (CSA)

This was enacted into law by Congress as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. It provides that the

manufacture, importation, possession and distribution of certain drugs are regulated by the federal government. Five schedules (classifications) of drugs have been enacted. The Act is found at 21 U.S.C. § 801 et seq.

Anabolic Steroid Control Act of 1990

In response to concerns over the use of steroids in high school, college and professional sports, Congress drafted this federal law characterizing possession or use of anabolic (muscle-building) steroids as controlled substances thereby making their non-medical use a felony. This puts anabolic steroids in the same classification as cocaine and heroin. It also replaced the Anti-Drug Abuse Act of 1988, which apparently was ineffective and insufficient.

Dietary Supplement Health and Education Act of

1994 (DSHEA)

This federal law regulates supplements, but places the burden on the Food and Drug Administration ***(FDA)*** *to demonstrate that a supplement is unsafe before it can take any action to remove a product from the marketplace. It also only requires reporting of serious adverse effects. You are probably familiar with the phrase: "This statement has not been evaluated by the Food and Drug Administration. This product is not intended to* ***CBA***

collective bargaining agreements

Controlled Substances Act

enacted in 1970, provides that the manufacture, importation, possession and distribution of certain drugs are regulated by the federal government, and established five schedules (classifications) of drugs

CSA

Controlled Substances Act

Anabolic Steroid Control Act of 1990

added possession or use of anabolic steroids as a felony, criminalizing their non-medical use and placing anabolic steroids in the same classification as cocaine and heroin

Dietary Supplement Health and Education Act of 1994

federal law which requires a special dis-

claimer statement posted by manufacturers on their supplements, and also places burden of proof on federal government to prove unsafe product

DSHEA

Dietary Supplement Health and Education Act of 1994

FDA

Food and Drug Administration

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diagnose, treat, cure, or prevent any disease." This disclaimer is required by law under the DSHEA.

Anabolic Steroid Control Act of 2004

This went into effect January 20, 2005 and added prohormones (steroid precursors) to the list of controlled substances from the Anabolic Steroid Control Act of 1990. Under this act, drugs such as Androstenedione (Andro), Tetrahydrogestrinone ***(THG)****, and others became classified as Class III substances. In 2006, the sentencing guidelines for these substances were increased by 25 percent.*

Ryan Haight Online Pharmacy Consumer

Protection Act

This was passed in 2008 110 P.L. 425 (Oct. 15, 2008) to amend the CSA and to further regulate online prescription drug availability and trafficking through online pharmacies. Online pharmacies are federally regulated primarily by the FDA and the United States Drug Enforcement Administration ***(DEA)****. The FDA regulates online pharmacies through the Federal Food, Drug, and Cosmetic Act* ***(FD&C)****.*

FTC

It is also worth noting that the Federal Trade Commission ***(FTC)*** *has become involved in labeling issues, such as misleading advertising, for any product (including supplements) even if a disclaimer is used by the manufacturer. For explored, in 2007 the FTC fined makers of several weight-loss supplement manufacturers—*

including Xenadrine EFX, Cortaslim, TrimSpa and One-A-Day WeightSmart —for deceptive advertising. In 2008, the documentary Bigger, Stronger, Faster explored drug use in the U.S., PEDs in general, the role of federal agencies such as the FTC, and labeling issues involving nutritional supplements.

Testing Agencies

Since the late 1990s, the testing for drugs in athletes has become more organized and efficient. Today, the study of drugs in sports requires a basic understanding of the national and international organizations which test for drugs and a few acronyms and other terminology as well.

WADA

Scandals in the 1990s surrounding the Tour de France bike race highlighted the need for an independent international agency to set unified standards for antidoping work, and to coordinate the efforts of various sports organizations and public authorities. The International Olympic Committee ***(IOC)*** *took the initiative* ***Anabolic Steroid Control Act of 2004***

added prohormones (steroid precursors) to the list of controlled substances from the Anabolic Steroid Control Act of 1990 including Androstenedione (Andro) and Tetrahydrogestrinone (THG)

THG

Tetrahydrogestrinone

Ryan Haight Online Pharmacy Consumer Protection Act *federal regulation of online pharmacies*

DEA

United States Drug Enforcement Administration

FD&C

Federal Food, Drug, and Cosmetic Act

FTC

Federal Trade Commission

IOC

International Olympic Committee

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and convened the First World Conference on Doping in Sport in Lausanne, Switzerland in February, 1999. Following the proposal at that conference, the World Anti-Doping Agency (WADA) was established on November 10, 1999.

The current president of WADA is John Fahey.

The Code and the List

WADA has led the fight against doping in sport and has made significant strides in harmonizing a set of anti-doping rules known as the World Anti-Doping Code ***(WADC)****, known simply as The Code. The Code provides a* ***Prohibited List****, and rules and regulations for sport organizations and public authorities on testing procedures, laboratories, Therapeutic Use Exemptions* ***(TUEs)****, and the protection of privacy and personal information.*

The Code can be downloaded for free online. WADA's Prohibited List, known in some circles as just the List, categorizes specific drugs and is also available online. It includes substances and methods (such as the use of altitude tents) and whether their use is prohibited at all times both in-competition and out-of competition ***(OOC)****. The Code also recognizes that certain substances are prohibited just for particular sports. Publication of the updated Prohibited List comes into effect on January 1 each year. In 2011, WADA's Prohibited List became available as an app that can be downloaded from the iTunes store.*

Non-Approved Substances

Recently, WADA added a new class of banned substances, non-approved substances, to the Prohibited List in order to combat drugs that are still in the research and development stage, but are available on the black market. For example, the drug Mircera, a new continuous erythropoietin receptor activator ***(CERA)****, which was designed to stimulate red blood cell production to treat kidney disease, appeared on the athletic scene in 2005. Swiss manufacturer Roche Holding played a key role in catching users of it at the 2008 Tour de France.*

USADA

The United States Anti-Doping Agency ***(USADA)*** *is the independent anti-doping agency for Olympic related sport in the United States. It began operations on October 1, 2000 based upon recommendations made by the United States Olympic Committee. The USADA was given full authority to execute a comprehensive national anti-doping program and is involved in testing U.S. athletes. According to the USADA website, which links directly to WADA, a substance or method will be considered for the WADA Prohibited List if it meets any two of the following three criteria:*

1) It has the potential to enhance or enhances sport performance 2) It represents an actual or potential health risk to the athlete 3) It violates the spirit of sport

WADC

World Anti–Doping Code

prohibited list

also known as just the List, it provides a comprehensive list, summary and categorization of drugs, substances and methods which are banned by WADA ***TUEs***

therapeutic use exemptions

OOC

out–of competition

CERA

continuous erythropoietin receptor activator

USADA

United States Anti–Doping Agency

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In 2011, the USADA publicized new research that found that Americans rank the use of PEDs as the most serious problem facing sports today. The USADA-commissioned study surveyed about 9,000 Americans including adults, children, athletes, coaches and teachers to measure the impact sports has on values and culture in the United States. The study found that 75 percent of adults surveyed agreed that athletes' use of PEDs is a violation of ethics in sports and that the use of PEDs was the most serious problem in sports. The next two highest-ranked problems were the focus on money and the criminal behavior of well-known athletes.

Additionally, nearly 90 percent of adults surveyed agreed that high-profile athletes have a responsibility to be a positive role models for young people.

▪ ***Performance-Enhancing Drugs***

In order to understand the law and cases that are related to drugs and sports, students must be able to appreciate the differences among the PEDs, which athletes inject or ingest to increase the human body's ability to perform. Performance-enhancing drugs might be taken orally, via injection or topically (rubbed into the skin). Illegal drugs such as cocaine, heroin, and marijuana do not necessarily increase performance, but are characterized by the federal or state governments as illegal ***controlled substances****. This section is designed to provide a fundamental outline for the major PED categories found in the study of sports law.*

Steroids

Steroids were developed in Europe in the 1800s. It is usually ***anabolic*** *steroids, or muscle-building steroids, that are at issue in sports law. There are other kinds of steroids, of course, but it is important not to confuse anabolic steroids with corti-costeroids (such as Prednisone) which do not build muscle but are released in the body to prevent inflammation and to treat disease. Steroids can be water-based or oil-based; the latter remain the body for a much longer time.*

Ultimately, steroids are synthetic (man-made) versions of the hormone testosterone. Testosterone is found in both men and women, though at significantly higher levels in men. One benchmark for drug testing is the testosterone/epitestosterone ratio, or the T/E ratio. An average person has a 1:1 ratio. If the testosterone to epitestosterone ratio is greater than 4:1, then WADA determines whether it is due to: 1) a physiological condition or 2) administration of ***exogenous*** *(outside, synthetic) hormones. The International Olympic Committee Medical Commission set a T/E ratio of 6:1 in 1982, but in 2005 the WADA lowered the legal ratio to 4:1.*

Frequently mentioned types and brands of steroids include Stanozolol (Winstrol), Dianabol, and Nandrolone (19-nortestosterone) also known as Deca-Durabolin. Androstenedione ("Andro") is actually a steroid precursor. This means it is not a steroid itself, but when ingested the body it combines with body chemistry to turn into a steroid having remarkable effects. It was banned in the United States as part of the Anabolic Steroid Control Act of 2004.

controlled substances

drugs that the government has declared to be illegal to possess or use without a prescription

anabolic

a substance or drug that is builds muscle

exogenous

a substance that is not naturally found in or produced by the human body
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▪ CASE 11

Mary Decker Slaney, Plaintiff-Appellant, v. The International Amateur Athletic Federation and The United States Olympic Committee, Defendants-Appellees ***No. 99-4146***

June of 1996, she competed in the 5000 and 1500

United States Court of Appeals for the Seventh Circuit *meter races in the national trials for the Atlanta Olym-January 19, 2001, Argued*

pics. Following her 5000 meter race, Slaney provided ***March 27, 2001, Decided***

the USOC1 with a urine sample which was tested for

prohibited substances including exogenous testoster-

OPINION BY: FLAUM, CHIEF JUDGE

one. Because current technology cannot detect the

Former Olympic runner Mary Decker Slaney ("Slaney")

presence of prohibited testosterone in the body, testing brought suit against the International Amateur Athletic programs measure the ratio of testosterone to epitestos-Federation ("IAAF") and the United States Olympic

terone ("T/E") in the body. This test, referred to as the Committee ("USOC") shortly after an IAAF arbitration T/E test, assumes that an ordinary T/E ratio in

panel determined that Slaney had committed a doping

humans is one to one, and thus any ratio of above six offense. Slaney's complaint raised a litany of state-law to one is consistent with "blood doping." The ratio was claims which the district court determined it lacked sub-established at six to one in order to account for nonject matter jurisdiction over because of the applicability doping factors that might cause elevated ratios in

of The New York Convention and the Amateur Sports

female athletes. Factors which may influence T/E

Act. Additionally, the complaint alleged violations of the ratio include an individual changing birth control

Racketeer Influenced and Corrupt Organizations Act

pills, age, menstrual cycle, bacterial contamination of ("RICO"), which the district court dismissed pursuant to the urine sample, and alcohol use.

Fed.R.Civ.P. 12(b)(6). Slaney now appeals the district Slaney's test was conducted at the University of California court's decision, arguing that: (1) the New York Conven-at Los Angeles ("UCLA") Laboratory. The test re-

tion does not bar adjudication of her claims against the vealed that Slaney's T/E ratio was elevated significantly IAAF, (2) the Amateur Sports Act does not preempt all beyond the permitted six to one ratio.2 The laboratory state-law claims by a participating athlete against the notified both the USOC and the IAAF3 of its findings.

USOC, and (3) her complaint adequately alleges RICO

According to Slaney, the USOC informed United States violations. For the reasons stated herein, we affirm the of America Track and Field, Inc. ("USATF")4 of its

decision of the district court.

mandatory duty to investigate whether Slaney's specimen should be declared positive for testosterone. How-I. BACKGROUND

ever, it appears that the USATF played no such role, as In the course of her storied career, middle-distance the actual investigation was conducted by the IAAF.

runner Mary Decker Slaney has captured a multitude

The IAAF's investigating doctor analyzed Slaney's sam-of United States and world records. She is considered ples, her past test results, and two additional samples.

by many to be one of the most celebrated female ath-

Slaney claimed that her elevated level was the result of letes of the past century, as well as one of the greatest (1) her menstrual cycle, and (2) her changing of birth runners of all-time. While Slaney began running in

control pills. Furthermore, Slaney posited that there 1969, it was not until fifteen years later that she

was no scientific validity to the hypothesis that a T/E

received international attention. At the 1984 Los

ratio above six to one was not normal for female

Angeles Games, Slaney was considered a favorite to

athletes. Nonetheless, on February 5, 1997, the IAAF

medal in the 3000 meters competition. While the

adopted the investigating doctor's recommendation

world watched on, half-way through the race, Slaney

and found Slaney's specimen positive for the prohib-

began jostling for position with Zola Budd, a South

ited substance testosterone.

African born, barefooted runner. When the pair

As a result of the IAAF's decision, IAAF and USOC

became entangled, Slaney was tripped up by Budd.

rules required the USATF to hold a hearing to deter-

Slaney tumbled onto the infield, injuring her hip. As mine whether Slaney had committed a doping offense.

she crashed to the infield, any chance for an Olympic Slaney asked the USATF Custodial Board to dismiss her medal came crashing down with her. To this day, an

case, and also filed a complaint with the USOC under indelible picture of Slaney, fallen on the side of the its rules. The USOC complaint alleged that the USATF

track and writhing in pain, remains in the minds of

proceedings against her violated the Amateur Sports

many who witnessed the event.

Act as well as the USOC Constitution and By-Laws. Spe-Slaney rebounded from her Olympic defeat and con-

cifically, the complaint alleged that the use of the T/E

tinued to compete, overcoming countless injuries. In test on female athletes had not been scientifically

(continued)

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validated, that the test discriminated against women by and USOC pursuant to Fed.R.Civ.P. 12(b)(1), and dis-shifting the burden to an athlete to prove by clear and missing Slaney's 18 U.S.C. § sec. 1962(c) and (d) claims convincing evidence that she was innocent, and that

pursuant to Fed.R.Civ.P. 12(b)(6). Specifically, the dis-the IAAF had failed to conduct a proper investigation.

trict court held that the United Nations Convention

Concerned with the dilatory nature of the USOC and

on the Recognition and Enforcement of Foreign Arbi-

the USATF proceedings, on June 10, 1997, the IAAF

tral Awards, 9 U.S.C. § 201 ("New York Convention"), suspended Slaney on an interim basis. The suspension barred Slaney's claims against the IAAF, as those claims occurred just prior to the National Track and Field

had been the subject of a valid arbitration decision.

Championships in Indianapolis. Furthermore, the

With regard to Slaney's claims against the USOC, the IAAF ensured compliance with the suspension by

court held that the Amateur Sports Act, 36 U.S.C. §

invoking its contamination rule, whereby anyone who

220501 et seq. , gives the USOC the exclusive right to competed with a suspended athlete (in this instance

determine disputes over eligibility and does not create Slaney) would themselves be suspended. The IAAF's

a private right of action. Finally, while the court held a actions prompted the USATF Custodial Board to sus-RICO claim could theoretically be maintained against pend Slaney pending a hearing before the USATF

the USOC, Slaney's complaint did not "come close to

Doping Hearing Board, effectively mooting her motion fitting the family of claims Congress intended the

to dismiss the case against her.

RICO statute to cover," nor did it adequately allege a violation of the RICO conspiracy provision.

Slaney received her hearing before the USATF Doping

Hearing Board on September 14, 1997. The Hearing

Slaney now appeals the decision of the district court.

Board, unpersuaded by the testimony of the IAAF's inves-She contends that (1) the New York Convention does

tigating doctor, unanimously determined that no doping not bar her claims against the IAAF, (2) the Amateur violation had occurred. Satisfied with the USATF Hear-Sports Act does not preempt all state-law claims made ing Board's finding that the IAAF's rules regarding the by an athlete against the USOC, and (3) her complaint use of the T/E ratio test were vague and inconsistent and adequately alleges a RICO claim against the USOC.

the six to one ratio was not scientifically proven to be ***II. DISCUSSION***

inconsistent with the normal ratio in humans, Slaney withdrew her complaint with the USOC.

[…]

The IAAF was unsatisfied with the USATF Hearing

1. Decision of the Tribunal

Board's findings, and invoked arbitration of the

The April 25, 1999 opinion of the IAAF arbitral panel USATF's decision.5 Slaney and the USATF opposed

begins by expounding on the reasoning behind its

arbitration, but both were represented before the

interlocutory opinion. Setting forth the evidentiary pro-IAAF Arbitral Panel ("the Tribunal"). In late January cedure, the Tribunal notes that the initial burden of 1999, the Tribunal issued an interlocutory decision

proof rests with the IAAF to show that an athlete has upholding the IAAF's interpretation of how to adjudi-a T/E ratio greater than the 6:1 established limit. If the cate a testosterone doping offense, and found that the IAAF can do so, according to the Tribunal, the Federa-rules were neither vague nor inconsistent. Thus, once tion has provided sufficient evidence for the sample to the IAAF showed that Slaney had a T/E ratio greater

be deemed positive. At that point, the burden is shifted than six to one, Slaney had to come forth and show by to the athlete, who must prove by clear and convincing clear and convincing evidence that the elevated ratio evidence that the elevated T/E ratio was due to patho-was attributable to a pathological or physiological con-logical or physiological conditions. In making this anal-dition. Believing that it was scientifically impossible to ysis, the Tribunal drew from the IAAF rules on testing prove by clear and convincing evidence that her high for testosterone.

T/E ratio was due to pathological or physiological fac-With the evidentiary procedure established, the Tributors, Slaney withdrew from the arbitration, followed by nal continued to consider whether Slaney had commit-the USATF. Ultimately, the Tribunal ruled that Slaney ted a doping offense. The Tribunal noted that the

had committed a doping offense.

IAAF had established that both of Slaney's specimens Slaney filed suit in the District Court for the Southern had been analyzed as having T/E ratios significantly District of Indiana raising numerous state-law contract higher than 6:1. The tribunal also observed that Sla-and tort claims against both the IAAF and the USOC.

ney's longitudinal study revealed a previous T/E ratio Slaney also alleged that the organizations had violated high of 3:1; meaning that her present ratio, by the most the RICO Act, 18 U.S.C. § 1961 et seq. On November 5, modest of calculations, was more than three times

1999, the district court entered a judgment and order greater than she had ever previously tested. Thus the dismissing Slaney's state-law claims against the IAAF

burden was shifted to Slaney to produce a valid

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explanation for the findings. The Tribunal noted that Slaney. Slaney claims that the IAAF had a duty to prop-Slaney had produced no evidence, let alone that of a erly test her for drug use. Since Slaney asserts that the clear and convincing nature, to prove that her elevated IAAF breached this duty by employing the T/E test, the ratio was the result of pathological or physiological fac-court would de facto be required to determine whether tors. Since Slaney had withdrawn from the proceed-the implementation of that test constituted a breach of ings, and refused to tender her medical records to

the duty to properly test athletes. Of course, the court the Tribunal, the panel was forced to conclude under could not reach that decision without addressing the the burden-shifting procedure it had outlined that Sla-validity

of the test itself. Likewise, any examination of ney was guilty of a doping offense on June 17, 1996.

damages would require an assessment of whether Sla-

ney was properly found guilty of a doping offense.

2. Slaney's Present Complaint and its Relationship *Thus, we accept the district court's finding that allow-to the Tribunal's Decision*

ing Slaney's current action would undermine or nullify Keeping in mind the orbit of the Tribunal's decision, the Tribunal's decision. See Rudell v. Comprehensive we now turn to examine Slaney's present state-law

Accounting Corp., 802 F.2d 926, 928 (7th Cir. 1986).

causes of action against the IAAF. Slaney raises six

[…]

such claims: breach of contract, negligence, breach of fiduciary duty of good faith and fair dealing, fraud, Reduced to its essence, Slaney contends that the

constructive fraud, and negligent misrepresentation.

burden-shifting approach adopted by the IAAF violates Putting aside Slaney's amorphous allegations of mis-United States public policy. We disagree. According to representations, we note that her complaints center

the parties, proving the presence of exogenous testoster-around the claim that the IAAF violated its obligations one in the body by scientific tests is not possible at the to Slaney by "using the T/E ratio as a proxy for doping present time. Therefore, the IAAF has adopted the

in women." Thus, she alleges that the Federation failed rebuttable presumption of ingestion from a high T/E

to properly investigate her urine sample. Though Slaratio in an athlete's urine, as detailed throughout this ney does not specify how she was damaged by the

opinion. Were the IAAF not to make use of the rebutta-implementation of the T/E test (for reasons that will ble presumption, it would be nearly impossible, absent become pellucid during our discussion of Slaney's

eyewitness proof, to ever find that an athlete had

state-law claims against the USOC), the answer is appar-ingested testosterone. As the IAAF notes, criminal defen-ent. The implementation by the IAAF of a burden-

dants are frequently required to come forward with

shifting approach to proving ingestion of testosterone proof establishing a basis for asserting affirmative damaged Slaney in that, as a result, she was unable to defenses. See, e.g. , Martin v. Ohio, 480 U.S. 228, 94 L.

disprove that she had committed the offense--resulting Ed. 2d 267, 107 S. Ct. 1098 (1987); Leland v. Oregon, 343

in her suspension.6

U.S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952). We hope that at some juncture, science will develop a means for We conclude that Slaney's present complaint seeks to detecting exogenous testosterone in athletes, such that address issues decided by the Tribunal. During the

an athlete's T/E ratio of 11.6:1 can be discounted if it is course of the IAAF arbitration, Slaney presented two based on innocent factors. However, until that point in positions: (1) that the IAAF's T/E ratio test for deter-time, we are confident that requiring an athlete to prove mining ingestion of exogenous testosterone was

by clear and convincing evidence that her elevated ratio invalid, and (2) that it could not be proven that Slaney was due to pathological or physiological factors does not had committed a doping violation. Though Slaney

invoke a violation of United States public policy as fed-attempts to limit the import of the Tribunal's decision, eral case law has required in order for a court to refuse characterizing that decision as merely a finding that to enforce a foreign arbitral award.

she had a T/E ratio above 6:1, it is incontrovertible that the arbitration panel went further, first upholding

[…]

the T/E ratio test, and then determining that Slaney According to the Amateur Sports Act, one of the pur-had committed a doping offense. As our inquiry

poses of the USOC is to exercise exclusive jurisdiction above made transparent, Slaney's state-law claims

over all matters pertaining to United States participation against the IAAF seek deliberation on the identical

in the Olympic Games. See 36 U.S.C. § 220503(3). The issues. For example, in order to adjudicate whether Sla-Act also states that the USOC is designed "to provide ney's Fifth Count (negligence against the IAAF) is a swift resolution of conflicts and disputes involving ama-valid claim, the court would be required to delve into teur athletes, national governing bodies, and amateur whether the cause of action makes the prima facie case.

sports organizations," and "to encourage and provide That probing would require that the court assess

assistance to amateur athletic activities for women." Id.

whether the IAAF in fact breached its obligations to at §§ 220503(8), 220503(12).

(continued)

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Beginning with the often quoted language from the con-Olympic Movement or an agreement to commit two pred-

currence in Michels v. United States Olympic Committee, the icate acts. Thus, Slaney results to bolstering her 1962(d) district court reiterated that "there can be few less suit-claim by introducing new evidence and drawing infer-

able bodies than the federal courts for determining the ences from those materials that the USOC is engaging eligibility, or procedures for determining the eligibility, in a conspiracy to violate RICO. We have consistently of athletes to participate in the Olympic Games." 741

frowned upon such essays to cure pleading deficiencies F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring).

by means of introducing new factual support in appellate From there, the court cited numerous cases which have briefs. Put simply, "the pleading itself must state the essen-adopted the principle that eligibility decisions fall within tial elements of the RICO action or it is worthy of

the USOC's exclusive jurisdiction over all matters per-dismissal." Richmond v. Nationwide Cassel L.P., 52 F.3d taining to United States participation in the Olympic 640, 646 (1995). As a result, we find that Slaney has failed Games. For example, in Dolan v. United States Equestrian to sufficiently allege a RICO conspiracy.

Team, Inc., 257 N.J. Super. 314, 608 A.2d 434, 437 (App.

Div. 1992), the court focused on the need for uniformity ***III. CONCLUSION***

in determining questions of eligibility, and held "that it Slaney participated in a valid arbitration with the IAAF

would be inappropriate to attribute different or unique which, under the New York Convention, we are obligated meanings to [the Amateur Sports Act's] provisions in to recognize. Thus, the issue decided in that arbitration New Jersey and thus create a jurisdictional sanctuary cannot be relitigated. Because adjudication of the state-from the Congressional determination that these types law claims alleged against the IAAF in Slaney's complaint of disputes should be resolved outside the judicial

would necessitate relitigation of the issue decided in the processes." Similarly, in Walton-Floyd v. United States Olym-arbitration, the district court correctly determined that it pic Committee, 965 S.W.2d 35, 40 (Tex. Ct. App. 1998), the lacked subject-matter jurisdiction over those claims. Like-court noted that "the interest of maintaining consistent wise, the district court correctly determined that it lacked interpretations among jurisdictions requires the Act to jurisdiction to adjudicate Slaney's state-law claims against pre-empt claims asserted under state tort law. To hold a the USOC, finding that those claims were preempted by common law duty exists outside the scope of the Act, Congress's grant of exclusive authority to the USOC to thereby enabling an individual athlete to bring suit, determine the eligibility of American athletes. Finally, threatens to override legislative intent and opens the the district court correctly determined that Slaney did door to inconsistent interpretations of the Act." We not state a proper claim against the USOC for violation agree with the district court and the courts in Dolan and of the federal RICO statute.

Walton-Floyd that strict questions of athletes' eligibility are For the foregoing reasons, we Affirm the decision of preempted by the Amateur Sports Act's grant of exclu-the district court.

sive jurisdiction to the USOC over all matters pertaining to United States participation in the Olympic Games.

FOOTNOTES

However, that conclusion does not end our analysis.

1. The USOC, located in Colorado Springs, Color-

Despite the fact that the district court specifically noted ado, is the National Olympic Committee for the

its ruling was not based on a finding that the Amateur United States. This status dictates that the USOC

Sports Act was a complete preemption to all state-law carry out the mission of the International Olympic

claims, Slaney devotes an ample portion of her brief to Committee ("IOC") and the Olympic Movement

arguing that the complete preemption doctrine should in this country. Because the IOC has promulgated

not be applied in this context. There is no disagree-a drug testing program, the USOC administers

ment that state-law causes of action can be brought

that program in the United States for all qualifying against the USOC. However, when it comes to chal-competitions for the Olympic Games.

lenging the eligibility determination of the USOC,

2. Specifically, Slaney's samples tested at ratios of only a very specific claim will avoid the impediment to 9.5:1 to 11.6:1.

subject matter jurisdiction that § 220503(3) poses.

3. The IAAF is an unincorporated organization

[…]

based out of Monaco, which was founded to coor-

Slaney's complaint is wanting for any allegation that the dinate and control track and field activities around USOC agreed to violate RICO. As the district court noted, the world. The IAAF, which has a membership of

the closest the complaint comes to alleging any sort of federations representing over 200 nations and ter-agreement is in the statement that the USOC ordered

ritories, establishes worldwide rules for track and

the UCLA laboratory not to hand over to Slaney any infor-field competitions which are embodied in the

mation regarding the laboratory's analysis of her speci-IAAF Constitution and other regulations. Each fed-

men. Yet, as the court noted, there is not even a hint eration governs track and field competitions within

that this command by the USOC was given with any moti-its own territory and has agreed with all other fed-

vation to participate in the fraudulent affairs of the erations to follow IAAF rules in doing so.

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4. In addition to its Olympic duties, the USOC has

were turning blind eyes to their athletes' drug

been designated as the coordinating body for all

abuse, the IAAF established worldwide testing pro-

amateur sports in this nation by the Ted Stevens

cedures and eligibility rules. Rules 21-23 require all Olympic and Amateur Sports Act ("Amateur

disputes between the IAAF and members to be

Sports Act"), 36 U.S.C. § 220501 et seq. Under the submitted to an arbitration panel.

Amateur Sports Act, the USOC is required to

6. We note that Slaney walks a tightrope through-

select a national governing body for each amateur

out this portion of her appellate argument. On the

sport. For track and field, the USATF, an Indian-

one hand, in order to raise many of the causes of

apolis corporation, has been designated as the gov-

action she alleges, Slaney must establish that there erning body. As the national governing body, the

is a contractual relationship between her and the

USATF is subject to the Amateur Sports Act. Fur-

IAAF. However, in order to maintain the action as

thermore, the USATF is also a member of the

a whole against the IAAF, Slaney must avoid any

IAAF, and is responsible for enforcing the IAAF's

suggestion that she has a contractual relationship

rules and regulations.

with the IAAF whereby she has agreed to abide by

5. Because of indications, during the late 1970's,

their rules, including those which compel arbitra-

that some national track and field federations

tion of all disputes.

The list of prominent athletes who took PEDs including steroids is far too numerous to list or discuss. One case worth exploring is when, in 1996, U.S. athlete Mary Decker Slaney had a T/E ratio of greater than 6:1. She took her case to arbitration and argued that birth control pills can cause false positives for the test, but the arbitration panel ruled against her. She lost in subsequent litigation as well in Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580 (7th Cir. 2001).

The Slaney case was one of the last U.S. decisions to accept jurisdiction over international drug testing policies and procedures. Since the advent of WADA, the USADA and the Court of Arbitration for Sport ***(CAS)****, discussed in greater detail subsequent chapters, virtually all complaints and appeals of positive drug tests are handled through CAS in conjunction with WADA's Code. Competitors agree to such jurisdiction as a condition of participation at the highest level in the Olympic Movement through their international federations. WADA and CAS*

are also involved in drug testing in some professional sports.

Prior to Slaney, the most prominent international incident involving steroids occurred at the 1988 Seoul, Korea Olympic Games when Ben Johnson (Canada) broke the world record in the 100 meter dash, running it in 9.79 seconds. Both of Johnson's post-race drug tests were positive, and his gold medal was revoked.

In 1993 Johnson was banned from international competition for life when another test found high levels of testosterone.

In 2007, U.S. cyclist Floyd Landis lost his victory at the Tour de France due to a T/E ratio of 11:1 and the presence of synthetic testosterone in his tests. Landis denied taking testosterone, and his continued legal battle has led to other allegations and revelations in cycling and the Tour de France. Some continue to attempt to prove that U.S. cyclist Lance Armstrong used PEDs.

Blood Doping/EPO/CERA/Hematide

Blood doping used to be common in endurance sports such as cross-country skiing, running and cycling. It involved removing blood from your body, refrigerating it, and then injecting yourself with your own blood. In this way, the body gained ***CAS***

Court of Arbitration for Sport

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supersaturated red blood cells which carry more oxygen and, as a result, improve endurance. It was extremely dangerous, however, and several athletes died due to resulting blood clots. With the advent of synthetic drugs, blood doping is now much less common.

With advances in science, drugs were developed with had the same or better effects as the process of blood doping. This included synthetic forms of ***erythropoietin (EPO)****, a hormone that boosts the body's production of red blood cells. In 1989, the Food and Drug Administration approved EPO drugs for legitimate medical purposes primarily to treat anemic conditions in patients with kidney diseases and cancer. At the 2000 Sydney Olympics, testing for synthetic EPO began.*

It is also the drug substance seven-time Tour de France winner Lance Armstrong has been accused of using, though there has been no crystal-clear proof. Numerous athletes have tested positive for EPO including Nina Kraft (Germany) who failed a post-race test at the Ironman Triathlon World Championship in Hawaii in 2004 and later admitted using EPO. She was immediately stripped of her title.

Following the regulation of EPO came CERA. CERA is another synthetic hormone that functions similarly to EPO and remains in the blood for a longer period of time. There was no test available for CERA at the Beijing Olympics, but the IOC

holds onto doping samples for eight years so it can analyze them later if new testing methods become available. Using a new test in 2009, the IOC retroactively caught five Beijing Olympians using CERA. Following CERA came a newer drug, Hematide, which like CERA stays in the body even longer, reducing the number of treatments for legitimate patients.

Ephedra/Ephedrine/Pseudoephedrine

Ma Huang (also known as ephedra) is a plant whose properties have been used as a stimulant in fat burning pills and supplements. It is the herbal form of ephedrine, a synthetic, FDA-regulated drug found in many asthma

medications. In 2001, the NFL banned its players from using ephedra as a dietary supplement after the death of Minnesota Vikings lineman Korey Stringer due to heatstroke.

Ephedra was blamed in the death of Baltimore Orioles pitcher Steve Bechler in 2003. After he collapsed on the field during a spring training workout in Florida and died from heat exhaustion, the medical examiner determined ephedra was the primary cause of his death. Subsequently, MLB placed ephedra on the list of banned drugs at the Minor League level. Almost immediately thereafter, the FDA banned it from over-the-counter sales, stating that products containing ephedra presented an unreasonable risk of illness or injury.

However, these products are not always harmful, or used to gain a competitive advantage, and it is difficult for athletes and coaches to keep track of what drugs are prohibited and in what amounts, In an unfortunate circumstance, gymnast Andreea Raducan of Romania lost her gold medal at the 2000 Sydney Olympics because she tested positive for the stimulant pseudoephedrine, a drug found in over-the-counter cold and nasal decongestant products such as Sudafed and chemically related to ephedra/ephedrine. Arbitrators denied the Romanian all-around winner's appeal to have her gold medal restored, upholding the decision by the IOC. The Romanian doctor who gave her the nasal decongestant was banned from the Olympics through 2004.

erythropoietin (EPO)

performance-enhancing hormone affecting red blood cells ***EPO***

erythropoietin

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At the time, the Raducan decision marked the uncompromising nature of WADA and the IOC with regard to drug use. WADA removed pseudoephedrine from the list in 2006, adding it back in 2010 only if an in-competition urine sample has at least 150 mg/ml, which even WADA acknowledges could be rarely reached.

Unfortunately, this has yet to help restore Andreea Raducan's gold medal.

Human Growth Hormone

*Human Growth Hormone (**HGH**) was originally developed to treat growth disorders, but is used by athletes and bodybuilders to promote muscle growth. HGH is produced naturally by the pituitary gland in the brain and stimulates the growth of muscle, cartilage and bone. It is difficult to test for in a urine sample and has a short detection life. The most effective test is a blood test.*

*Attempts to test for HGH have received considerable resistance from professional sports leagues. However, in 2011, the Canadian Football League (**CFL**) agreed to include HGH testing as part of its CBA with the Canadian Football League Player's Association. This was, in fact, the first drug testing policy established by that league. In the summer of 2011 the NFL and NFLPA, as part of their new 10-year CBA, agreed that players might be tested for HGH by a blood test, the first time for any U.S. professional sports league.*

Diuretics and Masking Agents

Diuretics, both natural and synthetic, increase and encourage urination. In some circles, diuretics are referred to as water pills since they can reduce a

person's water weight by inducing dehydration. When an individual knows they might be tested for drugs, sometimes a diuretic is used to facilitate flushing the presence of a drug from the body's system. In essence, the athlete is attempting to out-smart the test.

The drug finasteride, a masking agent for steroids such as nandrolone also found in hair loss products like Propecia, was included on WADA's Prohibited List.

U.S. skeleton racer Zach Lund was unaware that finasteride had been added to the list in 2005, and after testing positive for the drug was unable to compete in the 2006 Turin Olympics. In 2008, after international outrage, finsateride was removed from the list. Lund subsequently competed for the United States at the 2010 Olympic Games in Vancouver.

BALCO and Designer Steroids

Designer steroids have the same effects as steroids, but their chemical makeup is so novel that they do not show up on tests. The idea is that you cannot test positive for a drug whose chemical make-up is unknown. Designer steroids reached a pin-nacle with the drug Tetrahydrogestrinone (THG), which was the center of the ***BALCO*** *(Bay Area Laboratory Cooperative) scandal. THG is now a Schedule I* ***Human Growth Hormone (HGH)***

hormone that affects all body systems and plays a major role in muscle growth and development

HGH

Human Growth Hormone

CFL

Canadian Football League

diuretic

a substance or drug that is used to reduce water in the human body through urination ***masking agent***

a drug or substance used in order to hide the existence of a PED in a blood or urine sample

BALCO

Bay Area Laboratory Cooperative

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substance under the CSA, meaning it has high potential for abuse and has no currently accepted medical use in the United States.

BALCO was an organization founded in 1984 by Victor Conte who later served four months in federal prison for his guilty plea for money laundering and steroid distribution. Discussion of BALCO and its far-reaching influence has been associated with some of the most prominent professional athletes including Barry Bonds, Tiger Woods, Marion Jones, Tim Montgomery, NFL linebacker Bill Romanowski, and many others. In their 2006 book Game of Shadows, Mark Fainaru-Wada and Lance Williams, reporters for the San Francisco Chronicle, detailed the extensive and methodical use of such PEDs.

Gene Doping

Gene doping *is the practice of using genetic engineering to artificially enhance athletic performance and is similar to gene therapy which alters a person's DNA to fight disease. It essentially causes the body to produce hormones on its own to improve endurance, muscle strength and size, and to recover faster from injury. It is banned by WADA, and efforts were made to have a test ready before the 2012*

London Olympics.

Therapeutic Use Exemption

There are circumstances when an athlete has a legitimate reason for using a drug which appears on the Prohibited List. An athlete may be undergoing a treatment for either an acute or chronic medical condition that requires he take a medication.

WADA accepts this and includes rigid standards for granting athletes therapeutic use exemptions (TUE) which involve approval from certified doctors. An example includes an endurance athlete who has asthma and must be permitted to use an inhaler in order to compete without having an asthma attack.

Having the fundamentals of PEDs and drug testing in sports is vital for the student, sports lawyer and anyone involved in medical or legal issues in sports law.

The next sections explore the four major regulatory environments involving drugs and sports.

- ***Interscholastic (High School) Environment***

Understanding sports law issues concerning drug testing at the high school level requires an historical perspective on changing attitudes by society and by the courts. Consider, for example, whether former First Lady Nancy Reagan's Just Say No to drugs campaign, which began in 1982, might have effected attitudes in society and among state and federal courts and legislatures about the government's role in weeding out drug use in the U.S.

Some cases reached the Supreme Court of the United States, but many only reached the federal circuit appellate courts or ran their course through the state court systems. The following are short summaries of some of the most prominent cases that have helped to shape the U.S. legal landscape with regard to drug testing in the interscholastic environment after the Just Say No campaign began.

Gene doping

the practice of using genetic engineering to artificially enhance athletic performance

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New Jersey v. T.L.O., 469 U.S. 325 (1985) *The Supreme Court held that school authorities may conduct personal searches of a student and their belongings without a warrant as long as there is a reasonable suspicion that the student is concealing something detrimental to the school. The search still must be conducted in a reasonable manner, however. The students in this case were smuggling cigarettes into a bathroom. The ruling balanced student Fourth Amendment protections (including a legitimate expectation of privacy) with the substantial interest of public school officials and teachers to conduct searches of students and their belongings.*

Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988)

The Seventh Circuit Court of Appeals held that Tippecanoe County School Corporation's implementation of a random urine testing program for student-athletes and cheerleaders was acceptable. The school had a drug screening program, and if students wanted to participate in athletics they had to consent to a random urine test. The Court relied strongly on New Jersey v. T.L.O. for guidance.

If a student tested positive, the school informed the student's parents and allowed the student to clear his or her name by offering an innocent explanation for the positive result. If, however, the student failed to explain the test result, the school suspended the student from participating in the athletic activity for part of the season.

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) *A Supreme Court decision said that in Oregon, as elsewhere, suspicionless and random drug testing for student-athletes is acceptable especially since student-athletes have a lower expectation of privacy than the general population. Student-athletes already submit to heavy regulation, they use common locker rooms and showers, and the testing procedure used by the school district was minimally intrusive. Thus, there is no violation of the Fourth Amendment. Evidence had shown that the school district had a serious student drug problem, that the drug culture was centered among athletes, and that some student athletes had suffered sports injuries linked to drug use. The Supreme Court opined that students within the school environment have a lesser expectation of privacy than members of the population generally. In sum, the school district's desire to stem drug use outweighed the student-athletes' lower expectation of privacy.*

Todd v. Rush Cnty. Schs. , 133 F.3d 984 (7th Cir. 1998) *The Seventh Circuit Court of Appeals held that Indiana's policy in which all students, not just student-athletes, had to consent to random and suspicionless urine testing was acceptable, even for those who merely wanted a parking permit since obtaining this is a privilege rather than a right. William Todd's parents had refused to sign a consent form and he was barred from videotaping the football team.*

Rush County Schools' drug testing program required all students who wish to participate in extracurricular activities must consent to urine testing for

alcohol, unlawful drug, and cigarettes. In addition, school officials could test any student whom they reasonably suspected of drug, alcohol, or tobacco use. The testing policy sought to promote student health, and their reasoning that "successful *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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extracurricular activities require healthy students" was upheld as consistent with the Fourth and Fourteenth Amendments.

Bd. of Educ. Indep. Sch. Dist. #92 of Pottawatomie v.

Earls, 536 U.S. 822 (2002)

The Supreme Court held that a requirement for a random, suspicionless drug testing for participation among the "Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics" was constitutional since a urine sample was minimally intrusive for anyone, even those involved in non-sports related extracurricular activity. Again, a school's interest in ridding campuses of drugs outweighs an individual's right to privacy.

Joye v. Hunterdon Cent. Reg. Bd. of Educ., 826 A.2d 624 (N.J. 2003)

The New Jersey Supreme Court held that random drug and alcohol testing is acceptable for athletes, non-athletes involved in extracurricular activities, and those who want a school parking permit as well. The court noted that it

was important to maintain order, safety and discipline in public schools. There was evidence that a sizable portion of the population was involved in illegal drug and alcohol abuse, though the school was not in a state of rebellion as in the Vernonia decision.

The trial court had invalidated the entire program.

Testing for Steroids

In 2003, 17-year-old Dallas-area high school pitcher Taylor Hooton hung himself from his bedroom door after using steroids. His death sparked nationwide debate and discussion over the use of steroids in high school and the need for testing.

Some allege that his death was not due to steroids but rather due to the use of antidepressant medication. Students are encouraged to visit the website of the foundation his father started, the Taylor Hooton Foundation, at taylorhooton.org.

Following his death, a few states attempted to test for steroids. In 2005, New Jersey became the first state in the country to mandate steroid testing for high school athletes on teams that qualify for post-season play (playoffs and championships). Thereafter, a few other states followed including Texas (2007) and Illinois (2008). Delaware considered establishing a program but declined to institute one.

Texas initially had a budget of $3 million in 2007 for over 50,000 tests. Texas reduced the funding to only $750,000 in 2010–11 due to economic reasons. In 2007, Florida established a pilot drug testing program for high school football, baseball and wrestling. The program was cut after the first year in which there were only 21 positive tests, two were unresolved and 139 failed for procedure such as unexcused absences.

- ***NCAA Regulation***

Intercollegiate student-athletes must sign a consent form in order to play college sports under the NCAA's policies. The NCAA established its own drug testing program in 1986 and comprehensively tests for both illegal

street drugs and performance-enhancing drugs. The NCAA out-sources drug testing to the National Center for Drug *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Free Sport in Kansas City, Missouri, which conducts approximately 13,000 tests per year. To the NCAA, participation in college sports is a privilege, not a right, and student-athletes must sign a form consenting to be tested for drugs. According to Bylaw 14.1.4., Drug-Testing Consent Form,

14.1.4.1 Content and Purpose*. Each academic year, a student-athlete shall sign a form maintained by the Committee on Competitive Safeguards and Medical Aspects of Sports and approved by the Legislative Council in which the student consents to be tested for the use of drugs prohibited by NCAA legislation. Failure to complete and sign the consent form prior to practice or competition, or before the Monday of the fourth week of classes (whichever occurs first) shall result in the student-athlete's ineligibility for participation (practice and competition) in all intercollegiate athletics.*

In the event a student-athlete tests positive for a drug, Bylaw 18.4.1.5, Ineligibility for Use of Banned Drugs, states:

A student-athlete who, as a result of a drug test administered by the NCAA, is found to have used a substance on the list of banned drug classes, as set forth in Bylaw 31.2.3.4, shall be declared ineligible for further participation in postseason and regular-season competition in accordance with the

ineligibility provisions in Bylaw 18.4.1.5.1. The certifying institution may appeal to the Committee on Student-Athlete Reinstatement for restoration of the student-athlete's eligibility if the institution.

The above NCAA Bylaws are certainly not the only important drug-related provisions, and students are encouraged to explore the NCAA Manual, which can be downloaded for free from the NCAA website in a pdf file.

NCAA Policies

The NCAA has its List of Banned Substances which can be easily accessed from its website at NCAA.org and elsewhere online. From the NCAA's website, and listed in Bylaw 31.2.3.4, Banned Drugs, the following general categories (classes) of drugs are banned, as are any substance chemically related to these classes: ***a.*** *Stimulants*

b. *Anabolic Agents*

c. *Alcohol and Beta Blockers (banned for rifle only)* ***d.*** *Diuretics and Other Masking Agents*

e. *Street Drugs*

f. *Peptide Hormones and Analogues*

g. *Anti-estrogens*

h. *Beta-2 Agonists*

The NCAA also notes drugs and procedures subject to restrictions including:
a. *Blood Doping*

b. *Local Anesthetics (under some conditions)*

c. *Manipulation of Urine Samples*

d. *Beta-2 Agonists permitted only by prescription and inhalation* ***e.*** *Caffeine if concentrations in urine exceed 15 micrograms/ml The NCAA emphasizes that there is no complete list of banned drugs anymore. This is likely due to*

the continuous introduction of new and improved drugs into the marketplace. The NCAA also notes that any substance that is chemically related to the class of banned drugs is also banned, unless otherwise noted.

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In Bylaw 31.2.3.4.2, Positive Drug Test-Non-NCAA Athletics Organization, the NCAA recognizes WADA and states,

A student-athlete under a drug-testing suspension from a national or international sports governing body that has adopted the World Anti-Doping Agency (WADA) code shall not participate in NCAA intercollegiate competition for the duration of the suspension.

This is particularly relevant for Olympic-caliber, elite student-athletes who might also participate at the international level of competition in their respective sport and be subjected to a WADA in or out-of-competition testing schedule.

The following lists more specific examples of classes of banned substances according to the NCAA's website. The NCAA also encourages student-athletes and others to contact the athletic department staff before consuming any medication or supplement at all.

Stimulants:

amphetamine (Adderall); caffeine (guarana); cocaine; ephedrine; fenfluramine (Fen); methamphetamine; methylphenidate (Ritalin); phentermine (Phen); synephrine (bitter orange); etc.

exceptions: phenylephrine and pseudoephedrine ***Anabolic Agents*** *(sometimes listed as a chemical formula, such as 3,6,17-androstenetrione):*

boldenone; clenbuterol; DHEA; nandrolone; stanozolol; testosterone; methasterone; androstenedione; norandrostenedione; methandienone; etiocholanolone; trenbolone; etc.

Alcohol and Beta Blockers *(banned for rifle only): alcohol; atenolol; metoprolol; nadolol; pindolol; propranolol; timolol; etc.*

Diuretics (water pills) and Other Masking Agents*: bumetanide; chlorothiazide; furosemide; hydrochlorothiazide; probenecid; spironolactone (canrenone); triameterene; trichlormethiazide; etc.*

Street Drugs:

heroin; marijuana; tetrahydrocannabinol (THC)—no other substances are classified as NCAA street drugs

Peptide Hormones and Analogues:

growth hormone (hGH); human chorionic gonadotropin (hCG); erythropoietin (EPO); etc.

Anti-Estrogens:

anastrozole; tamoxifen; formestane; 3,17-dioxo-etiochol-1,4,6-triene(ATD), etc.

Beta-2 Agonists:

bambuterol; formoterol; salbutamol; salmeterol; etc.

Hill v. NCAA

In the early 1990s, the NCAA and its drug testing policies faced a formidable challenge in Hill v. NCAA, 865 P.2d 633 (Cal. 1994), though this was more akin to an invasion of privacy case in California than a drug testing issue. Jennifer Hill was joined by other Stanford University students in alleging that the NCAA drug testing *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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policies violated Article I, Section I of the California Constitution. After weighing the pros and cons of the drug testing policy, the California court of appeals held that the drug testing program did further the NCAA's legitimate interest in maintaining the integrity of the athletic program. Also, the court held that a student-athlete's expectation of privacy was diminished and that monitoring of urine promoted its legitimate interest of sound competition. The court reversed the holding of the trial court which had granted Hill and others a temporary victory in state court.

▪ *The Olympic Movement*

No other organization or movement in the world has taken a more proactive stance on preventing the use of performance-enhancing drugs than the International Olympic Committee (IOC). In 1968 the IOC established the first testing of athletes in Grenoble, France's winter Olympic Games. The Olympic Movement sets the standard for both in competition drug testing and out-of-competition testing.

Testing is the responsibility of each country's national Olympic committee ***(NOC)*** *and the national governing body* ***(NGB)*** *for each particular Olympic sport.*

As mentioned earlier in this chapter, the advent of the World Anti-Doping Agency (WADA) and United States Anti-Doping Agency (USADA) continue the war against PEDs each year to deter cheating and to protect the athletes from adverse health effects. All of the Olympic sports federations have adopted this World Anti-Doping Code (WADC). The updated list of prohibited substances is published by October 1 and it comes into effect on January 1 the following year.

As mentioned, the list of Olympic athletes who have been found in violation of the Prohibited List is far too numerous to discuss. Some admitted to intentionally using PEDs, others vehemently denied using them, and still others claim that their food or supplements were spiked or mislabeled. Some of the more prominent figures include, but certainly are not limited to, Greek sprinting superstars Kostas Kenteris and Katerina Thanou who missed a scheduled drug test on the night prior to the Olympic Games in Athens in 2004. Others include U.S. sprinters Kelli White and Jerome Young, Harry "Butch" Reynolds, Michelle Collins, U.S.

swimmers Angel Myers, Jessica Foschi, and Irish swimmer Michelle Smith. Swimmer Jessica Hardy tested positive for Clenbuterol and was dismissed from the USA Olympic team. She sued her supplement company AdvoCare claiming it was the origin of the drug. Hardy, however, had her suspension reduced and was reinstated to be able to qualify for the 2012 London Olympics.

Biological Passport

Given the outrageous, consistent, and borderline comical use of performance-enhancing drugs in cycling, medical profiles of riders, known as the biological passports, were created in 2007. The biological passport is an electronic marker or record for an individual athlete in which results of doping tests are collected over a period of time. Doping violations can be detected by noting variances of an athlete's established levels from

permissible limits, rather than testing for and identifying illegal substances. The main advantage of the passport concept is that ***NOC***

national Olympic committee

NGB

national governing body

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it is based on the stability of physiology. Much of the effort to establish this program came after Floyd Landis tested positive for synthetic testosterone on his way to winning the Tour de France.

▪ *Professional Sports*

All major professional sports in the United States coordinate their own drug testing and use policies, primarily through collective bargaining agreements (CBAs).

The NFL was the first league to adopt a drug testing policy. Historically, the major aim of professional sports and drug testing appeared to be treatment rather than punishment. This policy is much different than the Olympic Movement where punishment and deterring others appears to be the primary concern.

One of the major concerns with drug testing in professional sports is that there is no uniform standard that applies to the NFL, NBA, NHL, and MLB at the moment. Each sport has different testing for a variety of drugs, and punishments and treatment are different in each league. Drug testing issues in professional sports center on contract and consent issues, normally not constitutional issues.

Big Four Policies

Drug policies in the big four sports may have been on the books for years, but have been ineffective in testing for or deterring the use of illegal drugs or PEDs.

For example, steroids had been part of MLB's banned substance list since 1991, but testing for MLB players did not begin until 2003.

Though their policies keep changing, the latest comparison for punishment between the big four leagues is noteworthy. Below are suspensions handed out for a PED such as steroids:

League

First Positive Second Positive Third Positive

Fourth Positive

MLB

50 games

100 games

Lifetime

Minor League

50 games

100 games

Lifetime

Baseball (MiLB)

NFL

4 games

6 games

1 year

NBA

10 games

25 games

1 year

Lifetime

NHL

20 games

60 games

Lifetime

In MLB, a player can seek a reinstatement to the league two years after a lifetime ban and NHL player can also request reinstatement after two years. The NHL

does not test for drugs once the playoffs start.

Juiced

On March 17, 2005, seven current and former MLB players were subpoenaed by a congressional committee to testify about steroids. The list

included Jose Canseco, Mark McGwire, Jason Giambi, Curt Schilling, Sammy Sosa, Rafael Palmeiro, and Frank Thomas, who appeared by video hookup. They were called to testify about steroids in front of the House of Representatives Government Reform Committee *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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hearing on steroids in baseball. At the time, Congress had been considering adopting federal legislation to govern drug testing in the major professional sports. Prior to the hearing, Canseco had penned the book Juiced in which he talked of rampant steroid use in baseball, admitted to using steroids, and named several MLB

players who used steroids including Mark McGwire, who in 1998 used the steroid precursor Andro which was legal at the time. Mark McGwire later admitted that he used steroids on and off for nearly a decade, including during the now-infamous 1998 season when he broke the single-season home run record.

As part of the drama of the Congressional hearings, Rafael Palmeiro jabbed his finger in the air and exclaimed, "I have never used steroids. Period." Unfortunately for Palmeiro, five months later he was suspended 10 days for testing positive for steroids. That was the penalty at that time. Palmeiro still claimed that he did not intentionally or knowingly use steroids. Many were disappointed with the hearing which appeared more like a circus than a legitimate inquiry.

The Mitchell Report

The Mitchell Report, more formally known as The Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball, was the result of former Senator George J.

Mitchell's 20-month investigation into performance-enhancing drug use in Major League Baseball (MLB) including the use of anabolic steroids, HGH and other similar drugs. Mitchell, a former democratic senator from Maine, had been appointed by MLB Commissioner Bud Selig on March 30, 2006 to investigate drugs in MLB.

Released on December 13, 2007, the 409 page Mitchell Report names 89 MLB players who were alleged to have used the illegal substances.

Key to the report was the testimony of Kirk Radomski, a former batboy and employee for the New York Mets. Radomski was actually charged with distribution of a controlled substance and money laundering and faced up to thirty years in prison, though he reached a plea bargain for cooperating with the Mitchell investigation.

The Mitchell Report also accused Brian McNamee of distributing drugs. He was a former personal trainer and strength coach for the New York Yankees, the Toronto Blue Jays and several individuals including MLB pitcher Roger Clemens.

According to the Mitchell Report, McNamee assisted players, including Clemens, in obtaining PEDs. Clemens remained adamant that he did not take steroids, HGH

or any other banned substance. Both McNamee and Clemens appeared in front of the same Congressional committee in 2008 with contradictory and inconsistent stories. Clemens then filed a defamation lawsuit against McNamee in 2008 in Texas which was later dismissed. In turn, McNamee then filed a defamation lawsuit against Clemens in 2009 which was moved from New York state court to federal district court in New York. Meanwhile,

in 2008, Jose Canseco came out with his second book, Vindicated. Clearly, MLB had turned into a comic tragedy with regard to PEDs.

Post-Mitchell Report Fallout

After the Mitchell Report was released Congress applied intense pressure to MLB

and other professional sports leagues to dramatically improve the scope, procedure and penalties of drug testing, threatening possible federal legislation and ***Mitchell Report***

a 2007 report led by former Senator George J. Mitchell Report which names 89

MLB players who were alleged to have used illegal or performance-enhancing substances Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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regulation. MLB in particular stepped up its penalties for PEDs from a 10 day suspension to a 50-game suspension for a first positive drug test.

In August, 2010, pitcher Roger Clemens was indicted by a federal grand jury in Washington, D.C. on charges that he lied to Congress when he said he never used PEDs. The charges included three counts of making false statements, two counts of perjury and one count of obstruction of Congress

during his testimony in a nationally televised hearing in February 2008 before the House Committee on Oversight and Government Reform.

In 2011, Manny Ramirez retired from MLB after testing positive for a banned substance, an infraction that would have carried the 100-game suspension. At the time of his retirement Ramirez was playing for the Tampa Bay Rays. Ramirez, playing for the Los Angeles Dodgers, had already received a 50-game suspension for a positive drug test in May, 2009 which had cost him $7.7 million in lost salary.

Meanwhile a federal jury on April 13, 2011, convicted MLB player Barry Bonds of a single charge of obstruction of justice, having failed to reach a verdict on the three counts that he knowingly used steroids and human growth hormone and lied to a grand jury about it. In 2001, Bonds broke McGwire's single-season home run record of 70 by hitting 73.

Dismayed, many refer to the last few years as the Steroid Era in MLB. Only time will tell how MLB and other professional and amateur sports leagues will continue to work against the use of illegal and PEDs in sports. Most likely, it will involve the assistance of WADA, USADA, FDA, FTC and a host of chemists.

Horse Racing

Sadly, it is not just humans competitors who utilize steroids to increase performance; horse racing also has a history of PED abuse. As of 2007 the use of anabolic steroids in horse racing was legal in every state except Iowa. Laws changed quickly, however, after a 2008 Congressional subcommittee hearing began looking into doping and horse racing, possibly regulating steroid use in horses at the federal level. This was largely the result of an incident in May 2008, after a horse named Big Brown won the Kentucky Derby, narrowly beating Eight Belles. Shortly after Eight Belles crossed the finish line, she collapsed and was euthanized on live television as a result of fractures in her two front ankles. After Big Brown's trainer later admitted that he regularly administered anabolic steroids to Big Brown, the issue of anabolic steroids in horse racing reached national prominence in an ignominious way.

Since 2009, virtually every racing jurisdiction in the United States has banned the use of steroids in horses. The Kentucky Derby gathered attention that same year when it declared that it was going drug-free and began to test for PEDs in horses by gathering blood and urine samples. Times in races are remarkably slower since then.

▪ *Summary*

The purpose of this chapter was to provide the fundamentals of the language and law governing drug use in sports. Perceptions of drug testing and drug use have changed remarkably since the mid-1980s, in part due to the Just Say No anti-drug campaign.

The momentum in the war against drug use continued with the enactment of federal laws in the 1990s and 2000s, particularly over performance-enhancing drugs.

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When the government or a governmental agency is involved in drug testing, the Fourth and Fifth Amendment apply. Constitutional concerns have been tested in the courts with regard to the various drug testing policies in public schools, though it is quite clear that drug testing serves a legitimate purpose. In fact, the legality of drug testing of high school students and professional athletes has been established and affirmed by the Supreme Court. For private employers and other non-governmental organizations,

courts have held that both mandatory and random, suspicionless drug tests are legitimate as well.

While illegal and performance-enhancing drugs continue to be of concern to competitors and administrators, testing has become more accurate. The NCAA, the IOC, and professional sports leagues have different drug testing policies and procedures that can be confusing at times. Numerous athletes have been dismissed from competition due to testing positive for drugs. As the tests become more accurate and prevalent, athletes will continue to be deterred from using drugs, though some will continue to attempt to outsmart the test. It is important for students to be well versed in the specific terminology and relevant rules with regard to drugs, supplements and other substances.

- ***Key Terms***

anabolic *a substance or drug that is builds muscle* ***Anabolic Steroid Control Act of 1990*** *added possession or use of anabolic steroids as a felony, criminalizing their non-medical use and placing anabolic steroids in the same classification as cocaine and heroin*

Anabolic Steroid Control Act of 2004 *added prohormones (steroid precursors) to the list of controlled substances from the Anabolic Steroid Control Act of 1990*

including Androstenedione (Andro) and Tetrahydrogestrinone (THG) ***Bill of Rights*** *first 10 amendments to the Constitution* ***Buckley Amendment*** *also known as the Family Educational Rights and Privacy Act of 1974 (FERPA), which protects student academic records* ***controlled substances*** *drugs that the government has declared to be illegal to possess or use without a prescription*

Controlled Substances Act *enacted in 1970, provides that the manufacture, importation, possession and distribution of certain drugs are regulated by the federal government, and established five schedules (classifications) of drugs* ***Dietary Supplement Health and Education Act of 1994*** *federal law which requires a special disclaimer statement posted by manufacturers on their supplements, and also places burden of proof on federal government to*

prove unsafe product ***diuretic*** *a substance or drug that is used to reduce water in the human body through urination*

doping *international word for the use of performance-enhancing drugs* ***due process*** *right to a hearing before a person's life, liberty, or property is taken away* ***equal protection*** *clause in the Fourteenth Amendment that states that the government must treat a person or class of persons the same in similar circumstances*

erythropoietin (EPO) *performance-enhancing hormone affecting red blood cells* *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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exogenous *a substance that is not naturally found in or produced by the human body*

Fifth Amendment *the requirement for a "due process" hearing before a person's life, liberty, or property is taken away; this amendment to the United States Constitution also provides the right against self-incrimination* ***Fourteenth Amendment*** *prohibition against states abridging the rights guaranteed under the United States Constitution*

Fourth Amendment *amendment to the United States Constitution prohibiting the government from conducting a search of a person's body or home without the individual's consent, a warrant, or a contract; referred to as the "search and seizure" warrant*

Gene doping *the practice of using genetic engineering to artificially enhance athletic performance*

Human Growth Hormone (HGH) *hormone that affects all body systems and plays a major role in muscle growth and development*

Intercollegiate *college and university environment* ***Interscholastic*** *high school environment*

masking agent *a drug or substance used in order to hide the existence of a PED in a blood or urine sample*

Mitchell Report *a 2007 report led by former Senator George J. Mitchell Report which names 89 MLB players who were alleged to have used illegal or performance-enhancing substances*

Olympic Movement *the overall environment associated with the Olympic Games* ***performance-enhancing drugs (PEDs)*** *drug or substance ingested, injected, or inhaled by an athlete to increase muscle growth, repair, or development or any substance used to decrease the effects of fatigue*

Professional sports

prohibited list *also known as just the List, it provides a comprehensive list, summary and categorization of drugs, substances and methods which are banned by WADA*

quasi-state action *Characterization of a private sports organization such as a statewide high school athletic association which technically is not a branch of state government but oversees and administers rules and regulations involving state actors such as public high schools calling in to question whether constitutional protections should apply to member schools and individual participants* ***Ryan Haight Online Pharmacy Consumer Protection Act*** *federal regulation of online pharmacies*

- ***Acronyms***

BALCO *Bay Area Laboratory Cooperative*

CAS *Court of Arbitration for Sport*

CBA *collective bargaining agreements*

CERA *continuous erythropoietin receptor activator* *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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CFL *Canadian Football League*

CSA *Controlled Substances Act*

DEA *United States Drug Enforcement Administration* ***DOE*** *Department of Education*

DSHEA *Dietary Supplement Health and Education Act of 1994*

EPO *erythropoietin*

ERISA *Employee Retirement Income Security Act* ***FDA*** *Food and Drug Administration*

FD&C *Federal Food, Drug, and Cosmetic Act* ***FERPA*** *Family Educational Rights and Privacy Act of 1974*

FTC *Federal Trade Commission*

HGH *Human Growth Hormone*

HIPAA *Health Insurance Portability and Accountability Act* ***IOC*** *International Olympic Committee*

NGB *national governing body*

NOC *national Olympic committee*

OOC *out–of competition*

PEDs *performance enhancing drugs*

PHI *Student–Athlete Authorization/Consent for Disclosure of Protected Health Information*

THG *Tetrahydrogestrinone*

TUEs *therapeutic use exemptions*

USADA *United States Anti–Doping Agency*

USOC *United States Olympic Committee*

WADA *World Anti–Doping Agency*

WADC *World Anti–Doping Code*

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▪ *Discussion and Review Questions*

1. *Why might athletes continue to use performance-enhancing drugs even though it can affect their eligibility to participate in a sport?*

2. *Is testing for drugs via urine or blood a violation of constitutional rights? What constitutional amendments are primarily involved?*

3. *Is participation in high school or college sports a privilege or a right or both?*

4. *Describe privacy rights involving FERPA and HIPAA in sports.*

5. *Discuss the company BALCO and its influence on drug testing in sports.*

6. *Should the use of performance-enhancing drugs be legalized?*

7. *What is a designer steroid?*

8. *How has WADA affected drug testing at the international level?*

9. *Do you think that the public scrutiny now available by the Internet may have affected the rapid moves by the federal government to push regulation of PEDs subsequent to the 1998 baseball homerun race between McGwire and Sosa?*

10. *Why do you think horse racing accepted the use of anabolic steroids for so many years?*

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CHAPTER EIGHT

International Sports

Issues

After reading this chapter you will be able to:

1. Describe the modern Olympic Movement.

2. Explain the structure of the International Olympic Committee and its relationship to the various international sports federations and national governing bodies.

3. Note when the United States first allowed professional athletes to participate in the Olympic Games.

4. Discuss the purpose of the Olympic Charter and outline the themes found in the Fundamental Principles of Olympism.

5. Discuss the political landscape of the Olympics including infamous examples of improprieties throughout the modern Olympics.

6. Compare and contrast the Amateur Sports Act of 1978 and the Ted Stevens Olympic and Amateur Sports Act of 1998.

7. Explain how competitive it is to bid for the broadcast rights for the Olympic Games themselves.

8. Discuss the role of the Court of Arbitration for Sport in resolving disputes.

9. Summarize some of the more prominent legal cases involving the United States Olympic Committee.

10. Discuss other international sports law issues such as immigration and citizenship.

▪ *Introduction*

International sports and the law revolve primarily around the Olympic Games, more formally known as the ***Olympic Movement****. The international Olympic rules, policies, and procedures have faced sometimes controversial national and international legal challenges, including boycotts and suspension during the World Wars.*

Olympic athletes compete for international fame, fortune, personal pride and the financial incentives of winning a medal. The summer and winter Olympic Games often produce modern heroes.

The money involved in the Olympic Games themselves has skyrocketed, particularly with the competition for the right to broadcast the event. In 2011, for example, Comcast Corporation (NBC television) bought the rights to broadcast all the Olympics through 2020 for $4.38 billion. Professional athletes are now commonplace ***Olympic Movement***

term used to describe the underlying goals and themes of the Olympics (Olympic Games) and the International Olympic Committee (IOC) ***315***

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Chapter Eight

during the Olympics as well, though at one time the Olympics were for amateurs only.

At the 1992 Barcelona Olympics, the United States sent the Dream Team, which was composed of superstar NBA players including Larry Bird, "Magic" Johnson, and Michael Jordan, as a result of the decision by the international federation for basketball (FIBA) to allow professionals to play in the Olympics. The USA's team easily won gold and, as a result, the landscape of the Olympics changed in a most significant way.

For the first time, professionals were welcomed with open arms by the Olympics, as long as their respective international federations authorized professionals to play within their sport. In 1998 NHL players began competing as well, much to the excite-ment of professional hockey players and fans. Today, the USOC and national governing bodies actually award cash prizes to U.S. athletes based on their performance at the Olympics, something other countries have done for decades.

This chapter focuses on the Olympic Movement's evolution and its impact on international law related to sport primarily from a U.S. perspective. After reading this chapter, students should master the relationship between the various organizations (and know their acronyms) including the ***International Olympic Committee*** *(**IOC**), United States Olympic Committee (**USOC**), World Anti-Doping Agency (**WADA**), United States Anti-Doping Association (**USADA**), **International Federations** (**IF**) and the **Court for Arbitration for Sport** (**CAS**). It also is important to understand that the Olympic Games are heavily influenced by political forces that have, on occasion, put the competitors at the mercy of misdeeds by judges and in some cases acts of terrorism.*

▪ *The Olympic Movement*

The modern Olympic Games began in 1896 in Athens, Greece. Originally held in ancient Greece, they were founded by a French nobleman, Pierre Frédy, Baron de Coubertin in 1894. At first, the modern Olympics were for men only. At that time, athletes were expected to compete in the Olympic Games as amateurs much like the NCAA's commitment to amateurism today. In fact, U.S. Olympic pentathlon and decathlon champion Jim Thorpe was

disqualified in 1912 when it was discovered that he played semi-professional baseball prior to winning his medals, though the IOC restored his medals after further review in 1983.

The phrase Olympic Movement includes everything involved in the Olympics, including national sport governing bodies, athletes, media and sponsors of the Olympic Games. The official Olympic Motto is Citius, Altius, Fortius, a Latin phrase ***International Olympic Committee (IOC)***

Organization responsible for managing the Olympic

Movement

IOC

International Olympic Committee

USOC

United States Olympic Committee

WADA

World Anti–Doping Agency

USADA

United States Anti–Doping Agency

International Federation (IF)

sport-specific regulatory body that sets international rules under the jurisdiction of the IOC

IF

International Federation

Court of Arbitration for Sport (CAS)

body that addresses complaints and appeals of athletes, coaches, and federations under the jurisdiction of the Olympic Movement ***CAS***

Court of Arbitration for Sport

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International Sports Issues

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meaning Swifter, Higher, Stronger. Through 1992, both the winter and summer Olympics were held during the same year. Things changed in 1994 when the winter Olympics were held that year while the summer Olympics were held in 1996.

Today, the Olympic Games alternate in even numbered years. In recognition of its roots back to ancient Greece, the Greek Olympic team always enters the arena first at the opening ceremonies. The official languages of the Olympic Games are English and French, the latter in recognition of the modern Olympics' founder.

The Olympics are indeed a celebration of athletics skill and national pride.

Today, after more than a century in existence, the Olympics are no longer just for amateurs. In fact, professional athletes participate in the Olympic Movement today in almost every sport.

▪ ***Olympic Structural Hierarchy***

One must understand the relationship between each level of the Olympic Movement in order to appreciate how its international hierarchy functions. It all starts with the IOC's headquarters in Lausanne, Switzerland. Then, all the international sport federations (IFs) work in conjunction with the IOC to establish eligibility and competition rules for each individual sport. Each country, then, has its own ***National Olympic Committee*** *(****NOC****) which is responsible for organizing and assembling its own team to compete in the Olympics in compliance with IOC rules and the standards established by the IFs. Then each* ***National Governing Body*** *(****NGB****) is responsible for, among other things, selecting a team in a particular sport.*

The Olympic hierarchy can be illustrated as follows: IOC

IF

International (Sport) Federations (e.g., IAAF for track & field) NOC

National Olympic Committees (e.g., United States Olympic Committee) NGB

National Governing Bodies (e.g., USA Track & Field) There are currently 35 sports officially recognized by the IOC. In order to make this list, a sport must be administered by an IF which ensures that the sport's activities follow the Olympic Charter. If it is widely practiced around the world and meets a number of criteria established by the IOC, it may then be added to the Olympic program on the recommendation of the IOC's Olympic Programme Commission. In 2011, the IOC approved women's ski jumping to appear for the 2014 Sochi Games.

IOC

The International Olympic Committee (IOC) controls the Olympics, the largest international sports event, though some might argue that FIFA's World Cup (soccer) is a close ***National Olympic Committee (NOC)***

designated national organization responsible for managing the affairs of a particular country's Olympic teams, such as the USOC

NOC

National Olympic Committee

National Governing Body (NGB)

sport-specific regulatory body for a particular country, such as United States Swimming

NGB

National Governing Body

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rival. The IOC has evolved over time changing especially due to the tremendous influx of money and exposure directly related to the rights to television broadcasts, the advent of cable television, and now the sale of all other media broadcast rights. The current President of the IOC is Jacques Rogge (Belgium) who has been serving in that capacity since 2001.

*The IOC cannot force its rules on national governments, but countries that wish to participate in the Olympics must agree to its procedures in order to promote fair play and jurisprudence when resolving disputes. The IOC normally chooses the site of future games at least six years in advance and then works with the host country's NOC which forms an Organizing Committee of the Olympic Games (**OCOG**).*

Being the supreme authority of the Olympic Movement, the IOC is the final authority on all questions concerning the Olympic Games and the Olympic Movement, including matters of discipline affecting NOCs and coaches. Of course, this also includes decisions regarding the suspension, expulsion, or disqualification of all athletes. The IOC has relatively recently emphasized that disputes involving its own rules must be submitted to binding arbitration under the Court of Arbitration for Sport (CAS). This is in response, in part, to numerous legal challenges among various United States state and federal courts in which individual and collective American plaintiffs have sued the IOC for its rules, policies and adverse decisions.

The IOC has only had a relatively few leaders considering the length of its history. The eight Presidents of the IOC are:

2001–2013

Count Jacques Rogge (Belgium)

1980–2001

Juan Antonio Samaranch (Spain)

1972–1980

Michael Morris (Ireland)

1952–1972

Avery Brundage (United States)

1946–1952

J. Sigfrid Edström (Sweden)

1925–1942

Henri de Baillet-Latour (Belgium)

1896–1925

Pierre Frédy, Baron de Coubertin (France)

1894–1896

Dimitrios Vikelas (Greece)

Olympic Charter

*The **Olympic Charter** is the founding document of the Olympic and sums up the philosophy, aims, traditions and realities of the Olympic Movement. This includes all aspects of the Olympic Movement from the role of the International Federations, the National Olympic Committees, WADA, the Olympic flag, motto, flame, and so on.*

The Charter is committed to lofty and philosophical goals. The Charter has five Chapters and 59 articles. According to the Introduction to the latest version of the Olympic Charter in force from February 11, 2010, the IOC's Olympic Charter has three main purposes:

*a) The Olympic Charter, as a basic instrument of a constitutional nature, sets forth and recalls the Fundamental Principles and essential values of **Olympism**.*

OCOG

Organizing Committee of the Olympic Games

Olympic Charter

fundamental document of the Olympic Movement that establishes guidelines, rules and policies for the Olympic Games

Olympism

the philosophical goal of the Olympic Movement in general, which is to promote an individual's sound mind and body, and to promote harmony in society through the use of international sport *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in*

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b) The Olympic Charter also serves as statutes for the International Olympic Committee.

c) In addition, the Olympic Charter defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement, namely the International Olympic Committee, the International Federations and the National Olympic Committees, as well as the Organising Committees for the Olympic Games, all of which are required to comply with the Olympic Charter.

It also establishes its Fundamental Principles of Olympism in its Preamble :
Fundamental Principles of Olympism

1. Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example and respect for universal fundamental ethical principles.

2. The goal of Olympism is to place sport at the service of the harmonious development of man, with a view to promoting a peaceful society concerned with the preservation of human dignity.

3. The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all

individuals and entities who are inspired by the values of Olympism. It covers the five continents. It reaches its peak with the bringing together of the world's athletes at the great sports festival, the Olympic Games. Its symbol is five interlaced rings.

4. The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organisation, administration and management of sport must be controlled by independent sports organisations.

5. Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.

6. Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.

Also of note, the IOC opposes "any political or commercial abuse of sport and athletes." IOC Charter, Chapter 5, Article 51, Advertising, Demonstrations, Propaganda, 3, states that: "No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas." The IOC maintains a strict policy against the use of its Games to advocate a political policy or position.

International (Sport) Federations

Each sport in the Olympic Movement is governed by an International Federation (IF). The IOC relies heavily on the IFs to govern individual sports, and on the NOCs and governments to enforce its rules and regulations. The IOC delegates to individual IFs the technical control of all aspects of the sport they supervise, as well as authority for suspending or disciplining individual athletes who violate the IF rules or codes of conduct in accordance with the Olympic Charter.

Associations

There are many summer and winter sport federations most of which (but not all) participate in the Olympic Games. The summer federations, the winter federations Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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*and the other recognized federations have formed associations: the Association of Summer Olympic International Federations (**ASOIF**), the Association of International Olympic Winter Sports Federations (**AIOWF**), and the Association of IOC Recognized International Sports Federations (**ARISF**). ARISF has 32 non-Olympic sports such as Chess, Orienteering, and Sumo, and the SportAccord, which includes other sports federations, and whose mission is "to unite, support and promote its Member international sports federations and organisations for the co-ordination and protection of their common aims and interests, communication and co-operation, while at the same time conserving and respecting their autonomy."*

*Examples of the summer and winter sport IFs recognized by the IOC include: **ASOIF***

***Association football:** Fédération Internationale de Football Association (FIFA) [Soccer]*

Aquatics (swimming, diving, synchronized swimming, water polo and open water swimming):** Fédération Internationale de Natation (FINA) **Archery:

International Archery Federation (FITA) ***Athletics (covering track and field, road running, cross country running and race-walking):*** *International Association of Athletics Federations (IAAF)* ***Badminton:*** *Badminton World Federation (BWF)*

Basketball: *Fédération Internationale de Basketball (FIBA)* ***Boxing (amateur):*** *International Boxing Association (AIBA)* ***Canoeing:*** *International Canoe Federation (ICF)* ***Cycling:*** *Union Cycliste Internationale (UCI/ICU)* ***Equestrianism:*** *Fédération Équestre Internationale (FEI)* ***Fencing:*** *Fédération Internationale d'Escrime (FIE)* ***Gymnastics, (including rhythmic gymnastics, sports acrobatics, sports aerobics, trampolining and tumbling):*** *Fédération Internationale de Gymnastique (FIG/IFG)* ***Handball (team):*** *International Handball Federation (IHF)* ***Hockey (field):*** *International Hockey Federation (FIH)* ***Judo:*** *International Judo Federation (IJF)*

Modern pentathlon: *Union Internationale de Pentathlon Moderne (UIPM)* ***Rowing:*** *Fédération Internationale des Sociétés d'Aviron (FISA)* ***Sailing:*** *International Sailing Federation (ISAF)* ***Shooting:*** *International Shooting Sport Federation (ISSF)* ***Table tennis:*** *International Table Tennis Federation (ITTF)* ***ASOIF***

Association of Summer Olympic International Federations ***AIOWF***

Association of International Olympic Winter Sports Federations ***ARISF***

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Taekwondo: *World Taekwondo Federation (WTF)*

Tennis: *International Tennis Federation (ITF)* ***Triathlon:*** *International Triathlon Union (ITU)* ***Volleyball and Beach volleyball:*** *Fédération Internationale de Volleyball (FIVB)* ***Weightlifting:*** *International Weightlifting Federation (IWF)* ***Wrestling:*** *Fédération Internationale des Luttes Associées (FILA)* ***AIOWF***

Biathlon: *International Biathlon Union (IBU)*

Bobsleigh and skeleton: *Fédération Internationale de Bobsleigh et de Tobogganing (FIBT)*

Curling: *World Curling Federation (WCF)*

Hockey (ice): *International Ice Hockey Federation (IIHF)* ***Ice skating (including figure skating, speed skating, and Short-track speed skating):*** *International Skating Union (ISU)*

Luge: *Fédération Internationale de Luge de Course (FIL)* ***Skiing (including Alpine, Nordic combined, cross country, freestyle, ski jumping and snowboarding):*** *Fédération Internationale de Ski (FIS)* ***USOC***

The United States Olympic Committee (USOC) is the National Olympic Committee (NOC) for the United States. It is based in Colorado Springs, Colorado. It was federally chartered by Congress on September 21, 1950, but is indeed a private organization. The USOC's Chief Executive Officer as of 2010 is Scott Blackmun.

The USOC has exclusive jurisdiction over U.S. participation in the Olympics, Paralympic Games, and Pan American Games. USOC also has exclusive use of the word Olympic under U.S. law for commercial (money-making) purposes. Use of the word Olympic without permission is considered trademark infringement, a topic discussed in much greater detail in Chapter 10: Intellectual Property.

The USOC oversees organizations responsible for the administration of individual and team sports. Each of these organizations is called a national governing body (NGB) and authority for their creation is found in the Amateur Sports Act of 1978, which was amended by the Ted Stevens Olympic and Amateur Sports Act of 1998. The authority of the NGBs includes recommending individual athletes to the USOC for participation in the Olympic or Pan American Games, as well as establishing internal procedures for determining eligibility standards.

The USOC has been held not to be a state actor, even though it is federally chartered.

Vicious legal battles have been waged against the USOC and specific NGBs for the failure to select an individual or send an entire team to the Olympics. However, with the addition of the binding arbitration capabilities of CAS, U.S. courts have virtually removed themselves from the jurisdiction of team selection, Olympic competition, and eligibility disputes altogether.

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Chapter Eight

Amateur Sports Act of 1978

*Congress expanded the powers of the USOC by enacting the Amateur Sports Act of 1978 (formerly 36 U.S.C. § 380, now 36 U.S.C. § 220506), which included sections dealing with grievance procedures for individual athletes wishing to contest suspensions. The Amateur Sports Act of 1978 (**ASA**) gave*

*Olympic athletes rights for the first time. Prior to the adoption of the ASA in 1978, the Amateur Athletic Union (**AAU**) represented the United States on international competition matters and regulated amateur sports generally. The AAU was often considered unkind to athletes and relentless in its maintenance and control over amateurism and American competitors. The AAU had adopted rules which prohibited women from participating in certain international running events and even banned any American competitor who had raced in the same event as another runner sponsored by a shoe-company.*

Ted Stevens Olympic and Amateur Sports Act of 1998

*On October 21, 1998, President Bill Clinton signed into law some modifications of the 1978 Act and renamed it the Ted Stevens Olympic and Amateur Sports Act (**TSOASA**) in honor of Ted Stevens, a United States Senator from Alaska. The TSOASA expanded the USOC's role significantly including adding supervision over the Paralympics, preventing injunctions against the USOC 21 days prior to the relevant Games, and requiring the USOC to hire an athlete ombudsman to provide free independent advice to athletes about the Act and USOC bylaws in circumstances like opportunity-to-compete disputes.*

Today, as amended by the TSAOSA, the USOC has the exclusive right to use: (1) the name "United States Olympic Committee";

(2) the symbol of the International Olympic Committee, consisting of 5 interlocking rings, the symbol of the International Paralympic Committee, consisting of 3 TaiGeuks, or the symbol of the Pan-American Sports Organization, consisting of a torch surrounded by concentric rings;

(3) the emblem of the corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief; and

(4) the words "Olympic", "Olympiad", "Citius Altius Fortius", "Paralympic", "Para-lympiad", "Pan-American", "America Espirito Sport Fraternite", or any combination of those words.

Competition to Host the Olympic Games

Nations fiercely compete for the ability to hold the Olympic Games within their borders to enhance their economic and social well-being. Corruption within the ***Amateur Sports Act of 1978***

American amateur sports act that established guidelines for athletes and the United States Olympic Committee

ASA

Amateur Sports Act of 1978

AAU

Amateur Athletic Union

Ted Stevens Olympic and Amateur Sports Act (TSOASA) of 1998

Amendments to the Amateur

Sports Act of 1978 giving amateur athletes more specific competition rights and recognizing the role and needs of athletes with disabilities

TSOASA

Ted Stevens Olympic and Amateur Sports Act of 1998

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Olympic Movement itself has forced IOC to re-evaluate the way it conducts business, particularly after the Salt Lake City bribery scandal involving selection of the city for the 2002 Games.

▪ Politics and Controversies

While the Olympic Games are supposed to unite the world through sport, international politics and wars have interfered with the Olympics. For example, World War I caused the 1916 Games to be cancelled, and World War II suspended the Games of 1940 and 1944. The following is a brief, historical summary of some of the notable socio-political and legal controversies or comparable milestones that have affected or influenced the Olympic Games.

1936 (Berlin)

At the 1936 Berlin Olympics, Jesse Owens was one of 18 African-American athletes who competed. The 22-year-old achieved four gold medals and set three Olympic records. On the first day of games, two Germans won gold medals. Hitler congratulated them in his box in front of the 110,000 people in the stadium. By the time Jesse's teammate, African-American high jumper Cornelius Johnson, won the gold medal that night, Hitler had left the stadium and did not congratulate him.

Owens' four track and field victories were an achievement unequaled until 1984

when Carl Lewis did the same at the 1984 Los Angeles Summer Olympics.

1968 (Mexico City)

Civil rights statements were made by Americans Tommie Smith (gold) and John Carlos (bronze) during the playing of the Star-Spangled Banner. Both raised their clenched fists with black gloves and bowed their heads on the podium in what has become known as the Black Power salute. IOC

President Avery Brundage immediately suspended Smith and Carlos from the team and banned them from the Olympic Village.

1972 (Munich)

Vince Matthews and Wayne Collett were suspended from running in the 1,600

meter relay team by the IOC for failing to stand at attention and not facing the flag during the playing of the Star-Spangled Banner following their one-two finish of the 400 meter race. The IOC called it a "disgusting display."

These Games were also marred by tragedy unforeseen in Olympic history when eleven members of the Israeli Olympic team were taken hostage by Palesti-nian terrorists. A failed liberation attempt led to the deaths of all of the abducted athletes along with five of the terrorists and a policeman. This event is known today as the Munich Massacre. The 2005 movie Munich is based upon this incident.

1976 (Montreal)

The 1976 Montreal Olympic Games were marred by the Canadian government's refusal to allow Taiwan's team to carry its flag or have its national anthem played at the games. Several African nations demanded that New Zealand be prevented from competing because one of its rugby teams had played in South Africa, which, at the *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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time, was a segregationist nation. Thirty-one nations boycotted and withdrew their teams from competition as a result of New Zealand's refusal to withdraw.

1980 (Moscow/Lake Placid)

The United States and 64 other Western nations including Japan and West Germany boycotted the 1980 Moscow Olympics to protest the Soviet Union's invasion of Afghanistan. President Carter asked the IOC to move the location or delay the games, to no avail. A few weeks later the USOC voted to support the boycott, the first and only time in U.S. history. President Carter had threatened to withhold funding and revoke the organization's tax exemption if the USOC did not comply with his request. The Winter Olympics, held later that same year in Lake Placid, New York, did, however, allow the Soviets to compete.

A lawsuit by a group of 25 U.S. athletes led by Anita DeFrantz (a member of the rowing team) attempted to get a U.S. court to issue an injunction against President Carter in DeFrantz v. United States Olympic Comm., 492 F. Supp. 1181 (D.D.C. 1980), aff'd 701 F.2d 221 (D.C. Cir. 1980). The plaintiffs alleged that the USOC violated the Amateur Sports Act of 1978 by not sending a team, but the district court disagreed. As a result, it did not issue an injunction though the court expressed its deepest sympathies to the athletes who suffered from the decision made by President Carter. DeFrantz eventually became a member of the IOC in 1986. The 466

U.S. athletes on that team were offered Congressional Gold Medals in 2007.

1984 (Los Angeles)

The Soviet Union and 15 other nations withdrew from the 1984 Games in Los Angeles in response to the boycott of the Moscow Games. However, the reason given was due to concerns over the safety of their athletes. Cuba refused to send a team as well.

1988 (Seoul)

Bribery in boxing led to infamous victories by South Korean Park Si-Hun over American Roy Jones, Jr. Meanwhile, American Michael Carbajal lost the gold medal to a Bulgarian in another controversial match. The boxing scoring system completely changed after these Olympics due to the unbridled bribery. During these Games, Canadian Ben Johnson tested positive for stanozolol after breaking the world record in the 100 meter sprint and subsequently had his gold medal revoked.

1992 (Barcelona)

The 1992 Olympics in Barcelona, Spain, included the Unified Team (with athletes from 12 former Soviet republics), a reunited Germany, and South Africa appearing for the first time since 1960.

1996 (Atlanta)

A bomb exploded in Centennial Park killing two and injuring more than 100.

American Richard Jewell was originally blamed for incident by the FBI, but was exonerated when another American, Eric Rudolph, was found to be the perpetrator.

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2000 (Sydney)

North and South Korea entered the games under one flag, although they competed as separate countries. The Paralympic Games gold-medal Spanish basketball team was stripped of its medal after it was discovered later that 10 of the 12 players indeed had no intellectual disabilities. This prompted the IOC to remove intellectual disabilities as a means of participation in the Paralympic Games entirely.

*The IOC fought vehemently against the use of illegal drugs in its Olympic Games. The International Weightlifting Federation (**IWF**) banned Bulgaria's entire weightlifting team from the Games, but the CAS ruled the IWF lacked a legal basis to ban the whole team and lifted the ban, allowing one Bulgarian weightlifter to win a silver medal.*

2002 (Salt Lake City)

*Olympic officials were bribed to secure votes for these Games to be held in Salt Lake City, Utah. Tom Welch, president of the Salt Lake City Olympic Committee (**SLOC**), and Dave Johnson, vice-president of the SLOC, faced 15 charges of fraud, conspiracy, racketeering, and corruption over what many regard as one of the biggest scandals in Olympic history. The United States Department of Justice charged the two men with attempting to bribe members of the IOC in order to win their votes for Salt Lake City to stage the Games. The scandal led to the eventual resignation and expulsion of 10 members of the IOC. In 2001, U.S. District Court Judge David Sam threw out the racketeering charges and eventually tossed out the other fraud and conspiracy charges.*

*Meanwhile, bribery was also uncovered among skating judges during the Games (from Russia and France). Russians Elena Berezhnaya and Anton Sikhar-ulidze won the skating pairs gold medal by one vote over Canadians Jamie Sale and David Pelletier in a highly controversial decision which is sometimes referred to as Skategate. Later, the Canadian duo received a share of first place (and gold medals) after the an investigation was conduct by the International Skating Union (**ISU**). In June, 2002, Alimzhan Tokhtakhounov, an alleged Russian international mob figure, was arrested in Italy on U.S. federal charges that he fixed two of the four events in the Salt Lake City's figure skating events.*

The ISU changed its scoring system after Salt Lake City to prevent fixing and provide less subjectivity.

2004 (Athens)

*American Paul Hamm took gold medal in the individual all-around gymnastics competition, becoming the only American man in Olympic history to win the gold medal in that event. Then, Hamm's gold was called into doubt due to a scoring issue. The International Gymnastics Federation (**FIG**) ruled that South Korean bronze medalist Yang Tae-Young was unfairly docked a tenth of a point in the all-around final. The 0.100 point deducted from Yang Tae-young's start value in **IWF***

International Weightlifting Federation

SLOC

Salt Lake City Olympic Committee

ISU

International Skating Union

FIG

International Gymnastics Federation

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parallel bars (determined by the difficulty of the routine) was the difference between third and first place.

FIG suspended three judges but said the results would not be changed. However, FIG sent a letter to Hamm in care of the USOC asking that he return the medal, that it would demonstrate the ideal of "fair play." The USOC pointed out that while there was an error in calculating Yang Tae-Young's "start value," there was also an error in failing to deduct for a mistake in his performance as well.

CAS determined that Hamm should keep gold, and the verdict was final and could not be appealed.

2010 (Vancouver)

In 2010, Nodar Kumaritashvili, a Georgian luger, died just hours before the opening ceremony when, during a training run, he was ejected from his luge and hit an immoveable support beam. His tragic death was played on television and appeared on the Internet. Training runs resumed the next day after padding was added to cover the metal beams.

The governing body for luge (FIL) attributed the accident to "driving errors starting in curve 15/16 …" Kumaritashvili's family received money from FIL and other sources including an insurance settlement from a policy Vancouver officials obtained for the Games. He was the fourth athlete to ever die during the Winter Olympics preparations. The other three were British luger Kazimierz Kay-Skrzypeski, and Australian skier Ross Milne both during the 1964 Innsbruck, Austria Games, and Swiss speed skier Nicola Bochatay in Albertville, France in 01992.

U.S. Legal Challenges

Several prominent American athletes have challenged the Olympic system of team selection, eligibility and participation in U.S. courts. These athletes include Anita DeFrantz, Harry "Butch" Reynolds, Tonya Harding, Matt Lindland, and several others.

Earlier in this text we reviewed a timeline women's participation in the Olympic movement. Recall, it was not until the 1972 Munich Olympic Games that women were allowed to compete in the 1,500 and 3,000 meter track races. Certainly it appears that legal challenges by American athletes, though unsuccessful, may have generated the interest, exposure and momentum to change IOC rules, policies and specific events at the international level.

Martin

In Martin v. International Olympic Comm., 740 F.2d 670 (9th Cir. 1984), numerous women runners (both American and non-American) and runners' organizations filed suit in California state court (later removed to federal court) against various Olympic organizations, directors, and officials of those entities. They sought to force the organizers of the 1984 Los Angles Summer Olympic Games to include 5,000 meter and 10,000 meter track events for women, claiming gender-based discrimination in violation of equal protection under the Fifth and Fourteenth amendments and California's Unruh Civil Rights Act. The United States District Court for the Central District of California denied a request for a preliminary mandatory injunction to require the organizers to include the events. The Court of *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Appeals upheld the trial district court's determination and found it persuasive

"that a court should be wary of applying a state statute to alter the content of the Olympic Games." Id. at 677.

[W]e find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement- the Olympic Charter. We are extremely hesitant to undertake the application of one state's statute to alter an event that is staged with competitors from the entire world under the terms of that agreement. Martin v. International Olympic Comm., 740 F.2d 670, 677 (9th Cir. 1984)

At the 2012 London Olympics, for the first time, all 26 summer Olympic sports will have male and female competitors.

Reynolds

Harry "Butch" Reynolds was an American sprinter and world record holder.

Reynolds ran in a meet in Monte Carlo on August 12, 1990, and was randomly tested for drugs by the IAAF. He was positive for the illegal steroid nandrolone and the IAAF immediately suspended him for two years, which resulted in him being automatically disqualified him from the 1992 Olympics in Barcelona. Reynolds contested the suspension and brought a lawsuit against ***TAC*** *("The Athletic Congress," the former name for the governing body of Track and Field in the United States) in the U.S. District Court for the Southern District of Ohio. The court dismissed Reynolds's due process claim under the Fifth Amendment finding that TAC and the USOC were not state actors. Reynolds made the U.S. Olympic team as an alternate for the 400-meter relay, but the IAAF refused to let him compete in the 1992 Olympics and forced TAC to remove him from the U.S. Olympic team roster.*

On August 10, 1992, the day before Reynolds's two-year ban by the IAAF

was to expire, the IAAF extended the suspension until January 1, 1993 as a form of punishment for his participation in the U.S. Olympic Trials. Reynolds then filed a supplemental complaint in the Southern District of Ohio, and on December 3, 1992, the court awarded Reynolds $27.4 million in damages finding the IAAF acted out of revenge and ill will toward

Reynolds. When Reynolds and his attorneys attempted to collect the judgment, an appeal to the Sixth Circuit Court of Appeals was made by the IAAF. This court reversed the judgment, citing lack of personal jurisdiction. The case ended swiftly thereafter, but the war had been waged. Reynolds v. IAAF, 23 F.3d 1110 (6th Cir.

1994).

Court of Arbitration for Sport

Inconsistencies and sheer craziness with regard to jurisdiction over the Olympics has led to the formation of the Court of Arbitration of Sport (CAS). CAS was founded by the International Olympic Committee in 1983 and has set up ad-hoc branches at every Olympics since the 1996 Atlanta Summer Games. Common challenges and appeals are related to drug-testing (doping), subjective judging issues ***TAC***

The Athletic Congress

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(such as in the Paul Hamm debacle), citizenship, eligibility and so on. Like the Olympics, the official languages of CAS are English and French. Many of its decisions are published on its website.

*CAS became more independent in 1994 when it came under the jurisdiction of the International Council of Arbitration for Sport (**ICAS**) instead of IOC, in order to avoid the appearance of impropriety and conflicts of interest. Decisions made by CAS are final, not appealable outside its jurisdiction, and agreed to by contract as a prerequisite for competition in the Olympic Movement. CAS also resolves sport disputes not related to Olympic Games by many other international sport organizations.*

Olympic

An intriguing international issue involving the Olympic Games is the commercial use of the word Olympic itself. The IOC continues to virulently protect its international trademark, and use of the word Olympic is discussed in greater detail in Chapter 10: Intellectual Property. In the United States, the USOC annually protects its monopoly over the commercial use of the word Olympic by sending cease and desist letters to violators, and in some cases filing lawsuits.

San Francisco Arts & Athletics, Inc. v.

United States Olympic Committee

San Francisco Arts & Athletics, Inc. (SFAA), a nonprofit California corporation, promoted the Gay Olympic Games in 1982 by using Olympics on its letterheads and mailings and on various merchandise. The USOC informed the SFAA of the existence of the USOC's exclusive right to use the word Olympic under the Amateur Sports Act of 1978 (later affirmed by the TSOASA), and requested that it terminate use of the word Olympic in its description of the planned Games. The SFAA did not comply, and the USOC brought suit in federal district court seeking a permanent injunction, which was granted. The Ninth Circuit Court of Appeals affirmed, holding that the act granted the USOC exclusive use of the word Olympic and that the USOC's property right in the word and its associated symbols and slogans can be protected without violating the First Amendment.

The case was appealed to the Supreme Court and it agreed in San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987), noting that when a word acquires value as the result of an organization and

the expenditure of labor, skill, and money by an entity, that entity constitutionally may obtain a limited property right in the word. Once again, the Supreme Court reaffirmed that the USOC is not a governmental actor to which the Fifth Amendment applies and the USOC's choice of how to enforce its exclusive right to use the word Olympic was determined not to be a governmental decision.

So serious is the concern over protected the use of the word Olympic that several cases involving U.S. courts were forced to decide on litigation involving the use of the word Olympic and its simulations (such as if it is misspelled with a "k") as demonstrated in the next case.

ICAS

International Council of Arbitration for Sport

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International Sports Issues

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▪ CASE 12

United States Olympic Committee, a federally chartered corporation, Plaintiff, v.

Tobyhanna Camp Corporation d/b/a Camp Olympik, et al., Defendants
United States District Court for the

than the old, because it still "tended to cause confusion ***Middle District of Pennsylvania***

or mistake, to deceive, or to falsely suggest a connec-November 4, 2010, Decided

tion" with the Olympic Games and the USOC. After

November 4, 2010, Filed

what the USOC characterized as "repeated attempts

since July 2009 to obtain Defendant's compliance with ***OPINION BY: A. RICHARD CAPUTO***

the Olympic and Amateur Sports Act," all to no avail, The United States Olympic Committee (USOC) brought

they commenced the present action on January 22,

this action to enjoin the defendants, who were doing busi-2010, seeking injunctive relief, damages, fees, and

ness as "Camp Olympik," from using the word "Olympic"

costs.

(or its simulations) or the Olympic symbol in their promo-Within the time specified by Federal Rule of Civil Proce-tional activities. Camp Olympik failed to appear in the dure 4(m), the USOC served the summons and com-action. Default was entered, and now the USOC applies plaint. The defendants have yet to appear or defend

for a default judgment against the camp. For the reasons this action. Pursuant to Rule 55(a) the clerk entered a discussed below, the USOC's motion for default judgment default on June 15, 2010. The USOC moved for a

will be granted in part and denied in part, and the USOC

default judgment against defendant Tobyhanna Camp

will be directed to submit additional evidence to support Corporation (the camp). This motion is presently

its request for attorney's fees and costs.

before the Court. The USOC seeks a permanent

injunction restraining the camp from using the five-

I. BACKGROUND

ring symbol or word "Olympic" in violation of relevant This action arose out of Camp Olympik's alleged use of law. The USOC further requests its fees, to the tune of words and symbols in violation of the USOC's common

$9,379.10, incurred in relation to the case, as well as its law and statutory rights. The USOC's complaint1

costs.

alleges that, as early as June 2008, the defendants operated a children's summer camp under the trade name

II. DISCUSSION

"Camp Olympic." Camp Olympic offered a range of

[…]

athletic activities, with an emphasis on sports featured in the Olympic Games, such as basketball, tennis,

B. The USOC's Claim Under the Olympic

hockey, judo, archery, and soccer. The defendants'

and Amateur Sports Act

website sported the camp's logo, consisting of the

When default judgment is to be entered, "the factual word "Olympic" and the five-ring Olympic symbol,

allegations of the complaint, except those relating to placed so that it slightly overlapped the "c" in

the amount of damages, will be taken as true." Comdyne

"Olympic."2 A cartoon drawing of an Olympic torch

I, Inc. v Corbin, 908 F.2d 1142, 1149 (3d Cir. 1990) (inter-served as the lowercase "l" in the work "Olympic."

nal citations omitted).

After discovering that the defendants were using the The USOC claims that the camp violated the Olympic

Olympic name and symbol, the USOC, by written and

and Amateur Sports Act. In pertinent part, the Act pro-oral demand, insisted that the camp cease using Olym-vides that "[the USOC] has the exclusive right to use …

pic words and symbols in violation of the Olympic and the symbol of the International Olympic Committee,

Amateur Sports Act. To underscore its position, the

consisting of 5 interlocking rings … the word[ ]

USOC provided the defendants with a copy of the

'Olympic'…." 36 U.S.C. § 220506. The Act creates a Act's relevant provisions.

cause of action against a person who "without the con-Nearly a year passed, and in May of 2009 the defen-

sent of the [USOC], uses for the purpose of trade, to dants changed their website. The new incarnation

induce the sale of any goods or services, or to promote branded the sports camp as "Camp Olympik," with a

any theatrical exhibition, athletic performance, or com-

"k" (the "l" in "Olympik" was still drawn as a torch).

petition," inter alia, the Olympic symbol, the word The five rings, once interlocking, were pushed apart

"Olympic," or any simulation thereof that tends to

so that they appeared bowling-pin style, with three

falsely suggest an association with, or authorization by, rings on the top and two on the bottom.

the USOC. Id.

The USOC remained unmollified. It informed the

The facts in the complaint, deemed true for purposes defendants by letter that the new website was no better of default judgment, show that the USOC is entitled to (continued)

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relief. The camp has persisted in using simulations of Accordingly, the Court will deny the request to destroy both the word "Olympic" and the Olympic symbol on

infringing materials.

its website. As evidenced by the current action, the

[…]

camp obviously lack the consent of the USOC. The

Here, the facts do not suggest that the camp acted in Court finds that the website's use of the word "Olym-good faith, under a belief it could use the Olympic sym-pic" (regardless of whether it is spelled with a "c" or a bol and the name "Camp Olympik" without violating the

"k"), combined with the five-ring symbol (regardless of Act. The camp's recalcitrance can be inferred: the camp whether or not the rings interlock), is designed to

was provided with copies of the Act's relevant provisions.

induce camp attendance and to promote the camp's

The Act is clear that unauthorized simulations of the athletic activities. Even if the offensive elements of the word Olympic, or the Olympic symbol, that tend to

website, viewed singly, do not falsely suggest the

cause confusion, are not allowed for the purpose of

USOC's affiliation or approval, their gestalt certainly inducing the sale of services. See 36 U.S.C. § 220506.

does. The combination of the word Olympik, with its

The fact that the camp had actual knowledge of the

"l" morphed into a torch, placed next to the five-ring Act's terms makes it very unlikely that the camp believed symbol—all in the context of advertising an athletic it had a claim of right to continue its infringing conduct.

camp—inescapably connotes the Olympic Games and

The facts in the complaint, taken as true on default, are a connection to or approbation of the USOC.

that the camp's violations were "intentional, willful and

[…]

without regard to the USOC's rights," and that the camp

"has gained profits" from its infringement. (Compl. at ***E. The USOC's Request for Destruction***

7.) In light of these circumstances, the Court finds that ***of Infringing Materials***

the camp engaged in deliberate, willful infringement, The USOC further requests that the camp be ordered

and that its conduct was culpable. The Court further to destroy all advertisements, promotional and admin-finds, by clear and convincing evidence, that the circum-istrative materials (or similar) that use the word "Olym-stances of this case make it an "exceptional" one enti-pic" or its simulations or depict the Olympic symbol or tling the prevailing party to attorney fees. Thus,

its simulations. When the USOC's rights have been

attorney fees are properly awarded.

infringed, 15 U.S.C. § 1118 provides that "the court

[…]

may order that all labels, signs, prints, packages, wrap-pers, receptacles, and advertisements in the possession ***ORDER AND DECREE***

of the defendant, bearing the … word, term, name,

NOW*, this 4th day of November, 2010,* ***IT IS HEREBY***

symbol, device, combination thereof, designation,

ORDERED *that the USOC's motion for default judg-description, or representation that is the subject of ment (Doc. No. 10) is granted in part, denied in part, the violation … shall be delivered up and destroyed."*

and held in abeyance in part. Specifically:

The decision whether to order the camp to "deliver[ ]

(1) The camp is ENJOINED to immediately cease all

up and destroy" these materials bearing the offending use of its trade name "Camp Olympik."

words and symbols is committed to the court's discre-

(2) The camp is PERMANENTLY ENJOINED AND

tion. See 15 U.S.C. § 1118 ("the court may order" the RESTRAINED from using, for the purpose of

destruction of such materials). Given that the camp

trade or to induce the sale of goods or services,

will be enjoined from all future infringement, which (i) the word "Olympic," by itself or in combina-would include the use, sale, or distribution of offending tion with any other words; (ii) any simulation of

materials, an order for destruction does not appear

the word "Olympic" (including "Olympik") tend-

necessary to protect the USOC's interests. See Kelley ing to cause confusion or mistake, to deceive, or

Blue Book v. Car-Smarts, Inc., 802 F. Supp. 278, 293

to falsely suggest a connection with the USOC or

(C.D. Cal. 1992) ("In light of the injunction, discussed any Olympic activity; (iii) the symbol of the Inter-

[above], to be entered by the Court in this matter, an national Olympic Committee, consisting of five

order requiring the destruction of any infringing articles interlocking rings, or any simulation of this sym-in the possession of the defendants is unnecessary."); bol falsely representing association with, or

Bonanza Int'l, Inc. v. Double "B," 331 F. Supp. 694, 697 (D.

authorization by, the USOC. This prohibition

Minn. 1971) ("Section 1118 on its face permits the trial includes, but is not limited to, using any of the

court to determine whether or not to order the delivery foregoing on any advertising materials, signage,

and destruction of the infringing items, and under the promotional

and

administrative

materials,

circumstances, since defendant has been enjoined from invoices, letterhead, business cards, packaging,

the use of the items bearing plaintiff's register marks, it is supplies, websites, or bags.

not believed that such delivery is necessary at this time.").

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International Sports Issues

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(3) The USOC's request that the camp file a report

FOOTNOTES

in writing under oath detailing its compliance

1. The facts in this section are those alleged in the with the Court's decree is DENIED.

complaint. Because a default judgment will be

(4) The USOC's request that the camp destroy infring-granted, the facts alleged in the complaint are pre-

ing materials is DENIED.

sumed to be true. Comdyne I, Inc. v Corbin, 908 F.2d (5) The request for costs and fees is HELD IN ABEY-1142, 1149 (3d Cir. 1990) (internal citations ANCE. The USOC is directed to submit sufficient

omitted).

evidence supporting its request for costs and fees

2. The symbol consisted of five interlocking rings

within thirty days from the date of this Order. The

in the same arrangement as the Olympic Symbol.

USOC is further advised that failure to respond in

Within each ring was an image of what the Court

the manner explained in the Court's opinion will

assumes to be campers, engaged in sport activities.

result in a denial of its request.

- ***Non-Olympic Issues***

While the IOC and the Olympic Games are the focus of this chapter, there are other international sports issues related to sports law. Some of these have already been covered in this text, including sports agent Gus Dominguez who served time in prison for human trafficking for smuggling Cuban baseball players to the U.S.

in 2006. Fraudulent age participation concerns were discussed related to Little League pitcher Danny Almonte and the Chinese gymnastics team. The

following material is just a few of the many other international sports law issues worth exploring.

NCAA

The NCAA does not cap the number of international student-athletes per institution or per team. To the NCAA, international student-athletes are treated no differently than those with United States citizenship. In 2006, the NCAA instituted an amateurism clearinghouse (now called the NCAA Eligibility Center) which certifies domestic and international student-athlete eligibility jointly. This includes issues related to obtaining visas and working with international sport federations. All-America honors at the NCAA level, however, are usually extended to the top eight U.S. citizens at a NCAA championship event, even if international student-athletes fill some of the first eight slots.

However, there have been issues related to international student-athletes and amateurism. In years past some international student-athletes have participated in pure professional or pseudo-professional competition, which would or should have resulted in a loss of eligibility under NCAA rules.

Immigration/Nationalization/Citizenship issues

One would think that the issue of citizenship would be clear-cut when determining which country an athlete may represent. However, many individuals have dual citizenship if, for example, they were born in one country and moved to another or have parents with different citizenships. Still, it seems unusual that NBA player Chris Kaman was able to acquire German citizenship in July 2008 (due to his great-grandparents being German) and then play on the Germany national basketball team in the 2008 Beijing Olympics. Or that WNBA guard Becky Hammon, who grew up in South Dakota, was able to play on the Russian team in Beijing in Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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2008 after she signed a contract with the club team CSKA Moscow. How was American citizen J.R. Holden, declared a Russian citizen by President Vladimir Putin, able to play for the Russian team the same year? Indeed, he was labeled a traitor in some circles.

Agosto and Belbin

Ben Agosto and Tanith Belbin won the silver medal in ice dancing during the Olympics in Turin, Italy in 2006, the first U.S. medal in 30 years. Belbin is a native of Canada, and though she and Agosto had skated for the United States 32 times in national and international competitions, only American citizens can be on the U.S.

*Olympic team. She came to Detroit to train with Agosto in 1999, earned her status as an alien of extraordinary ability in November 2000, and received her green card in early 2002. But a five-year residency requirement meant she was not eligible for citizenship until 2007. The U.S. Citizenship and Immigration Services (**CIS**) changed its internal rules on applying for extraordinary ability status and green cards shortly after Belbin filed, making her eligible for the 2006 Turin Olympic Games.*

Bosman

*In the United European Football Association (**UEFA**), players could only transfer (move) to another club after both clubs agreed to a transfer fee (the buyer bought the player from the selling club). Quotas limiting the number of foreign players based upon nationality existed in national leagues and UEFA competition. For example, only three foreign players plus an additional two assimilated players could play for a team.*

*In 1996, the European Court of Justice (**ECOJ**) held that Belguim's Jean-Marc Bosman's claim against this quota practice were valid. Specifically, the ECOJ held that Article 48 of the Treaty of Rome, now Article 39 of the European Union (**EU**) Treaty (which guarantees the right of free movement within the EU), superseded the UEFA policy which limited players fielded on a team from a particular nationality. Thus, quotas were held to be illegal and the court forbade discrimination in soccer based upon nationality.*

- ***Summary***

The Olympic Games is more than an international event that occurs every few years. The Olympic Games have been affected by politics, wars, protests, and other major international events. The International Olympic Committee's Olympic Charter establishes fundamental principles of Olympism and policies. The IOC

also grants each country's National Olympic Committee, such as the USOC, and respective national governing bodies the authority to participate in its Olympic Movement. At the same time, the numerous international federations set the technical standards for particular Olympic sports.

*American Olympic athletes were not granted statutory rights until the enactment of the Amateur Sports Act of 1978, which was amended in 1998 by the Ted Stevens Olympic and Amateur Sports Act of 1998. With its hierarchy of rules and **CIS***

Citizenship and Immigration Services

UEFA

United European Football Association

ECOJ

European Court of Justice

EU

European Union

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regulations, including drug testing procedures in and out of competition, challenges to the Olympic system in a court of law have been awkward for U.S. courts.

Legal challenges by Anita DeFrantz, Harry "Butch" Reynolds and others have forced courts and the IOC to establish the Court of Arbitration of Sport as the ultimate arbiter of Olympic-related disputes. Indeed, it has added balance and an element of fairness to the jurisprudence of the Games.

Politics and wars have influenced the Olympics for decades. Participants such as Americans Roy Jones, Jr., and Paul Hamm are just a few of the many examples in which improprieties have impacted the Olympics and have forced changes in the system. In some cases, abuse involving bribery has led to resignations and criminal charges. Issues related to immigration and citizenship status have called into question the legitimacy of certain participants.

▪ *Key Terms*

Amateur Sports Act of 1978 *American amateur sports act that established guidelines for athletes and the United States Olympic Committee* ***Court of Arbitration for Sport (CAS)*** *body that addresses complaints of athletes, coaches, and federations under the jurisdiction of the Olympic Movement*

International Federation (IF) *sport-specific regulatory body that sets international rules under the jurisdiction of the IOC*

International Olympic Committee (IOC) *Organization responsible for managing the Olympic Movement*

National Governing Body (NGB) *sport-specific regulatory body for a particular country, such as United States Swimming*

National Olympic Committee (NOC) *designated national organization responsible for managing the affairs of a particular country's Olympic teams, such as the USOC*

Olympic Charter *fundamental document of the Olympic Movement that establishes guidelines, rules and policies for the Olympic Games* ***Olympic Movement*** *term used to describe the underlying goals and themes of the Olympics (Olympic Games) and the International Olympic Committee (IOC)* ***Olympism*** *the philosophical goal of the Olympic Movement in general, which is to promote an individual's sound mind and body, and to promote harmony in society through the use of international sport*

Ted Stevens Olympic and Amateur Sports Act (TSOASA) of 1998 *Amendments to the Amateur Sports Act of 1978 giving amateur athletes more specific competition rights and recognizing the role and needs of athletes with disabilities*

- ***Acronyms***

AAU *Amateur Athletic Union*

AIOWF *Association of International Olympic Winter Sports Federations*
ARISF *Association of IOC Recognized International Sports Federations*
ASA *Amateur Sports Act of 1978*

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ASOIF *Association of Summer Olympic International Federations* ***CAS*** *Court of Arbitration for Sport*

CIS *Citizenship and Immigration Services*

ECOJ *European Court of Justice*

EU *European Union*

FIFA *Fédération Internationale de Football Association* ***FIG*** *International Gymnastics Federation*

ICAS *International Council of Arbitration for Sport* ***IF*** *International Federation*

ISU *International Skating Union*

IWF *International Weightlifting Federation*

IOC *International Olympic Committee*

NGB *National Governing Body*

NOC *National Olympic Committee*

OCOG *Organizing Committee of the Olympic Games* ***SLOC*** *Salt Lake City Olympic Committee*

TAC *The Athletic Congress*

TSOASA *Ted Stevens Olympic and Amateur Sports Act of 1998*

UEFA *United European Football Association*

USADA *United States Anti–Doping Agency*

USOC *United States Olympic Committee*

WADA *World Anti–Doping Agency*

▪ *Cases*

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▪ *Discussion and Review Questions*

1. *What is the Olympic Movement?*

2. *How have politics played a role in affecting the Olympic Games?*

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3. *Why has the IOC deferred to the international federations and National Olympic Committees as to defining who is eligible to participate in the Olympic Games (i.e., whether they can be professionals or not)?*

4. *What was the motivation behind the enactment and then revision of the Amateur Sports Act of 1978?*

5. *How has the Internet affected international issues in sport?*

6. *What is the Court of Arbitration for Sport and what is its role?*

7. *Discuss examples of claims and lawsuits by American athletes that challenged the authority of the USOC and the IOC.*

8. *What efforts has the USOC made to protect its monopoly on the word Olympic ?*

9. *Provide examples of athletes who were eligible to compete for another nation in the Olympic Games under odd circumstances related to their citizenship.*

10. *Summarize the effect of the Bosman decision involving European Union soccer players.*

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- ***Olympic Sites, Summer***

1896 – Athens, Greece

1900 – Paris, France

1904 – St. Louis, United States

1908 – London, United Kingdom

1912 – Stockholm, Sweden

*1916 – Scheduled for Berlin, Germany**

1920 – Antwerp, Belgium

1924 – Paris, France

1928 – Amsterdam, Netherlands

1932 – Los Angeles, United States

1936 – Berlin, Germany

*1940 – Scheduled for Tokyo, Japan**

*1944 – Scheduled for London, United Kingdom**

1948 – London, United Kingdom

1952 – Helsinki, Finland

1956 – Melbourne, Australia + Stockholm (there had been an equine quarantine in Australia so the event could not be held there)

1960 – Rome, Italy

1964 – Tokyo, Japan

1968 – Mexico City, Mexico

1972 – Munich, West Germany (now Germany)

1976 – Montreal, Canada

1980 – Moscow, U.S.S.R. (now Russia)

1984 – Los Angeles, United States

1988 – Seoul, South Korea

1992 – Barcelona, Spain

1996 – Atlanta, United States

2000 – Sydney, Australia

2004 – Athens, Greece

2008 – Beijing, China

2012 – London, United Kingdom

2016 – Rio de Janeiro, Brazil

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▪ Olympic Sites, Winter

1924 – Chamonix, France

1928 – St. Moritz, Switzerland

1932 – Lake Placid, N.Y., United States

1936 – Garmisch-Partenkirchen, Germany

*1940 – Scheduled for Sapporo, Japan**

*1944 – Scheduled for Cortina d'Ampezzo, Italy**

1948 – St. Moritz, Switzerland

1952 – Oslo, Norway

1956 – Cortina d'Ampezzo, Italy

1960 – Squaw Valley, California, United States

1964 – Innsbruck, Austria

1968 – Grenoble, France

1972 – Sapporo, Japan

1976 – Innsbruck, Austria

1980 – Lake Placid, New York, United States

1984 – Sarajevo, Yugoslavia (now Bosnia and Herzegovina) 1988 – Calgary, Alberta, Canada

*1992 – Albertville, France**

*1994 – Lillehammer, Norway**

1998 – Nagano, Japan

2002 – Salt Lake City, Utah, United States

2006 – Torino (Turin), Italy

2010 – Vancouver, Canada

2014 – Sochi, Russia

2018 – Pyeongchang, South Korea

** Due to World War I and II, Summer Olympic Games were not held in 1916, 1940, and 1944. Due to World War II, Winter Olympic Games were not held in 1940 and 1944. The 1992 and 1994 Winter Games are two years apart due to the transition of the Winter Games to alternating even-numbered years with regard to the Summer Games.*

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CHAPTER NINE

Antitrust and Labor

Issues in Sports

After reading this chapter you will be able to:

1. Describe the history of antitrust in the United States related to the sports industry.

2. Explain the role of the Sherman and Clayton Acts with regard to competition.

3. Describe the various analyses that the Supreme Court uses to determine whether or not there is a violation of federal antitrust laws.

4. Compare antitrust litigation among the various professional sports leagues and the NCAA.

5. Discuss why Major League Baseball is still exempt from antitrust laws.

6. Explain the impact of the Curt Flood Act of 1998.

7. Explore how antitrust laws have affected amateur sports, especially the NCAA.

8. Describe the BCS and whether or not it would survive an antitrust challenge.

9. Discuss the Sports Broadcasting Act and the NFL blackout rule.

10. Discuss minimum age issues in intercollegiate and professional sport environments.

▪ *Introduction*

The purpose of this chapter is to explore the fundamental antitrust and labor laws and cases that have woven their way into sports law. Sports in the U.S. have faced antitrust and labor issues at both the professional and amateur levels. Arguably, no labor issues have been more infamous than the strikes and lockouts related to professional sports leagues, as the owners of teams and leagues have fought the players in the courthouse and the court of public opinion.

When the industrial revolution and big business created monopolies in industries such as sugar and cotton, a concerned United States Congress enacted federal ***antitrust*** *laws designed to prevent anticompetitive activity in business and promote competition to ultimately drive down prices for consumers. Generally speaking, antitrust laws are in place to prevent monopolistic behavior and agreements that minimize competition by restraining trade. Any business that operates across state borders in theory falls under the federal antitrust laws since it affects interstate commerce.*

antitrust

term used to describe any contract, combination, or conspiracy that illegally restrains trade and promotes anticompetitive behavior

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Chapter Nine

*Around the same time as the advent of antitrust laws in the United States, and to protect the rights of workers, unions were formed to represent their members and to negotiate employment contracts collectively in order to achieve a collective bargaining agreement (**CBA**). As you know by now, in the sports industry the unions that represent the players in the Big Four sports are called players associations.*

Courts have consistently attempted to send a message to players and owners that union-related disputes arising from of their employment relationship should not be resolved by the courts.

While the areas of antitrust and labor law are often considered distinct subjects on their own, in the sports industry these topics are very much related. The major antitrust issues in sports law have focused on issues such as minimum and maximum salaries for athletes, player mobility from team to team (also known as free-agency), television and media broadcast rights, attempts to cap college coaches' salaries, limiting the number of coaches per team, eligibility and transfer rules for college athletes, the professional player entry draft, and franchise relocation issues.

Studying antitrust and labor law in sports affords a lesson in history. Learning the unique language of antitrust and labor law is vital before exploring some of the more prominent sports-related judicial decisions which have affected the Big Four leagues and the NCAA.

▪ *Federal Laws*

Labor and antitrust issues are governed primarily by federal statutes. The following acts and statutes are most relevant in the sports context. Students should become familiar with them.

Sherman Act

*The **Sherman Antitrust Act of 1890** (Sherman Act) is the most fundamental federal law that governs anticompetitive business behavior (15 U.S.C. §*

1 et seq.). Congress enacted the Sherman Act to regulate business practices among competitors affecting interstate commerce. In other words, whenever commerce or trade crosses states lines, antitrust laws might apply. The primary purpose of the Sherman Act is to promote competition and to deter monopolistic practices that ultimately hurt consumers. As Supreme Court Justice Thurgood Marshall stated in United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972),

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."

Section 1 of the Sherman Act forbids contracts, combinations, or conspiracies that may unreasonably restrain trade across state lines. Section 2 prohibits monopolization of trade and commerce. Put differently, it prevents the abuse of monopoly power by a single entity.

CBA

collective bargaining agreement

Sherman Antitrust Act

1890 federal law that prohibits interference with interstate production and distribution of goods

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Antitrust and Labor Issues in Sports

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Clayton Act

*Congress passed the **Clayton Act** in 1914 (amended in 1950), the second major federal antitrust law (15 U.S.C. § 12 et seq.). This act provides that labor unions and labor activities are exempt from the Sherman Act. Section 16 of the Clayton Act allows the government or a private plaintiff to obtain an injunction against anticompetitive behavior if necessary. The Clayton Act is often involved when a merger between two large corporations takes place and the Department of Justice (**DOJ**) or Federal Trade Commission (**FTC**) becomes involved to approve or disapprove in of the merger in advance. Of course the reason behind this is to prevent a merger from creating an organization so large that it would immediately become too powerful in the marketplace and could hurt consumers. Another key to the Clayton Act is that it allows for damages to be trebled when there is a violation of the Sherman Act.*

Violations

There are three main ways in which the federal antitrust laws are enforced. First, criminal and civil enforcement actions can be brought by the Antitrust Division of the DOJ. The DOJ alone is empowered to bring criminal prosecutions under the Sherman Act. For offenses committed before June 22, 2004, individual violators can be fined up to $350,000 and sentenced to up to three years in federal prison for each offense, while corporations can be fined up to $10 million for each offense. For offenses committed on or after June 22, 2004, individual violators can be fined up to $1 million and sentenced to up to 10 years in federal prison for each offense, and corporations can be fined up to $100 million for each offense. The government may also pursue civil damages for violations of the Sherman Act and such damages are automatically trebled. Additionally, reasonable costs and attorney fees may be awarded.

Second, civil enforcement actions under the authority of the Federal Trade Commission Act, which prohibits unfair methods of competition in interstate

commerce but carries no criminal penalties, can be brought by the Federal Trade Commission (through its Bureau of Competition and Economics). Finally, lawsuits may be brought by private parties asserting damage claims.

Norris-LaGuardia Act

*The **Norris-LaGuardia Act** (29 U.S.C.A. § 101 et seq.) is a federal labor law that favors unions. It allows employees to organize as a collective bargaining unit, which allows the employer to negotiate a contract that governs all covered employees as a unit. Enacted in 1932, it was also known as the Anti-Injunction Act. This Act was an attempt to remove the courts from having to become involved in labor matters and from abusing their power by issuing injunctions in unionized labor activity. Thus, it places restrictions on the power of the federal courts to grant injunctions in non-violent labor disputes.*

Clayton Act

1914 federal law that allows the government or a private plaintiff to obtain an injunction against anticompetitive behavior

DOJ

Department of Justice

FTC

Federal Trade Commission

Norris-LaGuardia Act

1932 federal law that forbids federal courts from abusing the injunctive process and to prevent employers from abusing the courts to obtain injunctions on union activities *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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National Labor Relations Act

*The **National Labor Relations Act** (**NLRA**) was enacted in 1935 (29 U.S.C. § 151 et seq.). It is also known as the Wagner Act. It guarantees workers the right to join unions without fear from management, and it supports collective bargaining between management and labor. It also encourages collective bargaining between employers and employees and requires employers and employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. These are known as the compulsory or mandatory subjects of collective bargaining. The NLRA's collective bargaining requirement is also bilateral: it protects both employers and the unions. The NLRA requires good faith bargaining, but it does not compel either party to agree to a proposal or require them to make a concession.*

National Labor Relations Board

*The NLRA created the **National Labor Relations Board** (**NLRB**) in 1935, which enforces the NLRA and prohibits employers from committing **unfair labor practices***

*(**ULP**). It is an independent federal agency. The NLRB's purpose is to oversee the process of collective bargaining, leaving the results of the bargaining to the parties.*

This administrative body is the most powerful administrative agency with regard to enforcing federal labor laws and rules in the United States. The NLRB's five members are appointed by the President of the United States.

The NLRB entered professional sports in 1969 with a decision in American League of Prof'l Baseball Clubs, 180 N.L.R.B. 190 (1969) when the American League umpires wanted to be recognized as a union (the National League already had one). The NLRB ultimately ruled that it had jurisdiction over the business of MLB and that antitrust laws did not exempt it from coverage or involvement of labor disputes. This decision was crucial to shaping sports law as we know it today in the context of antitrust and labor law.

Collective Bargaining

The collective bargaining process is the name given when a union negotiates a working contract with management. As mentioned, the ultimate contract is called the collective bargaining agreement (CBA). The mandatory subjects of collective bargaining include wages, hours and conditions of employment. All other subjects are called permissive. Minimum salaries and salary caps fall under the mandatory subjects of CBAs since they involve wages. Other components of a collective ***National Labor Relations Act (NLRA)***

federal act regulating relations between employers and employees

NLRA

National Labor Relations Act

National Labor Relations Board (NLRB)

federal agency created by the NLRA to regulate

employer and employee relations, particularly in the union context ***NLRB***

National Labor Relations Board

unfair labor practice (ULP)

allegation that management has violated terms of a collective bargaining agreement

ULP

unfair labor practices

collective bargaining

process of negotiating a contract between management and labor in the union context

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bargaining agreement in the Big Four might include issues related to guaranteed contracts, renegotiation options after a player has been in a league for a specified period of time, and termination clauses including hazardous activity and morals clauses, just to name a few.

Non-statutory Labor Exemption

*The phrase **non-statutory labor exemption**, also known as the implied labor exemption, is a judicial principle that holds that antitrust laws are not applicable when unions (employees) and management (employers) take part in the collective bargaining process of negotiating a working labor contract. Congress favors the process of collective bargaining over courts intervening in labor disputes. In Brown v. Pro Football, Inc., 518*

U.S. 231 (1996), the U.S. Supreme Court affirmed the position that courts should become less involved in disputes that arise from the collective bargaining process.

More specifically, unionized players or employees cannot file antitrust lawsuits.

Decertification

One way to avoid or dramatically alter the collective bargaining process in professional sports is for an existing union to decertify. Some have referred to this as the nuclear option.

When this occurs, there is no union to represent players who also, in theory, then lose all benefits, including pensions, insurance, etc., that are contained in the current CBA. Of course, management may always allege that the decertification of the union is an illegitimate sham intended in bad faith solely to seek redress under the federal antitrust laws.

Indeed, the NLRB does review and verify decertification petitions for legitimacy.

In 2011, the NFLPA decided to decertify after 16 days of mediation before the CBA expired and they were locked out by the owners ultimately resulting in the longest work stoppage in NFL history. Immediately after the decertification, NFL

players Tom Brady, Peyton Manning, Drew Brees, and seven others filed an antitrust lawsuit against the NFL in Brady v. NFL. The 2011 work stoppage, the longest in NFL

history, ultimately resulted in a ten-year collective bargaining agreement and settlement of all claims between the NFL and NFLPA, and no regular season games were lost in the process. However, this was not the first time the NFLPA had decertified.

Indeed, it decertified in 1989. The NFLPA then returned as a union in 1993 with a CBA which ultimately provided free agency in the NFL.

Impasse

*A bargaining **impasse** is the official term used to describe a deadlock in a collective bargaining process in which the management and worker's union*

cannot come to an agreement and neither believes that a settlement can be reached. Once that occurs, often mediation is suggested to help resolve the dispute. Still, given the time pressures related to the start of playing seasons, the league (owners) can generally institute the terms of the previous CBA unilaterally if impasse is reached.

Strikes and Lockouts

The NLRA grants workers the right to ***strike*** *if a CBA cannot be reached. Before a strike can occur, however, a union must have a vote and the members must vote by a majority.*

non-statutory labor exception

general term describing any union-management agreement that was a product of good faith negotiation and will therefore receive protection from federal antitrust laws

impasse

term used to describe when management and labor are no longer willing to negotiate after attempts have been made in good faith

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The union must give the employer 60 days notice before a strike can occur during what is called the cooling-off period. Workers who replace strikers are known as ***scabs****.*

As a CBA nears its end, four things usually happen in the event management and labor cannot reach an agreement:

1. Strike*: The failure of the workers to report;* ***2. Lockout****: Preventing the workers from reporting;* ***3. Decertification*** *of a union: Then, antitrust laws apply enabling the possibility of a class-action lawsuits; or*

4. *Extension of the agreement.*

The following are historical summaries of strikes and lockouts in the Big Four: ***MLB***

Strikes: 1972 (13 days), 1980 (8 days), 1981 (50 days), 1985 (2 days), and 1994–95, which led to the canceling of the World Series. In 1995, an injunction issued by Judge Sonia Sotomayor ordered that the former CBA had to remain in force.

The strike ended four days later (after 232 days).

Lockouts: 1973 (17 days), 1976 (17 days), 1990 (32 days).

NFL

Strikes: 1970 (4 days), 1974 (42 days), 1982 (57 days), 1987 (25 days, which led to the league signing replacement players).

Lockout: 2011 (132 days, the longest work stoppage in NFL history) ***NBA***

Lockout: Commissioner David Stern ordered a lockout in 1998–99 that lasted 50 games (191 days). NBA replacement referees were used in 1995 when the referees were locked out for more than 2 months (77 days). In 2011, the league locked out the players as well and the dispute has not been settled at the time of this writing.

NHL

Strike: 1992 (10 days).

Lockout: 1994–95 (104 days) ordered by Commissioner Gary Bettman. In 2004–05, a lockout cancelled the entire season (310 days).

Free Agency

*The term **free agency** is used to describe when a player may shop his or her services around to other teams within a league. Free agency and its several forms vary **strike***

*cessation of work by union members to obtain benefits or prevent abuses in the workplace **scabs***

pejorative term used to describe the replacement players and workers in place of those who are on strike

lockout

*temporary withholding of work by the employer to resolve a labor dispute **decertification***

process in which a union and its members disband officially and often with the intent to allow for an antitrust lawsuit

free agency

allows a player to shop his services around to other teams after a designated period of years

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slightly in the Big Four leagues, as it is a collectively bargained issue. Free agency was not established in professional sports until the 1970s.

*In general, professional players may become either **restricted** or **unrestricted** free agents. An unrestricted free agent (**UFA**) may shop their services around to the highest bidder after a certain number of years in the league (i.e., "years of service") or when a player turns a particular age. For example, the NHL currently has the "27-or-7" rule. As of 2008, any player whose contract has expired can declare himself an UFA if he is at least 27 years old or has at least seven years of service as an NHL player. Under the previous CBA, NHL players did not qualify for unrestricted free agency until the age of 31. A restricted free agent (**RFA**) is someone who may shop their services around according to the terms of the CBA, but their current team retains the right to match the best offer within a certain amount of time called the **right of first refusal**.*

Exploring the various antitrust and labor laws provides a foundation to move forward into the judicial analysis of such issues in the Big Four sports leagues.

Understanding that while antitrust and labor law are generally separate and distinct areas of the law, it is again vitally important to recognize that in professional sports they are often entwined.

▪ *Antitrust Analysis*

Once there has been an allegation of a violation of antitrust laws and parties cannot resolve their disputes privately, the federal courts often determine whether in fact a violation has occurred. Key to this determination is whether an organization is clearly attempting to monopolize a market by using an unfair labor practice, and whether the alleged monopolistic practice is reasonable or unreasonable.

Courts analyze whether an act, policy or merger is unreasonable in several ways.

Per Se Rule Analysis

When a court uses the ***per se rule analysis*** *to determine whether there has been a violation of antitrust law, any labor practices that are inherently unreasonable restraints of trade will be invalidated. Some believe that the per se analysis is not appropriate in professional or amateur sports leagues due to the unique nature of teams, which are highly interdependent and not business competitors in the traditional sense.*

In Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958), the Supreme Court stated that certain agreements or practices, because of their pernicious effect on competition, are conclusively presumed to be unreasonable and therefore illegal.

restricted free agent

term used to describe a player who is able to shop their services around to other teams on the condition that the player's current team may match other team's offers within a specific time frame and therefore retain the player
unrestricted free agent

term used to describe a player who may shop their services around to other teams with generally no strings-attached to the previous team ***UFA***

unrestricted free agent

RFA

restricted free agent

right of first refusal

right of a team to match a competing team's offer

per se rule analysis

rule that holds that certain types of trade agreements or arrangements are inherently anticompetitive and therefore illegal

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For example, price-fixing among competitors is a per se violation of antitrust laws.

Price-fixing is anticompetitive and hurts consumers.

Collusion

One of the most important concerns in any antitrust analysis is whether there was collusion between two or more parties to control price, costs, etc. that were not a byproduct of arm's length collective bargaining. For example, in 1990 as part of a collusion settlement MLB owners agreed to pay players $280 million in damages when they acted in violation of the Basic Agreement by agreeing not to sign free agents such as Kirk Gibson, Jack Morris, and Tim Raines in order to attempt to keep free agent salaries under control.

Tying Arrangements

Like price-fixing, tying arrangements are also normally violations of antitrust laws.

This occurs when a company says that you must buy product B in order to get product A. The purchaser really only wants to buy A, but strings are attached. Consider whether a fan could claim that having to buy pre-season tickets to NFL games in order to buy regular-season tickets constitutes an illegal tying arrangement.

*What about season ticket-holders who have to contribute a non-refundable fee or personal seat license (**PSL**) just for the right to purchase season tickets? Do you think that these arrangements could constitute per se violations of the federal antitrust laws outright?*

Rule of Reason Analysis

*If a **restraint of trade** fails the per se test, then further examination of the labor practice is not necessary. However, if it is not blatantly illegal then courts then use a **rule of reason analysis** in which a court must examine the labor practice at issue and determine whether it is reasonable or unreasonable. In fact, some restraints by a business might be characterized as a necessary or legitimate business practice just to remain in business.*

When a court uses a rule of reason analysis, first the plaintiff must allege and prove an anticompetitive effect within a cognizable relevant market. If the court buys the plaintiff's argument, the burden then shifts to the defendant to show that the conduct's procompetitive effect outweighs the anticompetitive effect. Put differently, an attempt is made to evaluate the procompetitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited. If necessary, a court then determines whether the same effect could be achieved through less restrictive means.

Quick-Look Analysis

The Supreme Court in Cal. Dental Ass'n v. Federal Trade Comm'n, 526 U.S. 756

(1999) supported the use of another modified form of antitrust analysis known as the quick look or structured rule of reason approach. It is a

middle-ground, truncated analysis used by courts to determine if "an observer with even a rudimentary ***PSL***

personal seat license

restraint of trade

expression used to describe a violation under antitrust law such as price-fixing ***rule of reason analysis***

rule that holds that only unreasonable restraints of trade violate section 1

of the Sherman Act

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understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.

Competitive harm is presumed under a quick-look rule of reason analysis. If the defendant does not provide some competitive justification for the practice, then it is condemned as an illegal restraint. If a procompetitive justification is given, the court may then proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.

▪ ***Antitrust in Professional Sports***

Professional baseball, football, basketball, and hockey have all had legal battles involving the application of the antitrust laws. Players associations, acting as the exclusive bargaining agent for the players, have had an effect on the current labor landscape and league organization in the sports business. As mentioned, part of the uniqueness of application of federal antitrust and labor laws to professional sports, however, is that teams in a sports league are both competitors and joint-venturers and often depend upon each other for league success and financial stability. The following section explores the major cases and decisions that have affected the U.S. professional sports landscape.

- ***Baseball***

Major League Baseball (MLB) is comprised of the American League and the National League. The MLBPA was formed in 1954, and MLB had its first collective bargaining agreement in 1968. Many of the disputes have been extremely contentious. This might account for MLB players having the highest salaries among the four major sports leagues.

Federal Baseball

However, professional baseball has held a unique exemption from antitrust laws in accordance since the controversial interpretation by the Supreme Court in Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs, 259 U.S. 200

(1922). The Baltimore Terrapins of the upstart Federal League sued the team owners of the American and National Leagues claiming that they violated the federal Sherman Antitrust Act by conspiring to monopolize professional baseball by destroying the Federal League, which had been trying to compete with them.

Recall from Chapter 2: Sports Contracts that under the professional baseball reserve system that had been in place since the late 1880s, players were required to sign contracts that had a ***reserve clause*** *that bound them to their teams permanently if they wanted to remain in the sport.*

Ultimately, the Supreme Court in Federal Baseball held that antitrust laws do not apply to professional baseball and the game of baseball did not affect interstate commerce. As odd as this may seem today, even though teams and players traveled across state lines, Justice Oliver Wendell Holmes, for a unanimous court, wrote ***reserve clause***

out-dated provision in a contract which allowed a team to own a players rights perpetually

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that such activity was only incidental to the game and that baseball was a form of entertainment. Thus, the Supreme Court legitimized the reserve clause with the Federal Baseball ruling, determining that the reserve clause did not constitute an antitrust violation even after several protracted yet unsuccessful legal challenges in subsequent years. This included the challenge by a minor league pitcher who remained stalled at the Triple-A level in the New York Yankees' organization, the level just below MLB.

Toolson

In Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), George Toolson sued over the use of the reserve clause claiming it blocked his path to the major leagues. In the decision, the Supreme Court ruled that when the Sherman Act was enacted in 1890, Congress did not intend it to include baseball and was meant to deal with individuals such as John D. Rockefeller

and Andrew Carnegie. For 18 years after Toolson, in case after case, courts acknowledged that the baseball antitrust exemption was flawed, but the Federal Baseball decision was never overruled.

Marvin Miller

*Marvin Miller, a former economist for the United Steelworkers of America who became the executive director of the Major League Baseball Players Association (**MLBPA**), was able to get the owners to agree to its first collective bargaining agreement in 1968. Around the same time, the NLRB noted that it had jurisdiction over labor matters in the sport of professional baseball. Then, in the 1970*

Basic Agreement, Miller got the owners to agree to the introduction of an impartial arbitrator to mediate grievances between the players and owners. This would serve as a prelude for another formal challenge to the reserve clause by MLB pitcher Curt Flood.

Flood v. Kuhn

With the support of Miller, Curt Flood filed a lawsuit against MLB challenging the legitimacy of the reserve clause. This ultimately proved to be the beginning of the end of the clause in MLB and similar systems in the other Big Four leagues. The all-star outfielder played for the St. Louis Cardinals but refused to accept a trade to the Philadelphia Phillies in 1969. Flood sued MLB and Commissioner Bowie Kuhn in order to become a free agent. He argued that the reserve clause was an unreasonable restraint of trade under the Sherman Act. With Miller's guidance, Flood asserted that a reasonable interpretation of the reserve clause might be that of a one-shot deal, giving a team the ability to renew a player's contract for only one year not to be built on top of a previous extension. Flood sat out the 1970 season and was traded to the Washington Senators the next year. His career ended when he retired after playing only 13 games for the Senators in 1971.

Flood's case weaved its way through the legal system, and in 1972 the Supreme Court in a 5-3 decision acknowledged that MLB's antitrust exemption found in the Federal Baseball decision was an anomaly, but it insisted that it was up to Congress to change this antitrust exemption not the

Supreme Court. Curt Flood fought a good fight but his legal challenge did not prevail. However, arbitrator Peter Seitz was ***MLBPA***

Major League Baseball Players Association

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about to forever change the landscape of MLB and U.S. sports with his arbitration decision in 1975.

Seitz Decision

Players Andy Messersmith (Los Angeles Dodgers) and Dave McNally (Montreal Expos) challenged the reserve clause after Flood's unsuccessful legal battle. Peter Seitz, an independent arbitrator, ruled in December 1975 that baseball's reserve clause granted a team only one additional year of service from a player, putting an end to perpetual renewal right the clubs had claimed for so long. Seitz was immediately fired by the owners as baseball's arbitrator and they appealed the Seitz decision to the Eighth Circuit Court of Appeals unsuccessfully. Free agency began in MLB in 1976 and worked its way to all the other Big Four leagues soon thereafter.

Curt Flood Act of 1998

The Curt Flood Act of 1998 was an attempt by Congress to legislatively override the antitrust ruling in Federal Baseball. Signed into law by

President Clinton, the act gave Major League Baseball players, like their NBA and NFL counterparts, the right to sue the league under antitrust laws provided they first decertify as a union. Still, the Curt Flood Act is limited only to certain activities of baseball and has little effect on prior court decisions or practical applications. For example, this Act does not apply to minor leagues franchise relocation, club ownership, the relationship between the Commissioner and the owners, the relationship with umpires, and others. It is a generally held belief that the Curt Flood Act of 1998 is not the landmark law that some had hoped for, especially because of the contemporaneous Supreme Court ruling in Brown v. Pro-Football, Inc., 518 U.S.

231 (1996), discussed below. Major League Baseball is still the only professional sport which holds an exemption from antitrust laws as a result of the Federal Baseball decision in 1922.

- ***Football***

Football has a history of antitrust and labor disputes that have been settled by court decisions. The following cases briefly summarize some of the most prominent antitrust and labor cases involving professional football in the United States in chronological order.

Radovich

*In Radovich v. National Football League, 352 U.S. 445 (1957), William Radovich sued the NFL after he was disallowed from returning to the league on the basis of dis-loyalty. Radovich spent two years playing in the rival American Football League (**AFL**) and when he tried to return, the NFL suspended him for five years.*

Radovich alleged that this violated federal antitrust laws. The NFL had hoped ***Curt Flood Act of 1998***

federal law that revokes part of a 1922 U.S. Supreme Court decision exempting baseball owners from antitrust laws

AFL

American Football League

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that because baseball had antitrust exemption, the NFL had antitrust exemption too. In 1957, however, the Supreme Court ruled that the league was, indeed, subject to antitrust laws even though MLB was not.

AFL

In American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963), the AFL sued the NFL for violating section 2 of the Sherman Act. The AFL alleged that the NFL had established a market monopoly. The Fourth Circuit Court of Appeals ruled in favor of the NFL on the basis of insufficient evidence of the NFL's intent to monopolize and that the NFL was a natural monopoly and did not violate the antitrust laws. The AFL and NFL actually merged in 1968.

Mackey

In Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), eventual NFL

Hall of Fame tight end and NFLPA president John Mackey challenged NFL salaries and the free agency system in place at that time. The 1970 ***Rozelle Rule***

(named after Commissioner Pete Rozelle) was considered by the players to be an unreasonable restraint of trade because there was no easy way to become a free agent. When a player's contract expired and he signed with a different club, the new club had to compensate the previous club with draft picks, current players or a sum of money that was either agreed-upon or imposed by the Commissioner before a trade was effective. This was professional football's version of baseball's reserve clause. The net effect of the Rozelle Rule was that it kept salaries low.

The court held that there was no bona fide arm's length bargaining and concluded that for the non-statutory labor exemption to apply, collective bargaining resulting from good faith arm's length bargaining must have occurred. The Rozelle Rule was considered a per se violation at the circuit court level (i.e., a group boycott), but the Eighth Circuit Court of Appeals held that rule of reason analysis was more appropriate. It also developed what is now known as the Mackey test, which has been adopted by the Sixth and Ninth Circuit Courts as well. That is, a CBA is only exempt from antitrust laws when:

1. the restraint primarily affects the parties of the agreement; 2. the provision is a mandatory subject of bargaining under the NLRA; and 3. the restraint was a product of bona fide arm's length bargaining.

In the end, the Rozelle Rule was considered an unreasonable restraint of trade.

L.A. Mem'l Coliseum Comm'n

In L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984), the Los Angeles Rams decided in 1978 to relocate from the L.A. Coliseum to a new stadium in Anaheim, California. The NFL and its members did not approve and the Los Angeles Memorial Coliseum Commission filed suit against the NFL for unlawful restraint of trade in violation of section 1 of the Sherman Act. After a first mistrial, the jury in the second trial ruled in favor of the Coliseum and awarded the ***Rozelle Rule***

named after Pete Rozelle, former NFL Commissioner, which essentially acted like a reserve clause since considerable compensation was owed to a

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plaintiffs $50 million dollars in damages, holding that the NFL franchise relocation rules violated antitrust laws (damages were trebled). It essentially made the whole Raiders team a free agent, and this decision led to the movements of NFL teams throughout the years.

USFL

*In USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988), the United States Football League (**USFL**), an upstart spring professional football league that only survived a few seasons, brought suit against the NFL for antitrust violations alleging that the NFL*

pressured major television networks not to form an agreement with them. The USFL sought damages of $1.7 billion. A federal jury ruled in favor of the USFL, believing that the NFL had unlawfully monopolized major league professional football. However, the jury only awarded nominal damages in the amount of $1 which was tripled to $3 (plus interest). The Eighth Circuit Court of Appeals affirmed the jury's verdict. The USFL attorneys, however, were awarded over $5.5 million.

Powell

In Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989), Marvin Powell, eight other players and the NFLPA brought an antitrust action against the league claiming that it violated antitrust law when it continued to enforce the terms of an expired CBA. The Eighth Circuit Court of Appeals concluded that the League and the players should continue to bargain or present their claims to the NLRB. The court held that the non-statutory labor exemption extends beyond impasse, and therefore, the league was not in violation of antitrust law. The effect was that unions were forced to decertify in order to gain leverage during the bargaining relationship. The Powell court concluded that the labor arena is intended to foster negotiated settlements rather than intervention by the courts.

McNeil

In McNeil v. NFL, 790 F. Supp. 871 (D. Minn. 1992), Freeman McNeil and seven others sued alleging that the NFL's Plan B free agency violated section 1 the Sherman Act. Plan B had been implemented in 1989 and allowed clubs to protect the rights to 37 players. The jury in this antitrust trial found that league compensation rules were more restrictive than reasonably necessary to achieve the objective of establishing or maintaining competitive balance in the NFL. This caused economic harm to the players. The decision led to the establishment of unrestricted free agency in the NFL.

Brown

In 1987, the NFL's CBA expired and the NFL and NFLPA began negotiations for a new collective bargaining agreement. The NFL owners implemented the Developmental Squad Players Program during negotiations. Antony Brown, a developmental squad player, and eight other practice squad players brought a class action lawsuit in Brown v. Pro-Football, Inc., 518 U.S. 231 (1996), which ultimately reached the Supreme Court. They alleged that the NFL owners and the NFL violated the ***USFL***

United States Football League

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Sherman Act by setting a fixed salary for the Developmental Players Squad.

More specifically, the plaintiffs alleged a price-fixing scheme when the owners continued to cap the amount these players could make at $1,000 per week.

The Supreme Court held that this type of dispute was not for the courts to decide and that the league acted lawfully when it imposed the fixed salary.

The Brown court, like Powell, reinforced the idea that the non-statutory labor exemption extends beyond impasse and allows the employer to impose unilateral restraints outside of the collective bargaining process without fear of antitrust violation.

Clarett

In Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004), Maurice Clarett sued in order to be eligible for the NFL draft held each spring. Since 1990, NFL eligibility rules had permitted a player to enter the draft only three full seasons after that player's high school graduation. Maurice Clarett claimed that the NFL rule which prevented him from entering the draft impeded his ability to make a living and violated federal antitrust laws.

Clarett had played for The Ohio State University but was suspended from the OSU football team for his second season (2003–04) for numerous alleged violations of NCAA rules. When Clarett decided to turn professional, the NFL refused to change its three season rule.

On February 5, 2004, District Court Judge Shira Scheindlin ruled that the NFL

eligibility rule was not protected by the non-statutory labor exemption. Only a few months later, however, on May 24, 2004, the Second Circuit Court of Appeals reversed her holding that the NFL eligibility rules violated the antitrust laws stating that the non-statutory labor exemption bars antitrust challenges to these rules. The Second Circuit also vacated the district court's order that Maurice Clarett be declared eligible for the 2004 NFL draft.

There is still disagreement whether this high school graduation "age" rule of three full seasons post high school was actually a byproduct of arm's length negotiations or, instead, a side-agreement (i.e., a memorandum) between the NFL and the NFLPA. However, that issue appears to now be moot even though it was litigated. The non-statutory labor exemption applies to both labor members and future members (such as Clarett) as well. Clarett was ultimately drafted in the third round by the Denver Broncos in 2005, but did not make the team.

American Needle

In American Needle, Inc. v. National Football League, 130 S. Ct. 2201 (2010), a hat-making company, from Buffalo Grove, Illinois, filed an antitrust challenge against the NFL, which had an exclusive agreement with Reebok since 2001. The key question for the Supreme Court was whether the NFL, which is made up of 32 distinct businesses (i.e., teams), is a single-entity for antitrust purposes or a collection of 32 separate entities.

On May 24, 2010, Supreme Court remanded the case back to the Seventh Circuit Court of Appeals and said that the NFL is not a single entity, that the 32 separate teams compete among themselves for profit and for wins, and in a unanimous decision said that the league is subject to the Sherman Act and antitrust scrutiny.

Only time will tell how this case impacts the business of professional football. The concept of single entity is discussed further later in this chapter.

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▪ Basketball

*Professional basketball players organized their union in the 1950s. Now known as the NBA Players Association (**NBPA**), the NBPA has been successful in its advocacy efforts on behalf of professional basketball players and has never participated in a labor strike against NBA team owners.*

Molinas

Jack Molinas was an NBA player (Fort Wayne Pistons) who had been suspended for placing a bet on a game in which he participated in 1954. Molinas brought suit against the NBA alleging violation of antitrust law due to restriction of trade because he had no economic alternative to playing basketball in the NBA. The trial court upheld Molinas' suspension asserting that the restraint was a reasonable one as the NBA had a legitimate interest in banning gambling in Molinas v.

National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961). Molinas was quite involved in fixing games and is the subject of the 2002 book by Charlie Rosen, The Wizard of Odds. He was murdered at the age of 43 in 1975.

Haywood

The NBA, similar to the NFL, had a rule that required a graduating high school player to wait four years before he could become eligible to be drafted or play in the NBA at all. The rule did not state that a player had to attend college, and there was no minimum age restriction.

*Spencer Haywood, however, was drafted by the NBA's Seattle SuperSonics even though four years had not passed since his high school graduation. At the time, Haywood was playing for the Denver Rockets of the American Basketball Association (**ABA**), which was competing with the NBA for talent. The ABA pursued players other than those already on NBA rosters, including Spencer Haywood, a sophomore at the University of Detroit who left after only one season when he signed a $1.6 million contract with Denver.*

NBA Commissioner Walter Kennedy would not waive this four-year rule for Haywood, even though he was now a professional. The NBA threatened to disallow the contract and punish the team. However, Haywood fought back and argued that the rule constituted a group boycott in violation of the Sherman Act. A federal district court, in Denver Rockets v. All-Pro Mgmt. , 325 F. Supp. 1049 (C.D. Cal.

1971), ruled in favor of Haywood and granted an injunction which allowed him to play in the NBA. The court believed that Haywood would suffer irreparable injury to his skills and playing career if he was prevented from playing. The case made its way up to the Supreme Court in Haywood v. National Basketball Ass'n, 401 U.S. 1204

(1971) which sustained the district court's decision to issue an injunction.

The Haywood Effect

*The Supreme Court's Haywood decision held that the NBA rule was invalid. Thereafter, the NBA altered its draft eligibility rules to allow a player to enter the draft as **NBPA***

NBA Players Association

ABA

American Basketball Association

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long as he had financial need or hardship; this became known as the hardship rule.

However, this change was short-lived and eventually any player whose class had already graduated from high school became eligible for the draft. This decision launched the professional careers of high school stars such as Moses Malone, Darryl Dawkins, and Bill Willoughby, all of whom jumped directly from high school to the NBA in the 1970s. In 1988, Shawn Kemp declared for the NBA draft and was drafted by the Seattle Supersonics, but other than Kemp there was virtually no one who jumped directly to the NBA.

In the 1990s things changed remarkably as more high school players entered the NBA draft. Future NBA superstars such as Kevin Garnett (1995), Kobe Bryant and Jermaine O'Neal (1996), Tracy McGrady (1997), and Al Harrington (1998) offered the NBA marketable skills during the 1990s right out of high school. In 2004, 13 high school players made themselves available for the draft and eight were taken in the first round. Thirty-eight international players aged 18 and 19

also joined that draft. This caused great concern for the NBA and its older players, and the issue of re-establishing the minimum age requirement (i.e.,

years after high school graduation) was revisited again by the NBA two decades after Haywood.

Under the 2005 CBA, United States players must be at least one year removed from high school and 19 years of age (by the end of that calendar year) before entering the draft. International players eligible for the draft must turn 19 during the calendar year of that draft.

Settlement Agreements

It is worth noting that in 1976 NBA players and owners signed the ***Robertson Agreement****, which eliminated the NBA's version of the reserve (option) clause that bound a player to his team even after the contract expired. In 1988, the NBPA settled another lawsuit by signing the* ***Bridgeman Settlement Agreement*** *bringing unrestricted free agency to the NBA, the first unrestricted free agency in any major professional sports league. However, litigation related to the NBA rules did not end there.*

Wood

In Wood v. National Basketball Ass'n, 602 F. Supp. 525 (S.D.N.Y. 1984), aff'd 809 F.2d 954 (2d Cir. 1987), the Second Circuit Court of Appeals dismissed Leon Wood's antitrust claim challenging certain provisions of a CBA (such as the salary cap) between the NBA and NBPA. The Second Circuit Court of Appeals found that the challenged provisions were mandatory subjects of collective bargaining and therefore were protected by the non-statutory labor exemption. Wood was ultimately drafted by the Philadelphia 76ers and later became an NBA referee.

Bridgeman

The plaintiffs in Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J.

1987) brought a suit against the NBA claiming that the college player draft, salary cap, and restricted free agency (right of first refusal) constituted antitrust violations. The district court held that after good faith bargaining, the non-statutory ***Robertson Agreement***

1976 agreement which upheld that the NBA's reserve system was no longer valid

Bridgeman Settlement Agreement

1988 agreement which provided unrestricted free agency to the NBA

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labor exemption lasts for as long as the employer continues to impose the particular restraint. That is, the district court held that once impasse has been reached, an employer may unilaterally implement changes that are reasonably comprehended within the pre-impasse proposals.

Williams

In NBA v. Williams, 45 F.3d 684 (2d Cir. 1995), NBA players yet again challenged the NBA league rules regarding the college draft and salary cap. The Second Circuit unanimously disagreed and said that the draft and salary cap were protected by the non-statutory labor exemption.

▪ ***Hockey***

Hockey has had the fewest antitrust challenges of the Big Four sports leagues. For many years, the only NHL labor issue was a strike that lasted a mere 10 days in 1992. However, in 2004 the NHL and the NHLPA could not

agree to terms and the entire 2004–05 season was cancelled by NHL Commissioner Gary Bettman.

Like all the Big Four sports, the NHL had a reserve clause similar to the one in MLB and the Rozelle Rule in the NFL. A few issues have required judicial intervention.

WHA

In 1972 the World Hockey Association (WHA) brought suit against the NHL alleging monopoly control over the player market akin to the AFL v. NFL and USFL v.

NFL disputes. The end result, after 15 separate lawsuits filed by different WHA teams and several rulings, was that all parties except one reached an antitrust settlement agreement. The claims made by the WHA team which did not decide to settle were later dismissed by the Supreme Court in Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972), which granted an injunction barring the NHL from seeking injunctions under state law to prevent its players from moving to the new WHA. While the WHA won the battle, it ultimately lost the war as it went out of business in 1979. However, the lawsuit was the impetus for the beginning of the end of the reserve system in place at that time in the NHL.

McCourt v. California Sport

In McCourt v. Cal. Sports, Inc., 600 F.2d 1193 (6th Cir. 1979), the Sixth Circuit Court of Appeals addressed whether the non-statutory labor exemption extended beyond impasse. Dale McCourt brought suit against the NHL teams the Los Angeles Kings and the Detroit Red Wings for unwillingly trading him from the Red Wings to the Kings. The NHL, however, had a modified Rozelle Rule, which allowed a restricted free agent to be traded to another team for compensation after approval by an arbitrator (rather than the Commissioner, as in the NFL).

This process was included in the 1975 CBA in place at that time, but it too discouraged teams from signing free agents.

Arbitrator Ed Houston ordered that Detroit transfer McCourt's NHL rights to Los Angeles as compensation for signing restricted free agent Rogie Vachon on Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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August 8, 1978. The Red Wings had been offering Jim Rutherford and Bill Lochead as compensation, but the Kings demanded McCourt. Houston sided with Los Angeles, which was offering McCourt a $3 million contract.

The McCourt court applied the Mackey test and found that the reserve system was incorporated into the collective bargaining agreement through bona fide arm's length bargaining and so it was exempt from the antitrust laws. Though McCourt lost his attempt to obtain in injunction, the NHL did slowly abolish its reserve system, beginning with modified changes to free agency compensation in its 1982 CBA.

▪ *Single Entity Structure*

Even though the individual teams in the Big Four may compete with each other on the court or field, for antitrust and labor purposes a question often arises as to whether the teams are actually "competing" with each other from a traditional business perspective. This was at the heart of the American Needle case involving the NFL, discussed above. Professional sports leagues are usually not considered single entities under antitrust law

especially since the teams are separately owned by individuals or corporations.

*However, in the 1990s, leagues such as the Women's National Basketball Association (**WNBA**), Major League Soccer (**MLS**), Women's United Soccer Association (**WUSA**), and Arena Football League (**AFL**) were established so that the league actually owns all the teams and is thus considered a **single entity**. In this league structure, while teams compete with each other for wins and losses, the league is able to keep salaries manageable, since the league has control over such matters. The arrangement would also serve as a defense to a claim of antitrust law violations by players and teams since there was only one legal enterprise: the league itself.*

Fraser

In Fraser v. Major League Soccer, 97 F.Supp.2d 13 (2000), 284 F.3d 47 (1st Cir. 2002), Iain Fraser and other players contended that the Major League Soccer (MLS) single entity structure was a pretext (i.e., a lie) in order to allow MLS owners to eliminate competition in the market for player services. Fraser and the players lost their claim after a jury found that MLS competes in an international market and did not have enough power to collude in violation of section 1 of the Sherman Act. However, the First Circuit Court of Appeals never clearly answered whether the MLS was actually a single entity and should be immune from antitrust challenges. In fact, it did characterize the league as a hybrid arrangement.

MLS did win the class action lawsuit filed by Fraser and the others, yet it changed its ownership model after this case. Each team is now separately owned.

WNBA

Women's National Basketball Association

MLS

Major League Soccer

WUSA

Women's United Soccer Association

AFL

Arena Football League

single entity

league model sparingly used in which the league owns all the teams and therefore controls all player salaries as well

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Indeed even leagues such as the WNBA and Women's United Soccer Association (WUSA) (folded in 2003) have moved away from the single entity model to individual ownership also referred to as the ***franchise model****.*

▪ ***NCAA***

The NCAA and its member institutions use student-athletes as their labor. Student-athletes are not considered employees under the law and so there are no legal issues involving labor in the intercollegiate environment akin to those in professional sports. However, the NCAA has had a remarkable history of antitrust lawsuits filed against it. Some of the cases stand as the more prominent in antitrust history.

The NCAA has won most of the antitrust claims against it, though there have been two major antitrust losses in NCAA v. Bd. of Regents of Univ. of Oklahoma, 468

U.S. 85 (1984) and Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998). As billions of dollars generated by television and media rights contracts continue to line the pockets of the NCAA, major conferences and individual athletic departments, there will certainly be more legal challenges to NCAA policies and the way its shares (or does not share) its revenue among schools in the same Division.

Amateurism and Eligibility Rules

While the NCAA is not exempt from scrutiny under the Sherman Act, its numerous amateurism and eligibility rules appear to be quite legal at this point in time.

Courts have recognized that the NCAA was originally established to promote amateurism in college sports and to integrate intercollegiate athletics into the educational programs of its member institutions.

The NCAA modified its rules over time to emphasize that student-athletes are supposed to be students first. These rules form restrictions, but they appear to be reasonable. For example, the NCAA has now limited the number of hours per week that a student-athlete may be supervised to practice in-season to 20 hours per week and no more than 4 hours per day. NCAA also restricts eligibility to five years to play four seasons (with a few exceptions). The NCAA restricts the number of coaches per team and number of scholarships that can be granted. None of these restrictive caps appear to violate federal antitrust laws as they do not serve a commercial purpose.

However, attempts by the NCAA to restrict coaching salaries or to limit the number of times an institution can appear on television have been ruled violations of federal antitrust laws by the courts. Indeed, courts have held that the motivation behind these rules was commercial in nature. The following case summaries (in chronological order) are some of the more prominent cases which have involved the NCAA.

Hennessey

In Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977), the NCAA had a rule that limited the number of assistant football and basketball coaches Division I institutions could employ. The assistant coaches failed to show that the limit on the ***franchise model***

common model in which teams within a league are individually owned rather than all of them being owned by the league itself

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number of coaches was an unreasonable restraint of trade after weighing the pro-and anticompetitive benefits of the restriction. The Fifth Circuit Court of Appeals upheld the rule restricting the number of coaches.

Justice

In Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983), the NCAA denied student-athlete eligibility to participate in an intercollegiate sport if the student-athlete accepted pay for participation in the sport. This has always been the general rule. Several members of the University of Arizona's football team had received cash payments as compensation for their football skills. The NCAA sanctioned the team and prohibited a post-season appearance. Though the federal district court held that the NCAA's amateurism rules were held to have a substantial effect on interstate

commerce, the NCAA won because the sanctions were reasonably related to NCAA goals of preserving amateurism and promoting fair competition.

Board of Regents

In arguably the greatest defeat in its legal history, in NCAA v. Bd. of Regents of Univ. of Oklahoma & Univ. of Georgia Athletic Ass'n. , 468 U.S. 85 (1984), the NCAA wanted to control television contracts by being the exclusive party to negotiate a maximum of 28 national television broadcasts per year, and to prevent individual schools from negotiating their own deals. Though the NCAA wanted to level the playing field by restricting the amount of times the big-time schools could appear on television, the Supreme Court held in a 7-2 decision that the NCAA's conduct of awarding television rights of college football games to only two networks (ABC and CBS) violated antitrust laws and was an unreasonable restraint on competition.

After this decision, regional networks began to appear throughout the United States. It is important to recognize that this was a time well before the Internet, and cable television was in its infancy. This case established the precedent needed to televise college sports on an unlimited basis.

Gaines

In Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990), the NCAA revoked Brad Gaines' eligibility to participate in football at Vanderbilt University since he chose to enter the NFL draft though he was not drafted. Gaines sought reinstatement, but the NCAA declared him to be ineligible. At that time, the NCAA had no-draft and no-agent rules. The case helped to determine that the NCAA's eligibility rules are generally insulated from the Sherman Act.

Banks

In Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), remarkably similar to the Gaines decision, the NCAA revoked Braxton Banks' eligibility to participate in an intercollegiate sport (football) at the University of Notre Dame since he chose to enter a professional draft and hired a lawyer-agent to help him secure a position with a professional team, and both actions were violations

of NCAA rules. The Seventh Circuit Court of Appeals upheld the rules, supporting the NCAA's intent to create a clear line of demarcation between amateur and professional sports.

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Law

*In Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998), the NCAA membership voted to establish the restricted earnings coach (**R.E.C.**) rule, which capped the amount of money certain coaches could make during any given year. This rule applied during the 1992–93 season to the salaries of entry-level, assistant basketball coaches primarily and limited them to $12,000 during the academic year and $4,000 during the summer months. The rule was enacted as a cost-cutting measure among NCAA institutions that claimed that it also provided for a more competitive balance among member institutions.*

A federal jury found that the rule violated antitrust laws and awarded $22.3 million, which was automatically tripled to $66.9 million under antitrust laws. Eventually the case settled out of court for $54.5 million in 2000. In the end, the procompetitive justifications advanced for this restraint did not outweigh the costs. There are no more restrictions on how much college coaches can make, which continues to fuel an arms-race among the major

college athletic departments, some of which pay coaches more than college presidents or the president of the United States.

Adidas

In Adidas America, Inc. v. National Collegiate Athletic Ass'n, 40 F.Supp.2d 1275 (D.Kan.

1999), Adidas tried to enjoin the NCAA from enforcing a bylaw that they claimed unreasonably restrained trade by limiting the size of a manufacturer's logo on a uniform. Today, the NCAA Bylaw 12.5.4, Use of Logos on Equipment, Uniforms and Apparel states in subsection (b):

The student-athlete's institution's official uniform (including numbered racing bibs and warm-ups) and all other items of apparel (e.g., socks, head bands, T-shirts, wrist bands, visors or hats, swim caps and towels) shall bear only a single manufacturer's or distributor's normal label or trademark (regardless of the visi-bility of the label or trademark), not to exceed 2 1/4 square inches in area (rect-angle, square, parallelogram) including any additional material (e.g., patch) surrounding the normal trademark or logo. The student-athlete's institution's official uniform and all other items of apparel shall not bear a design element similar to the manufacturer's trademark/logo that is in addition to another trademark/

logo that is contrary to the size restriction.

Adidas claimed that the NCAA unreasonably restrained trade and engaged in a group boycott in violation of section 1 of the Sherman Act and attempted to monopolize trade in violation of section 2. Because Adidas could not show the requisite anticompetitive effect in a properly defined relevant market, the court dismissed its claims against the NCAA.

Smith

As mentioned previously in this textbook, Renee Smith was an undergraduate volleyball player at St. Bonaventure University who graduated in two and one-half years and then enrolled in two different graduate school programs, one being law school. She attempted to play volleyball at the other university, which violated NCAA transfer and eligibility rules at that time.

The NCAA did not grant her a waiver and disallowed her eligibility from following her, citing its Bylaws that said ***R.E.C.***

restricted earnings coach

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that a student-athlete could only play as a post-graduate student at the same institution.

Smith sued under Title IX and antitrust laws, but in Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) the Supreme Court held in favor of the NCAA and did not even rule on the outright dismissal of the antitrust claims by both the lower courts, one being the Third Circuit Court of Appeals. Smith had claimed that the NCAA's transfer rule violated the Sherman Antitrust Act because it operated as an unreasonable restraint on trade, but such allegations were dismissed. The NCAA later changed its post-graduate transfer eligibility rules to allow a student-athlete to transfer to another school and participate with remaining eligibility under certain conditions as stated in Bylaw 14.1.9.1, One-Time Transfer Exception.

Tanaka

*In Tanaka v. Univ. of S. Cal., 252 F.3d 1059 (9th Cir. 2001), Rhiannon Tanaka, a soccer player recruited by the University of Southern California (**USC**), wanted to transfer to the University of California, Los Angeles*

*(**UCLA**), after her freshman year. She alleged that the NCAA and conference transfer rules, which resulted in her losing a season of eligibility, were violations of the Sherman Antitrust Act.*

In November 1999, the trial court dismissed the her claims on the grounds that the transfer rules challenged were not commercial and therefore not subject to Sherman Act scrutiny. The Ninth Circuit Court of appeals affirmed the lower court's dismissal and then denied the plaintiff's petition to rehear the case as well.

NIT

*The NCAA's March Madness basketball tournament has traditionally had a competitor known as the National Invitational Tournament (**NIT**). NIT was established in 1938 by five New York City-area colleges, which comprised NIT's parent organization, the Metropolitan Intercollegiate Basketball Association (**MIBA**). These five schools include Manhattan College, St. John's University (New York), New York University, Fordham University, and Wagner College.*

The MIBA filed an antitrust claim against the NCAA claiming that the increase in number of teams in the March Madness tournament (from 32 to 64 and then to 65) coupled with a mandate that NCAA schools that were selected for March Madness had to attend its tournament rather than the NIT illegally injured the NIT in violation of federal antitrust laws. In Metropolitan Intercollegiate Basketball Ass'n v. NCAA, 339 F.Supp.2d 545 (S.D.N.Y. 2004), the NCAA faced another possible huge defeat, as in the Bd. of Regents and Law cases, but the case was eventually settled out of court in a strange way: the NCAA bought out the NIT, and each of the five MIBA schools each would receive $1 million annually over the next nine years.

Walk-on Football Players

The case In re NCAA I-A Walk-on Football Players Litigation, 398 F.Supp.2d 1144

*(W.D. Wash. 2005) involved the issue of whether or not the NCAA's rule limiting **USC***

University of Southern California

UCLA

University of California, Los Angeles

NIT

National Invitational Tournament

MIBA

Metropolitan Intercollegiate Basketball Association

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the number of walk-ons violated antitrust laws. Former Washington walk-on wide receiver and special teams player Andy Carroll, who graduated in 2000, filed a class-action lawsuit on behalf of all non-scholarship athletes on any Division I team roster during the previous four years. He sued the NCAA in U.S. District Court in Seattle claiming that the NCAA's rules limiting the number of scholarships that a school may award in each sport violate antitrust law. The lawsuit sought to end the scholarship award limitations and asked that all Division I-A walk-ons in the last four years be compensated for tuition costs. In 2006, the federal district court in the

Western District of Washington denied class certification to the plaintiffs and the case fizzled out.

Warrior Sports

In 2010, the Sixth Circuit Court of Appeals held that the NCAA did not violate federal antitrust law or interfere with the business of a lacrosse stick manufacturer by changing its rules governing equipment in the sport. Warrior Sports, which makes sporting equipment, had argued that the NCAA's decision to change the allowable dimensions of lacrosse sticks had damaged the company's business, but the court ruled that the rule change affected all companies similarly and did not in any way single out Warrior.

Warrior Sports, Inc. v. NCAA, 2010 U.S. App. LEXIS 17650 (6th Cir. 2010).

Cartel

*Many consider the NCAA to engage in **cartel** behavior: that is, a combination of producers of a product (i.e., colleges and universities) joined together to control its production, sale and price. In technical terms, inputs are controlled and costs are lowered by not paying student-athletes, limiting the number of student-athletes, coaches, recruiting periods, etc. Indeed, the BCS (Bowl Championship Series) postseason bowl system and the NCAA March Madness basketball tournament are set up to reward the larger conferences much more favorably than the others.*

BCS

*The Bowl Championship Series (**BCS**) was created in 1998 and joined six of the largest football conferences and four major bowl games, adding the extra "national championship" game as of the 2006–07 bowl season. Prior to the BCS, there was the Bowl Coalition (1992–94) and the Bowl Alliance (1995–97).*

*The BCS is based upon a contract between the University of Notre Dame, the six Football Bowl Subdivision (**FBS**) conferences (Big East, Big 10, Big 12, Pac-12, ACC, SEC) and the Orange, Rose, Fiesta, and Sugar Bowls, which rotate hosting the BCS National Title Game. At least six of the ten spots are automatically filled by BCS conference teams. The five other*

conferences (Conference USA, the Mid-American Conference (MAC), the Mountain West, Sun Belt, and Western Athletic Conferences) and their teams are considered non-BCS schools.

Football in Division I-A (FBS) is the only sport not to have a national championship. As of 2011, there are 35 total bowl games in Division I, which means more ***cartel***

an agreement among competitors that fixes prices and restricts competition in order to maintain a monopoly

BCS

Bowl Championship Series

FBS

Football Bowl Subdivision, formerly known as Division I-A *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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than half of all Division I schools attend post-season football bowl games.The Football Championship Subdivision (formerly known as I-AA) has a playoff system that works efficiently and only one team ends the post-season competition as the clear-cut national champion.

Governmental Intervention

There has been increasing concern over whether the BCS system violates federal antitrust laws, and whether it constitutes an illegal restraint of trade. In recent years, the University of Hawaii (undefeated in 2008), University of Utah (which just joined the Pac-12 in 2011 but was undefeated in 2005, 2009), Texas Christian University (undefeated in 2010, 2011), and Boise State University (2007, 2010, 2011) have received at-large invitations to a BCS game, but never for the BCS

National Championship Game. In 2008, 81 percent of the BCS's $45 million payout went to the big 6 conferences, and 18 percent went to the others.

After many years of complaints about the BCS system, the DOJ met with Bill Hancock, Executive Director of the BCS, in the summer of 2011. They discussed the BCS, why college football remains the only sport not to have a national championship playoff, and whether the BCS does or does not violate federal antitrust laws by giving some schools and conferences preferential access to lucrative bowl games.

The DOJ had on May 18, 2011 sent a letter to NCAA President Mark Emmert asking the same questions, but he deferred his answers to the BCS. As of the time of this writing, Mark Shurtleff, the attorney general of the state of Utah, has stated that he has plans to sue the BCS for a violation of federal antitrust laws as well.

The Future

The NCAA has been under attack by plaintiffs and their lawyers for decades, but the NCAA has won most of the antitrust cases against it with the exception of two huge defeats: NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984) and Law v.

NCAA, 134 F.3d 1010 (10th Cir. 1998). The NIT case could have been disastrous for the NCAA, but it settled out of court. It appears that when the NCAA rules are commercial in nature that they are not viewed favorably by the courts and have been found to violate federal antitrust laws. Many are eager to see how the DOJ will view the BCS system and whether the government will intervene with the BCS and the NCAA.

White

In White v. NCAA, which was ultimately settled, the plaintiffs alleged that the NCAA and its member institutions violated antitrust laws by engaging in a horizontal agreement which excludes the student-athlete's scholarship (grant-in-aid) from the full cost of attendance at a university, which would include "school supplies, recommended textbooks, laundry expenses, health and disability insurance, travel costs and incidental expenses." White v. NCAA, Stipulation and Agreement of Settlement, No. CV-06-0999 RGKK (C.D. Cal. Filed Jan. 28, 2008). In the end, the rules were not changed after the White case, yet discussion about whether to pay student-athletes outright has become part of the national discourse.

Agnew

In 2010 a lawsuit was filed against the NCAA by former Rice University student-athlete Joseph Agnew claiming that the NCAA conspires with colleges to prohibit multi-year athletic scholarships. Agnew, who started for Rice in Houston as a *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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freshman in 2006, lost his scholarship after on-the-field injuries before his junior year. Agnew claims that the one-year scholarship contracts are a conspiracy which restrains trade and violates antitrust law. The case is Agnew v. NCAA, 10-04804, U.S.

District Court, Northern District of California.

The NCAA appears to be in a state of flux and extremely defensive with regard to potential violations of antitrust laws. In 2011 Mark Emmert called 50 college presidents to discuss the current state of the NCAA including whether or not student-athletes should be compensated for more than just their tuition and books. Pressure continues to mount as salaries for college coaches in revenue sports, conference commissioners, and even Mark Emmert's salary, continues to skyrocket into the multi-millions while student-athletes are prohibited from even trading their jerseys for tattoos or selling other memorabilia on eBay for anything of value.

The following case presents a recent unsuccessful antitrust claim by a college coach against the NCAA and his former employer, the University of Kentucky.

▪ ***CASE 13*** *Claude L. Bassett, Plaintiff-Appellant, v. The National Collegiate Athletic Association and University of Kentucky Athletic Association, Defendants-Appellees* ***United States Court of Appeals for the Sixth Circuit I.***

June 9, 2008, Decided

Appellant Claude L. Bassett was an assistant football coach for the University of Kentucky ("UK") from

OPINION BY: BOYKO

1997-2000 when he resigned due to allegations of

NCAA rules infractions. Bassett coached at Brigham

OPINION

Young University for twelve years prior to joining the Appellant Claude L. Bassett ("Bassett") was an assistant UK football program and thereafter, Bassett was hired football coach for the University of Kentucky ("UK") from by the UK head football coach, Hal Mumme, as recruit-1997–2000 when he resigned due to allegations of The ing coordinator and assistant coach.

Bassett's employ-National Collegiate Athletics Association ("NCAA") rules ment contract was with the UKAA, which serves as the infractions. Bassett filed suit against NCAA, the South-athletic department for the UK. On November 19, 2000, eastern Conference ("SEC") and the University of

Larry Ivy, the UK's athletic director, called Bassett and Kentucky Athletic Association ("UKAA"), alleging conspir-Mumme to a meeting, wherein Ivy confronted Bassett

acy to violate antitrust laws, fraud, civil conspiracy and about alleged rules violations. In the course of the meet-tortious interference with contract. The district court ing, Ivy asked Bassett to resign in light of the allegations granted NCAA's, the UKAA's and the SEC's motions to

of impropriety. In exchange for Bassett's resignation, Ivy dismiss the antitrust and civil conspiracy claims and assured Bassett no further actions would be taken

granted NCAA's and the SEC's motions to dismiss Plain-against him. As a result of the November 19, 2000 meet-tiff's fraud claims. Later, the district court granted suming Bassett resigned. The following day, the UK dis-

mary judgment for NCAA and the UKAA on Plaintiff's

closed that Bassett, along with several other assistants, remaining claims. Bassett now appeals the district court's had been fired. The UK conducted an internal investi-granting of NCAA's motion to dismiss the antitrust claim gation of its football program to determine if any NCAA and the district court's granting of summary judgment on rules violations occurred. The investigation proceeded the UKAA's fraud and alleged breach of contract claims.

with assistance from the SEC Commissioner and lasted The Appellant's appeal is not well taken. We find the through February 2001. On February 28, 2001, the UK

district court correctly determined Appellant's antitrust turned over the results of its internal investigation to claim was not commercial in nature and failed to allege NCAA. As a result, NCAA issued official inquiry letters

an antitrust injury. Furthermore, Appellant failed to to Bassett, regarding alleged infractions, who responded demonstrate reasonable reliance and causation on his in writing through his counsel. Bassett declined to

fraud claim and Appellant failed to plead a breach of appear at the hearing before NCAA, to address allega-contract claim and, even if he did, such contract would tions which included, improper recruiting inducements be void ab initio as against public policy.

provided to prospective student athletes and high school (continued)

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coaches and academic fraud in aiding enrolled student Even if they were commercial in nature, the district athletes by preparing their papers or having student court reasoned, Bassett had still failed to state a claim assistants type papers for enrolled student athletes.

because he failed to plead an antitrust injury. The dis-Shortly thereafter, NCAA imposed sanctions against

trict court relied on Brunswick Corp. v. Pueblo Bowl-the UK for violations of NCAA rules. In addition to the O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed.

sanctions against the UK, NCAA issued a show cause

2d 701 (1977), which defined antitrust injury as order requiring Bassett and any NCAA member institu-

(1) "injury of the type the antitrust laws were intended tion seeking to hire him in an athletically related posi-to prevent" and (2) injury "that flows from that which tion, from January 21, 2002 through January 30, 2010, to makes defendants' acts unlawful." The district court appear before NCAA Division I Committee on Infrac-went on to say, "because the purpose of the antitrust tions to "consider whether the member institution

laws is to protect competition rather than competitors, should be subject to the show cause procedures of

a plaintiff must allege injury, not only to himself, but to Bylaw 19.6.2.2-(1), which could limit the coach's atha relevant market. Thus, failure to allege an anti-

letically related duties at the new institution for a des-competitive impact on a relevant market amounts to a ignated period." On September 17, 2004, Bassett

failure to allege an antitrust injury." (JA 88) (citing filed his Complaint against the SEC, NCAA and the

Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, UKAA.

1087 (7th Cir. 1992), Brown Shoe Co. v. United States, 370

U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)).

II.

The district court determined Bassett's Complaint

On appeal, Bassett claims the district court erred in

"failed to allege any anticompetitive effect on an iden-granting Appellee NCAA's motion to dismiss Bassett's tifiable market, failed to allege any decrease in the sup-antitrust claim on the basis of its finding that NCAA's ply

or quality of coaching services, increase in cost of enforcement of its rules did not affect commerce and coaching services, or any harm to consumers resulting Bassett had failed to state an antitrust injury. Bassett from his punishment." (JA 89). The district court con-further contends the district court erred in granting cluded, "Bassett's conclusory allegations of an antitrust the UKAA's summary judgment motion on Bassett's

injury-unsupported by any factual allegations that

fraud and breach of contract claims when it found Bas-resemble a cognizable antitrust claim-are insufficient."

sett failed to demonstrate causation and reasonable

(JA 89).

reliance.

On appeal, Bassett contends "the trial court misunder-

[…]

stood the trade practice at issue." While Bassett claims the district court incorrectly presumed Bassett was

III.

attacking NCAA's standards for defining improper conduct, Bassett argues he was challenging NCAA's

Bassett's Antitrust Claim Against NCAA

enforcement of its standards. Bassett contends NCAA

Bassett's Complaint alleges NCAA, the UKAA and the

permits member schools to deflect blame from them-

SEC conspired to prevent Appellant from coaching at

selves to coaches and such action is commercial in

any NCAA member school in violation of the Sherman

nature as it affects the labor market for all college Antitrust Act, 15 U.S.C. § 1-2 (2000) and the Clayton coaches. "The restraint at issue here is NCAA's boycott Act, 15 U.S.C. § 15 (2000), as the conspiracy amounts of coaches unjustly or excessively punished because of to a group boycott. The district court determined

its disciplinary system. These bans affect interstate Bassett's antitrust allegation failed to state a claim commerce by preventing schools across America from

because NCAA's actions were not commercial in

hiring boycotted coaches to generate sports revenue

nature and therefore, did not violate the Sherman

and by preventing these coaches from seeking gainful Act. The district court held "enforcement of the

employment with NCAA institutions." (Final Reply

rules at issue here is not within the purview of anti-Brief of Plaintiff-Appellant at 6-7). "The restraint at trust law as it is not related to the NCAA's commercial issue here-the group boycott of coaches without ade-or business activities." (JA 88). Citing Smith v. NCAA, quate due process-is rooted in the commercialization 139 F.3d 180, 186 (3d Cir. 1999), the district court of intercollegiate athletics." (Id. at 11). Bassett con-held, "[r]ather than intending to provide the NCAA

tends NCAA's disciplinary scheme impacts commerce

or any of its member schools with a commercial

because the discipline involves financial sanctions.

advantage, enforcement of rules governing recruiting, Bassett argues his Complaint alleges sufficient facts improper inducements, and academic fraud 'primarily

demonstrating the commercial nature of the trade

seek[s] to ensure fair competition in intercollegiate restraint. According to Bassett, the show-cause sanction athletics.'" (JA 88).

issued by NCAA may end a coach's career.

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Bassett cites to paragraphs 16-24 and 51-55 of his Com-reason. "As a consequence, most antitrust claims are plaint, which he contends provide the necessary facts to analyzed under a 'rule of reason,' according to which support his antitrust claim against NCAA. The perti-the finder of fact must decide whether the questioned nent paragraphs of Bassett's Complaint may be summa-practice imposes an unreasonable restraint on compe-

rized as follows:

tition, taking into account a variety of factors, including specific information about the relevant business, its (a) Bassett spends a great deal of time exposing

condition before and after the restraint was imposed, what he calls the "student-athlete myth" and

and the restraint's history, nature, and effect." Id.

the money-making scheme of college football.

"Some types of restraints, however, have such predict-

(b) The thrust of his allegations is how NCAA relies able and pernicious anticompetitive effect, and such on its members to perform the bulk of investi-limited potential for procompetitive benefit, that they gating alleged infractions, yet fails to abide by

are deemed unlawful per se." Id. (citing Northern Pacific the due process guarantees under NCAA's con-R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L.

stitution and bylaws. He then alleges a conspir-

Ed. 2d 545, (1958)). "Per se treatment is appropriate acy by NCAA which violates the Sherman Act

"[o]nce experience with a particular kind of restraint and Clayton Act via denial of due process.

enables the Court to predict with confidence that the NCAA contends Bassett admitted to rules infractions

rule of reason will condemn it." Id. In the case before while coaching at the UK and therefore, the show cause this Court, Section One of the Sherman Act applies if order issued against him is the result of his own admitted NCAA's enforcement process and sanctions are com-misconduct and not a conspiracy to prevent him from

mercial in nature. See Worldwide Basketball & Sport coaching in violation of federal antitrust laws. NCAA Tours, Inc. v. NCAA, 388 F.3d 955, 958 (6th Cir. 2004).

argues it is ironic that Bassett complains the show-cause The Clayton Act provides a private right of action when order and sanctioning conduct constitute commercial

a person is "injured in his business or property by rea-activity when the rules enforced by NCAA, in fact, punish son of anything forbidden in the antitrust laws." 15

the attempted commercialization of student athletes and U.S.C. § 15. The district court, in analyzing Bassett's amateur intercollegiate athletics. Furthermore, NCAA Sherman Act/Clayton Act claim, determined the Sher- contends Bassett has failed to allege an antitrust injury.

man Act was not applicable because NCAA action was

Rather, according to NCAA, Bassett's Complaint alleges not commercial in nature and Bassett's Complaint

only injury to Bassett and is devoid of facts alleging failed to allege an antitrust injury. The district court anticompetitive effects on a discernible market.

relied on our decision in Worldwide Basketball and Sport NCAA also contends Bassett is barred by the doctrines Tours, Inc. v. NCAA, 388 F.3d 955, 958 (6th Cir. 2004), of res judicata, collateral estoppel and "law of the case"

which held the Sherman Act applies when the alleged

because he failed to appeal the district court's dismissal violation is commercial in nature. The district court of Bassett's similar claims against the SEC and the

determined the alleged violation in Bassett's Complaint UKAA, which are now final judgments. Finally, NCAA

stemmed from NCAA's "enforcement program and the

contends the district court, on summary judgment,

imposed sanctions arising therefrom." Therefore, in

found Bassett had failed to demonstrate that NCAA

order for the Sherman Act to apply, the enforcement

acted improperly in following its established enforce-action "must be commercial in nature." (JA 87). In

ment procedures. Therefore, NCAA claims Bassett is

examining court precedent in applying the Sherman

collaterally estopped from relitigating the propriety of Act to NCAA cases, the district court noted that some NCAA's enforcement process.

NCAA rules had been found to be commercial in

nature. See Worldwide Basketball at 955; National Collegiate ***Commercial Activity***

Athletic Association v. Board of Regents, 468 U.S. 85, 98, The Sherman Act states, "[e]very contract, combina-104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). The district tion in the form of trust or otherwise, or conspiracy, court also discussed a case wherein NCAA action was

in restraint of trade or commerce among the several

held to be noncommercial. See Smith v. NCAA, 139

States, or with foreign nations, is declared to be

F.3d 180, 186 (3rd Cir. 1998) vacated on other grounds by illegal." 15 U.S.C. § 1. The United States Supreme NCAA v. Smith, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed.

Court has held Congress intended to outlaw only

2d 929 (1999). The district court found the reasoning of

"unreasonable" restraints. State Oil Co. v. Khan, 522

the Third Circuit in Smith applicable to the facts in this U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). If case. In Smith, the issue before the Court was NCAA's a court determines the activity at issue is subject to the eligibility rules, and the Third Circuit affirmed dis-Sherman Act it must determine if the restraint on trade missal of the antitrust claims against NCAA, holding is unreasonable under the per se rule or the rule of they were not commercial. The district court in the

(continued)

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present case held, like the eligibility rules in Smith, encompasses both the rule and its enforcement. To

NCAA's enforcement of its rules governing recruiting, do otherwise would result in an incomplete analysis

improper inducements and academic fraud, did not

contrary to Worldwide Basketball. Such an examination give NCAA a competitive advantage, rather, they were demonstrates the enforcement of non-commercial

intended to "ensure fair competition in intercollegiate rules is not a commercial activity, therefore, we find athletics." (JA 88), quoting Smith at 185.

the allegations in Bassett's Complaint fail to state a We agree with the district court's analysis. In order to claim under the Sherman Act and we affirm the dis-state a claim under the Sherman Act there must be a

missal by the district court of Bassett's antitrust claim.

commercial activity implicated. As we held in Worldwide The district court also determined Bassett failed to Basketball, the appropriate inquiry is "whether the rule allege an antitrust injury. The district court held Bas-itself is commercial, not whether the entity promul-

sett's Complaint alleges only injury to Bassett and does gating the rule is commercial." Worldwide at 959.

not allege injury to a relevant market as required by Although the question before us is whether the

case law. (JA 89), (citing Banks v. National Collegiate Ath-enforcement activities of NCAA violate the Sherman

letic Ass'n, 977 F.2d 1081, 1087 (7th Cir. 1992); Brown Shoe Act and not a particular rule, the analysis must focus Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L.

on the enforcement action itself and not NCAA as a

Ed. 2d 510 (1962)). "Taken as a whole, the legislative commercial entity. The Smith decision further supports history illuminates congressional concern with the pro-such analysis; "rather than focus on Smith's alleged tection of competition, not competitors, and its desire injuries, we consider the character of the NCAA's

to restrain mergers only to the extent that such combi-activities." Smith at 185. Bassett's Complaint contains nations may tend to lessen competition." Brown Shoe at considerable information on the size and scope of col-320.

Bassett's Complaint alleges that many coaches, lege football and the revenues generated by it. The

including Bassett, have been unfairly investigated or Complaint is wholly devoid of any allegation on the

sanctioned through NCAA's enforcement process that

commercial nature of NCAA's enforcement of the

fails to apply the due process protections contained in rules it determined Bassett had violated. Bassett's Com-NCAA's enforcement process. While the Complaint

plaint contends NCAA's enforcement process violated

contains numerous allegations of the unfairness of the its own due process requirements and, as a result, con-proceedings that resulted in Bassett's show cause sanc-stitutes a Sherman Act violation. We find Bassett's Com-tion, the Complaint is devoid of any allegation of the plaint lacks the critical commercial activity component anticompetitive effect on the coaching market as

required to permit application of the Sherman Act.

pointed out by the district court. In Banks, the Seventh Similar to the eligibility rules in Smith, NCAA's rules on Circuit held,

recruiting student athletes, specifically those rules pro-the fundamental requirement at issue in this dis-

hibiting improper inducements and academic fraud,

pute is that of a sufficient allegation of anticompet-are all explicitly non-commercial. In fact, those rules itive effects that would result or have resulted from are anti-commercial and designed to promote and ensure the defendants' actions; the absence of such alle-competitiveness amongst NCAA member schools. Viola-

gations is ordinarily fatal to the existence of a

tion of the applicable NCAA rules gives the violator a cause of action. The purpose of the Sherman Act

decided competitive advantage in recruiting and retainis to rectify the injury to consumers caused by

ing highly prized student athletes. It also violates the diminished competition; it is for this reason that

spirit of amateur athletics by providing remuneration Congress provided a treble damage recovery for

to athletes in exchange for their commitments to play private parties willing to initiate an enforcement

for the violator's football program. Finally, violators of action. Thus, the plaintiff must allege, not only

these rules harm the student-athlete academically when an injury to himself, but an injury to the market as coaches and assistants complete coursework on behalf well….

of the student-athlete.

If the rules themselves and the corresponding sanc-

Banks at 1087-88.

tions are not commercial, as the reasoning in Smith sup-This circuit has held, "[a] private antitrust plaintiff, in ports, then the enforcement of those rules cannot be addition to having to show injury-in-fact and proximate commercial. As long as the enforcement of non-cause, must allege, and eventually prove, "antitrust commercial rules is reasonably and rationally related injury." In re Cardizem CD Antitrust Litigation, 332 F.3d to the rules themselves, we find enforcement is a non-896, 909 (6th Cir. 2003). Plaintiff, alleging violation of commercial activity. Although Bassett seeks to compart-

the Sherman Act, may allege antitrust injury either by mentalize the enforcement in his analysis, we must

alleging the plaintiff's injury was caused by defendant's examine the activity of NCAA, and that examination

engaging in antitrust violations, or by alleging the *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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antitrust violation was the necessary predicate for its that, despite the absence of any co-conspirators, he has injury. Id. at 914.

still alleged that NCAA was involved in a conspiracy.

Bassett's Complaint contains no allegations of the

Bassett would then have us remand this case to the dis-effect of NCAA's enforcement of its non-commercial

trict court so that it could preside over a conspiracy rules on the coaching market. It merely states NCAA's claim with only one conspirator, NCAA. We cannot log-actions have resulted in the unfair investigation and ically entertain such arguments.

sanction of coaches denied due process. Bassett's

[…]

alleged injury stems from the denial of his due process Therefore, we affirm the district court's dismissal of rights and the conspiracy which deprived him the

Bassett's antitrust claim against NCAA; affirm its grant-opportunity to defend himself against "rules violations ing summary judgment for the UKAA on Bassett's

that led to the ban." Bassett does not allege the ban fraud claim and find no breach of contract claim was resulted from some anticompetitive purpose. Rather,

alleged in Bassett's Complaint and, therefore, is not as the Complaint states, appellant's injury, i.e. the before this Court.

ban, was the result of the rules violations. Therefore, we agree with the district court that Appellant's claim Finally, the Court finds Bassett's Appeal was not frivo-fails to allege an antitrust injury sufficient to survive a lous and declines to award sanctions and costs.

motion to dismiss under Fed. R. Civ. P. 12(b)(6) and we affirm the district court's holding accordingly.1

FOOTNOTE

As alleged in Bassett's Complaint, it is the conspiracy of 1. Finally, though this issue was not raised by

three parties-NCAA, the SEC and the UKAA-that

NCAA, we find an additional ground for dismissal

resulted in the claimed violation of the Sherman Act of Bassett's antitrust claim. Paragraph 52 of Appel-and constitutes a group boycott. (Notably, Bassett has lant's Complaint states,

not alleged a conspiracy between NCAA's member

institutions.) However, once the district court dismissed The NCAA, SEC and the UKAA conspired to

Bassett's antitrust conspiracy claims against NCAA's prevent Coach Bassett from coaching at any

alleged co-conspirators, the SEC and the UKAA, Bas-

of the NCAA's over 1200 member schools.

sett's antitrust conspiracy claim against NCAA failed This conspiracy violates the Sherman Anti-because, as Bassett himself recognizes, a conspiracy trust Act (15 U.S.C. § s1-2) and the Clayton

requires more than one conspirator. Moreover, by fail-Act (15 U.S.C. § 15) as an unlawful group boying to appeal the dismissal of his antitrust claims

cott of Coach Bassett. In banning Coach Bas-

against the SEC and the UKAA, Bassett has effectively sett from coaching, these defendants violated

abandoned his antitrust conspiracy claim against

the letter and spirit of the NCAA rules

NCAA. In other words, Bassett's failure to contest the designed to afford Coach Bassett due process

dismissal of his claims against NCAA's alleged co-

in defending himself against the rules viola-

conspirators means that he is asking this Court to find tions that led to the ban. (Emphasis added).

- ***The Sports Broadcasting Act***

The federal Sports Broadcasting Act of 1961 (15 U.S.C. §§ 1291-95), signed into law by President John F. Kennedy, exempts television agreements entered into by professional football, baseball, basketball, and hockey leagues from the Sherman Act and federal antitrust laws. It was in response to a court decision that the NFL violated antitrust laws when it pooled rights by all its teams in a deal with CBS television. Interestingly, this act also states that professional football games cannot be broadcast on any Friday after six o'clock p.m. or on any Saturday from the second Friday in September to the second Saturday in December.

This act became an issue in 2005 when the NFL had to reschedule a Sunday game between the Kansas City Chiefs and the Miami Dolphins for Friday night Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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because of Hurricane Wilma. The game was televised on CBS affiliates in Miami and Kansas City, but there was no national telecast. Instead, a tape of the game was rebroadcast on the NFL's cable network on Sunday.

NFL Television Blackout Rule

Under the act, the NFL is also allowed to issue blackouts of games when local teams are being telecast and when there has not been a sellout at home. More specifically, the blackout rule stipulates that games will not be broadcast in home markets (i.e., within a 75-mile radius) unless they are

sold out 72 hours in advance of the opening kickoff. The league and the Commissioner have complete control to extend or suspend the deadline. The NFL has always maintained that the television blackout rule is necessary to sell tickets because home fans would not watch the games in-person if they knew they could watch them on TV for free. Supposedly, the NFL obtained a waiver from every high school and college within 75 miles of Miami and Kansas City to approve the Hurricane Wilma broadcast in advance.

Additional Concerns

Some feel that the Sports Broadcasting Act of 1961 is an anachronism. There have been attempts to modify or repeal the Sports Broadcasting Act altogether.

In 1968, the FCC established strict limitations on the sale of sports programming to pay-television operators in order to protect the television structure at that time.

These limits prohibited specific events such as the NCAA men's March Madness basketball tournament and the Super Bowl from being sold to anyone other than over-the-air broadcast television. In 1977, the FCC's ***anti-siphoning rules*** *(i.e., these same rules designed to keep sports off of cable television) were held to be unconstitutional except for specific events such as March Madness and the Super Bowl.*

- ***Age Discrimination in Employment***

Act of 1967 (ADEA)

The focus of this chapter has been on antitrust and labor issues that have generated considerable litigation in the Big Four sports and the NCAA. Other chapters in this text have dealt with various employment-related issues such as gender and disability laws and their applications in sports law. All the Big Four sports have CBAs dealing with age issues in some manner as a matter of collective bargaining, from the time required between high school graduation and entering the draft (NFL, NBA), to the minimum age at which a player is eligible to be drafted (NHL), to when a player may declare himself to be a free agent. Given this, we conclude with a look at the

*Age Discrimination in Employment Act (**ADEA**), a federal law that was passed in 1967 to protect individuals who are 40 or older (29*

U.S.C. §§ 621-634).

anti-siphoning rules

regulations designed to prevent pay television (cable) broadcasters from buying monopoly rights to televise certain important or significant events such as the Super Bowl ***Age Discrimination in Employment Act (ADEA)***

1967 law that prohibits job discrimination against

people age 40 and older based on age

ADEA

Age Discrimination in Employment Act of 1967

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The ADEA's protections apply to both employees and job applicants with respect to any term, condition, or privilege of employment, including, but not limited to, hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on

*age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA. The Equal Employment Opportunity Commission (**EEOC**) is responsible for enforcing this law. The Older Workers Benefit Protection Act of 1990 (**OWBPA**) amended the ADEA to specifically prohibit employers from denying benefits to older employees.*

Application

Certainly the ADEA would not apply to student-athletes since they are not considered employees, and usually far under age 40. Still, the ADEA definitely applies in college sports to administrators, coaches, sports information and publicity directors, medical staff, trainers, equipment managers, referees, academic advisors, and so on. It remains unclear whether the ADEA would apply to professional athletes however, more of whom break the 40-year-old threshold each year.

The ADEA ultimately remains relatively uncharted territory in the contexts of sports where employed athletes are terminated each year based on both objective (physical capability) and subjective (attitude, team chemistry) determinations. One wonders, with the high turnover of college and professional coaches each year, most of whom are over 40, whether ADEA claims will be generated related to their termination.

Defenses

*Exceptions to the act's provisions are provided where age is a bona fide occupational qualification (**BFOQ**) or the institution of a bona fide seniority system or employee benefit plan. Other defenses include legitimate reductions in work force (**RIF**), the business necessity defense, merit systems and the business judgment rule.*

For employers such as colleges and universities, it may be a strong defense to an ADEA claim by a terminated coach that the coach's win-loss record, recruiting ranking, or perception among student-athletes and others was inconsistent with the goals of their hire from the beginning. Therefore, great consideration should be given to writing performance reviews that avoid comments based upon age (ageism) and to review the proper wording of job

applications. Some states also have anti-discrimination laws which include age, including California's Unruh and Michigan's Elliot-Larsen Acts.

Moore

In Moore v. Univ. of Notre Dame, 968 F. Supp. 1330 (N.D. Ind. 1997), 22 F. Supp.2d 896 (N.D. Ind. 1998), assistant football coach Joe Moore was fired after he brought ***EEOC***

Equal Employment Opportunity Commission

OWBPA

The Older Workers Benefit Protection Act of 1990

BFOQ

bona fide occupational qualification

RIF

reductions in work force

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*an action against the University of Notre Dame (**UND**) under the ADEA. He also sued head coach Bob Davie, and Fan Action, Inc., owner and publisher of Blue and Gold Illustrated, which published an interview in which Davie said that Moore could only coach a few more years due to his age.*

Despite UND's assertion that Moore was terminated due to his failure to live up to the standards of Notre Dame, a jury rejected that assertion and awarded Moore back pay of $42,935.28 and liquidated damages of $42,935.28. The jury felt Notre Dame's conduct was willful and discriminatory in violation of the ADEA.

Post-trial motions from Moore demanded reinstatement or five-years of front pay as well, but the court felt that reinstatement was not the preferred remedy because the relationship between Moore and Davie was now toxic.

Minimum "Age"

At the other end of the spectrum, the ADEA does not protect those under 40 years old. The Maurice Clarett case discussed above dealt with the NFL's requirement that a player cannot enter the draft until one year after high school graduation, though it is not technically a minimum age rule. Oher professional sport leagues and organizations have similar standards. Even the now-defunct spring United States Football League (USFL) had issues related to minimum "age" and draft eligibility.

USFL

The USFL had a rule which stated, "No person shall be eligible to play or be selected as a player unless (1) all college football eligibility of such player has expired, or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college or university or (3) such player received a diploma from a recognized college or university …" Still, Robert Boris, a football player at the University of Arizona, withdrew from college and attempted to enter the USFL draft. Boris was barred by this draft rule and he challenged the age rule as a violation of federal antitrust laws in Boris v. United States Football League, 1984 U.S. Dist. LEXIS (C.D. Cal. Feb. 28, 1984).

Boris won his challenge against the USFL, and the league did not appeal the decision. They folded in 1986 and filed for bankruptcy protection after only three seasons as a spring professional football league. The court held that the draft rule constituted a group boycott, and was, therefore, a per se violation of section 1 of the Sherman Act.

NCAA

The NCAA does not have a minimum age rule in its plethora of bylaws. However, a student-athlete must be enrolled as a full-time student at a member institution in order to practice or compete, with an exception for the final semester of classes.

There is no maximum age under NCAA rules either. This explains the national attention given to the University of South Carolina football player Tim "Pops"

Frisby who, as a 20-year U.S. Army (and Gulf War) veteran with six children, walked-on the football team at age 39 and made the team.

MLB

Major League Baseball does not have a minimum age rule in general for its players or draftees, but it does have a policy against signing international players to a ***UND***

University of Notre Dame

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contract before the player reaches age 16. In 2000, the Los Angeles Dodgers allegedly violated such MLB policies by recruiting and signing Venezuelan pitcher Felix Arellan, who was only 15 at the time of signing. The Dodgers have had a public history of wrong-doing by signing under-age international players. In 1994 they signed 15-year-old Cuban-born player Adrian Beltre and were fined. They were fined again in 1999, $200,000 for signing two under-age Cuban players, Josue Perez and Juan Carlos Diaz.

In 2002, MLB established a policy that even batboys or batgirls had to be 14 years of age after San Francisco Giants Manager Dusty Baker's three-year-old son Darren was almost run over during a game in the 2002 World Series. This has become known as the Darren Baker Rule.

NBA

The NBA has the most active history of legal issues with regard to early entrants to the player draft and minimum age rules. As mentioned, the 2005 NBA CBA established that the minimum age-to-play in the NBA is 19 years old, plus one year removed from high school before the NBA draft. International players must turn 19 during the calendar year of the draft. This rule might change, however, depending upon how the NBA and NBPA resolve the 2011 lockout.

Other Leagues

As of the time of this writing, here is a list of the minimum age standards in a variety of other professional leagues which have frequently changed over time: ***National Basketball Association D-League (NBDL)****: The NBA's "D League" has a minimum age of 18 (it used to be 20).*

Women's National Basketball Association (WNBA)*: In the WNBA, the minimum age is 22 years old. Alternatively, players are eligible if they have completed their eligibility in college, or have graduated from a four-year*

college or university, or have played at least two seasons for another professional basketball league.

***National Hockey League (NHL):** Draftees must be 18 by September 15 in the year in which the draft is held.*

***Canadian Football League (CFL)**: Draftees must have attended college for at least 3 years.*

***Major League Soccer (MLS)**: Major League Soccer has no established age limit.*

***Professional Golfers' Association (PGA)**: Players must be 18 to get a PGA Tour card.*

***Ladies Professional Golfers' Association (LPGA)**: Players must be 18 but can apply for a maximum of 6 sponsor exemptions.*

***International Gymnastics Federation (FIG)**: Gymnasts must turn 16 during the Olympic calendar year as of 1997.*

***Association of Tennis Professionals (ATP) Tour**: Participants must be 16 to be on the men's tennis tour, but can play a limited number of tournaments between ages 14 and 16.*

***Women's Tennis Association (WTA)**: Participants must be 14, but cannot compete in more than 8 tournament appearances on the women's tennis tour.*

The appearance limit is raised to 10 appearances for 15 year-olds, 12 for 16 year-olds, and 16 for 17 year-olds.

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Chapter Nine

▪ *Summary*

Both professional and amateur sports involve labor and federal antitrust and labor issues. Congress enacted several laws to promote commerce and prevent monopolistic behavior by corporations in general. The Sherman Act, the Clayton Act, and the Norris-LaGuardia Act are all specific examples of federal laws designed to prevent anticompetitive behavior, and such acts are effective in the sports business. All the Big Four professional sports are subject to scrutiny by the National Labor Relations Board under the authority of the National Labor Relations Act.

Numerous strikes and lockouts in all the Big Four sports have affected the professional sports landscape over the years. The NCAA has been quite strong in its defense of amateurism and eligibility rules under federal antitrust laws. However, caps on coaching salaries and television appearance hurt the NCAA considerably both legally and financially.

The Sports Broadcasting Act of 1961 exempted the professional sports leagues from antitrust laws with regard to television broadcast rights. The Age Discrimination in Employment Act of 1967 is a federal law which may appear in litigation more frequently in the coming years by athletes or coaches 40 years old or older.

Along the same lines, but from the opposite end of the spectrum, the Big Four sports leagues and other sports organizations have established either minimum age or minimum draft eligibility rules for draftees and participants.

▪ *Key Terms*

Age Discrimination in Employment Act (ADEA) *1967 law that prohibits job discrimination against people age 40 and older based on age* ***anti-siphoning rules*** *regulations designed to prevent pay television (cable)*

broadcasters from buying monopoly rights to televise certain important or significant events such as the Super Bowl

antitrust *term used to describe any contract, combination, or conspiracy that illegally restrains trade and promotes anticompetitive behavior* ***Bridgeman Settlement Agreement*** *1988 agreement which provided unrestricted free agency to the NBA*

cartel *an agreement among competitors that fixes prices and restricts competition in order to maintain a monopoly*

Clayton Act *1914 federal law that allows the government or a private plaintiff to obtain an injunction against anticompetitive behavior* ***collective bargaining*** *process of negotiating a contract between management and labor in the union context*

Curt Flood Act of 1998 *federal law that revokes part of a 1922 U.S. Supreme Court decision exempting baseball owners from antitrust laws* ***decertification*** *process in which a union and its members disband officially and often with the intent to allow for an antitrust lawsuit* ***franchise model*** *common model in which teams within a league are individually owned rather than all of them being owned by the league itself* *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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free agency *allows a player to shop his services around to other teams after a designated period of years*

impasse *term used to describe with management and labor are no longer willing to negotiate after attempts have been made in good faith* ***lockout*** *temporary withholding of work by the employer to resolve a labor dispute* ***National Labor Relations Act (NLRA)*** *federal act regulating relations between employers and employees*

National Labor Relations Board (NLRB) *federal agency created by the NLRA to regulate employer and employee relations, particularly in the union context* ***non-statutory labor exception*** *general term describing any union-management agreement that was a product of good faith negotiation and will therefore receive protection from federal antitrust laws*

Norris-LaGuardia Act *1932 federal law that forbids federal courts from abusing the injunctive process and to prevent employers from abusing the courts to obtain injunctions on union activities*

per se rule analysis *rule that holds that certain types of trade agreements or arrangements are inherently anticompetitive and therefore illegal* ***reserve clause*** *out-dated provision in a contract which allowed a team to own a players rights perpetually*

restraint of trade *expression used to describe a violation under antitrust law such as price-fixing*

restricted free agent *term used to describe a player who is able to shop their services around to other teams on the condition that the player's current team may match other team's offers within a specific time frame and therefore retain the player*

right of first refusal *right of a team to match a competing team's offer* ***Robertson Agreement*** *1976 agreement which upheld that the NBA's reserve system was no longer valid*

Rozelle Rule *named after Pete Rozelle, former NFL Commissioner, which essentially acted like a reserve clause since considerable compensation was owed to a team who traded a player*

rule of reason analysis *rule that holds that only unreasonable restraints of trade violate section 1 of the Sherman Act*

scabs *pejorative term used to describe the replacement players and workers in place of those who are on strike*

Sherman Antitrust Act *1890 federal law that prohibits interference with interstate production and distribution of goods*

single entity *league model sparingly used in which the league owns all the teams and therefore controls all player salaries as well*

strike *cessation of work by union members to obtain benefits or prevent abuses in the workplace*

unfair labor practice (ULP) *allegation that management has violated terms of a collective bargaining agreement*

unrestricted free agent *term used to describe a player who may shop their services around to other teams with generally no strings-attached to the previous team* *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Chapter Nine

▪ ***Acronyms***

ABA *American Basketball Association*

ADEA *Age Discrimination in Employment Act of 1967*

AFL *American Football League*

AFL *Arena Football League*

BCS *Bowl Championship Series*

BFOQ *bona fide occupational qualification*

CBA *collective bargaining agreement*

DOJ *Department of Justice*

EEOC *Equal Employment Opportunity Commission*

FBS *Football Bowl Subdivision, formerly known as Division I-A* ***FTC*** *Federal Trade Commission*

MIBA *Metropolitan Intercollegiate Basketball Association* ***MLBPA*** *Major League Baseball Players Association* ***MLS*** *Major League Soccer*

NBPA *NBA Players Association*

NIT *National Invitational Tournament*

NLRA *National Labor Relations Act*

NLRB *National Labor Relations Board*

OWBPA *The Older Workers Benefit Protection Act of 1990*

PSL *personal seat license*

R.E.C. *restricted earnings coach*

RFA *restricted free agent*

RIF *reductions in work force*

UCLA *University of California, Los Angeles*

UFA *unrestricted free agent*

ULP *unfair labor practices*

UND *University of Notre Dame*

USC *University of Southern California*

USFL *United States Football League*

WNBA *Women's National Basketball Association*

WUSA *Women's United Soccer Association*

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▪ *Discussion and Review Questions*

1. *What does the word antitrust mean, and why is it important in the U.S. landscape of regulation?*

2. *Why are collective bargaining agreements important in professional sports?*

3. *What are the mandatory subjects of collective bargaining?*

4. *How have strikes and lockouts affected and shaped professional sports today in the U.S.?*

5. *Discuss some of the more prominent challenges to the Big Four sports leagues in the context of antitrust laws by Curt Flood, John Mackey, Spencer Haywood, and others.*

6. *What are some general defenses to a claim under the ADEA?*

7. *Do you think that an athlete or coach over 40 would likely be successful in a claim under the ADEA if they were terminated for reasons or factors other than age?*

8. *Do you think that minimum age rules or minimum draft eligibility rules violate federal antitrust laws even if they are collectively bargained by the owners and the players associations?*

9. *Should Congress change either the Sports Broadcasting Act of 1961 or the NFL blackout rule in order to relate to a new world of instant access and the Internet?*

10. *Why do so many decisions which involve the NCAA focus on whether the nature of the rule is commercial in nature?*

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CHAPTER TEN

Intellectual Property

Issues in Sports

After reading this chapter you will be able to:

1. Discuss how intellectual property relates to sports law.

2. Describe the differences between copyrights, patents, and trademarks and provide the constitutional basis for federal or state regulation.

3. Define what infringement means.

4. Explain what the fair use doctrine is and why it is important.

5. Discuss the Lanham Act and its relevance to sports law with particular regard to logos and mascots.

6. Explain how sports patents have become prevalent in recent years.

7. Describe the various efforts that the IOC and the USOC have taken to protect the word Olympic, among others.

8. Explain how the right of publicity relates to intellectual property.

9. Compare and contrast cybersquatting and typosquatting and the role of WIPO in managing Internet disputes.

10. Discuss the concept of ambush marketing.

▪ *Introduction*

The study of copyrights, patents, and trademarks relates to rights over intangible property, or ***intellectual property****. The importance of protecting intellectual property rights has never been more prominent than today, given the ubiquitous access to information, advertising, and sales on the Internet. Licensing trademarks has generated millions of dollars for professional and college teams. Protecting a trademark from an unlawful infringement or illegal counterfeiting continues to be a challenge in the real and virtual worlds.*

Protection is granted to copyrights and patents under Article 1, section 8, clause 8 of the Constitution. Trademarks fall under federal law created under Article 1, section 8, clause 3 of the Constitution, which allows Congress to regulate interstate commerce. Thus, intellectual property is primarily federally regulated.

Having an appreciation of the differences between copyrights, patents, and trademarks is important for anyone involved in the sports business, and this chapter focuses on the fundamentals. An exploration of how mascots and logos have changed over the years to comply with NCAA policies will be included. The concept ***intellectual property***

category of law pertaining to trademark, copyright, and patent rights

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of ambush marketing will be discussed as well. Students should not underestimate how valuable broadcast media and stadium naming rights can be in generating revenue streams for leagues, teams, and universities. The right of publicity, also known as commercial misappropriation, will be explored in the context of the First Amendment, though it was discussed in Chapter 3: Sports Torts.

One way or another, intellectual property revolves around generating ideas, protecting rights to those ideas, and financially benefiting from others who wish to use those ideas. Before proceeding into some of the important sports law cases, the student must have a fundamental understanding of the similarities and differences between copyrights, patents, and trademarks.

▪ *Copyright*

Congress enacted the United States Copyright Act of 1909 to protect the creative ideas of individuals against the unauthorized use of copyrighted materials and works. A ***copyright*** *protects original literary, artistic, dramatic, musical, graphics or other creations, including computer software.*

The Constitution gives Congress the authority to regulate copyrights in Article 1, section 8, clause 8 of the Constitution, also known as the Copyright Clause. The Constitution grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to

Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Copyright law in the United States is now governed by the 1976 Copyright Act (17 U.S.C. §§ 101-810) and amended by the Digital Millennium Copyright Act of 1998 ***(DMCA****), which focused on anti-piracy measures especially for electronic commerce on the Internet.*

Important to writers, publishers, videographers and other creative individuals who are authors of original works, a copyright gives the copyright owner the exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute copies of the copyrighted work, and to perform or display the copyrighted work publicly under § 106 of the Copyright Act. The 1976 act was the first time the law had been revised since 1909. In 1989 the United States became a member of the Berne Convention which established an international copyright treaty. There is no state-level copyright protection.

A work is covered under the act whether or not a copyright notice © is attached, and whether or not the work is registered with the federal Copyright Office or the Library of Congress (37 C.F.R. §§ 201-204). Still, although it is no longer necessary, placing a notice on copyrighted material might avoid questions or concerns as to whether or not it is copyrighted. Nearly every original, tangible (written or recorded) expression is copyrighted immediately once it is created.

Sonny Bono Copyright Term Extension Act of 1998

Copyright does not last forever. The Sonny Bono Copyright Term Extension Act of 1998 amended the copyright laws by extending the duration of copyright protection an additional 20 years. For works created after January 1, 1978, for example, ***copyright***

property right in an original work of authorship such as literary, musical, artistic, or graphic work

DMCA

Digital Millennium Copyright Act of 1998

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copyright protection will endure for the life of the author (i.e., as long as they are alive) plus an additional 70 years after the author's death. In the case of a joint work, the term lasts for 70 years after the last surviving author's death. For anonymous and pseudonymous works and works made for hire, the term is 95 years from the year of first publication or 120 years from the year of creation, whichever expires first.

Copyright Infringement

*The term **infringement** is used when there is an unauthorized use of another's work.*

*Copyright infringement is a tort in which a plaintiff attempts to demonstrate that the protected work has been copied without permission. In the sports business, the main area of copyright concern is the protection of rights related to sports broadcasting media. Laws and cases involving attempts to control or provide unauthorized telephone, audio, video, satellite, microwave, and Internet broadcasts of events and games in progress are contemporary issues. In 2011, the Department of Homeland Security seized the **domain names** of several websites that streamed live, unauthorized sports broadcasts for free.*

Individuals who violate copyright laws are subject to a court-ordered injunction, the collection and destruction of the infringing articles, payment

to the true owner monetary damages realized by the infringer, attorney's fees, and possible criminal penalties.

Work for Hire

*Although the general rule is that the person who creates a work is its author, there is an exception to that principle called the work for hire or work made for hire. This is a work prepared by an employee within the scope of his or her employment, or a work specially ordered or commissioned in certain specified circumstances. When a work qualifies as a work made for hire (**WMFH**), the employer or contractor is considered to be the author rather than the person who came up with the idea or concept (the employee or subcontractor). Persons (writers, composers, graphic designers) who are commissioned to come up with ideas, lyrics, scripts, or designs are often paid by fixed or contingent fees.*

Fair Use

*A major exception in copyright law is the **fair use doctrine** (17 U.S.C. § 107). Fair use was developed over the years as courts tried to balance the rights of copyright owners with society's interest in allowing copying in certain circumstances. Generally speaking, the fair use doctrine holds that non-commercial endeavors such as teaching, research and science are permitted to distribute and disseminate information to others without having to pay a fee to do so.*

infringement

act that interferes with one of the exclusive rights of a patent, copyright, or trademark owner

domain name

Internet address, usually followed by .com, .org, .net, .edu, etc., and registered as part of the Internet system

WMFH

work made for

fair use

term used in the copyright context that allows reasonable yet limited use of a work without requiring the author's prior permission

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Still, there is no clear, bright-line test in fair use cases, and when in doubt one may wish to contact the copyright holder for permission to use the work in writing.

Each instance of a potential violation of fair use must be judged on its own merits.

Numerous cases have attempted to better define what fair use is, and courts have differed upon its interpretation.

License

One way to generate money from a copyrighted work is to ***license*** *the material to someone else that they can use it for their own purposes. A license is the formal grant of the right to use copyrighted material by the author (licensor) and usually is conditioned upon payment of a fee or a royalty by the licensee. Downloading and using computer software and interactive computer games usually require a license, for example. Using athlete names and likenesses in video games also requires a license.*

Public Domain

One may use works deemed to be in the public domain without seeking permission and without infringement concerns. Essentially no one owns the rights to these works anymore. Public domain contains all works that are not protected by copyright, including a lost copyright, an expired copyright, a copyright owned or authored by the federal government, a copyright specifically granted to public domain, or a work that is simply non-copyrightable.

Some of the frequently cited examples of public domain works include Hamlet and other plays by William Shakespeare and Symphony No. 5 by Ludwig van Beethoven. Because of the duration of copyright protection established in the 1976 revision of the U.S. Copyright Act, no works published after January 1, 1978, will pass into the public domain until at least the year 2048.

- ***Patent***

*A **patent** is the formal grant of a property right to the inventor. The property right is granted by the U.S. government to an inventor to exclude others from making, using, offering for sale, or selling the invention throughout the United States, or importing the invention into the United States, for a limited time in exchange for public disclosure of the invention when the patent is granted.*

Those who use a patent without permission commit a patent infringement. When one applies for a patent, the phrase patent applied for or patent pending may be used on articles or processes and in advertisements. In order to become a patent, the invention must be novel, not obvious, and it must serve a useful purpose. In order to maintain a patent, periodic maintenance fees must be paid to the government as well.

*Patent laws were enacted in 1870. Patents in the United States are governed by the Patent Act (35 U.S.C. § 1 et seq.), which established the United States Patent and Trademark Office (**USPTO**). The United States recognizes numerous types of **license***

revocable permission to commit an act such as copying a trademark ***patent***

federal government's grant for the exclusive right to use, make, or sell an invention if the device is novel, useful, and not obvious

USPTO

United States Patent and Trademark Office

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patents including utility patents (which last 20 years), design patents (which last 14 years) and plant patents (which last 20 years). Patent laws focus on excluding others from using the inventions without permission.

In sports law, patents are relevant to the design and manufacture of all sports equipment and goods including artificial turf, golf clubs, shoes, bats, and other equipment. Interestingly, even the game of Arena Football was patented in 1987

by James F. Foster, Jr., a former executive of the NFL and the USFL. That patent expired 20 years later in 2007.

▪ ***Trademark***

*A **trademark** is used by a merchant or a manufacturer to identify and distinguish their goods from others. Trademarks are registered with the USPTO. Trademark law allows a trademark owner to prevent someone else from using the trademarked name, symbol or emblem without prior permission. This protects consumers from being confused over the quality and source of the product.*

*The word trademark is commonly used to describe all types of marks or **indicia***

that are protected under the law including service marks, certification marks, and

***collective marks**. A trademark serves to identify the distinct source of goods and services. Words, names, sounds, colors, scents, symbols, and shapes (including combinations), and phrases have been held to be legitimate trademarks. For example, the phrase Let's Get Ready to Rumble is a trademark catch-phrase owned by Michael Buffer, the boxing announcer. The phrase, Three-Peat is owned by a company started by Los Angeles Lakers' coach Pat Riley. It had become the motto of his team during the 1988-89 season as they began their quest for their third straight NBA title.*

After the mark has been registered at the federal level (and only then), the symbol ® may be used. An unregistered mark may use the symbol 'TM' for trademark and 'SM' for service mark. Use of these symbols puts third parties on notice that trademark rights are being claimed.

Understanding trademarks is extremely important for professional and amateur sports leagues and teams that profit from the licensing of their logos.

Trademarks, no matter what type, can generate considerable revenue for the trademark holder through a license (royalty). This is applicable in the sports context when consumers purchase officially licensed products bearing their favorite team name and logo. This includes shirts, jerseys, caps, trading cards, and other goods. This area is often referred to as sports merchandising. Colleges and professional sports teams make millions of dollars each year by licensing their names, logos, and colors. Professional

sports leagues address licensing issues in their CBAs in order to share revenue among teams and with the players associations.

Unlike copyrights or patents, trademarks can in theory be maintained forever, as long as they are used commercially. Trademark registrations that were issued or renewed on or after November 16, 1989 must be renewed every 10 years. Pursuant ***trademark***

word, phrase, logo, slogan or symbol used to distinguish a product from others ***indicia***

term used to describe any distinguishable or identifying mark ***collective mark***

trademark of an association, union, or other group

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to section 8 of the Lanham Act, 15 U.S.C. § 1058, the owner of a trademark registration is required to periodically submit a declaration of use attesting to and demonstrating that the mark is still in use in commerce.

Failure to take measures to protect a trademark may result in it becoming a diluted mark, which does not receive protection. The most common ways to lose a trademark are through (1) abandonment; (2) using the mark in a generic manner such as Aspirin, Kleenex, Thermos; (3) licensing the mark

indiscriminately; and (4) failing to prosecute infringers. In general, non-use for three consecutive years creates a presumption of abandonment.

Lanham Act

In 1946, the federal government enacted the Lanham Act (also known as the Trademark Act) to allow owners to seek injunctions and other remedies from individuals who infringe on their protected registered mark. The Lanham Act is the cor-nerstone of trademark law in the United States (15 U.S.C. § 1501).

Section 43(a) of the Lanham Act allows for an individual to bring a civil suit for infringement if the use of a mark is likely to cause confusion, mistake, or deception as to the origin of the mark. Once a trademark has been acquired, a plaintiff may recover treble damages for an infringement. Prior to obtaining a trademark, one might want to conduct a trademark availability search. Often, the key issue in a claim involving the Lanham Act is whether there is a likelihood of confusion caused by the alleged infringer's use of the owner's mark.

Prohibitions

Under section 2 of the Lanham Act, immoral, deceptive, or scandalous matters may not be trademarked. What is immoral, deceptive, or scandalous, however, depends upon the subjective interpretation by the USPTO or subsequently by a court. One of the prominent, yet unsettled, sports law issues involving such trademark prohibitions includes many amateur and professional sports teams that still use nicknames, mascots, and logos involving Native Americans. For example, teams such as the Atlanta Braves, Cleveland Indians, Washington Redskins, Kansas City Chiefs, and Chicago Blackhawks continue to operate though the use of these names causes considerable national discourse. President Bill Clinton refused to wear a baseball cap with the Cleveland Indians logo on it when he threw out the first pitch of the 1994 Major League Baseball season.

In Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.C. Cir. 2005), the U.S. Court of Appeals for the District of Columbia considered whether canceling the registration of the Washington Redskins football team (its official name is Pro-Football, Inc.) was appropriate based upon the claim that its name is a

racial slur and is disparaging to Native Americans. After years of litigation involving procedural issues, whether the name is in violation of the Lanham Act is still uncertain. The Supreme Court denied certiorari in 2007, and the Redskins continue to use this nickname.

In some cases, a trademarked name might not appear to be immoral, scandalous, or deceptive on its face. However, in MLS, the Houston 1836 became the Houston Dynamo after the use of the year 1836 was deemed by some to be offensive. The team had moved from San Jose, California, to Houston, Texas and was named ***Lanham Act***

1946 federal act that provides for a national system of registration of trademarks *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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the Houston 1836 to honor the city's founding, but some felt the name was anti-Mexican because it was also the year Texas defeated Mexico for its independence.

Similarly, in 2007, the Philadelphia Phillies AAA baseball team, the Lehigh Valley IronPigs, had a contest to name their mascot. The Iron Pigs Motorcycle Club of Texas had already threatened to sue the team for trademark infringement over the team name, though that threat never appeared to materialize in the form of a lawsuit. The mascot name Pork Chop won, but members of the Latino community in that Pennsylvania

region said the name was insensitive to them and it was changed instead to Ferrous, a reference to the element iron.

Categories

Trademarks come in a variety of flavors, but no matter how they are characterized or itemized, they are still marks. This includes brand names, trade dress (color combinations), certification marks (e.g., Good Housekeeping Seal of Approval), and collective marks (NFLPA). There are several sub-categories of trademark law including fanciful/arbitrary trademarks in which the names had no meaning before becoming a trademark such as Yahoo or Reebok), suggestive trademarks that allude to product quality such as Coppertone, descriptive trademarks that describe the goods or services such as Central Michigan University, and generic trademarks that describe a whole class of products such as milk or glue.

*A **service mark** is any word, name, symbol, device, or any combination used or intended to be used in commerce to identify and distinguish the services of one provider from services provided by others, and to indicate the source of the services (15 U.S.C. § 1127). Service marks are similar to trademarks except that they apply to services rather than goods (e.g., Federal Express).*

Licensing Agencies

*There are numerous licensing agents in the United States. These agencies are hired by professional and amateur sports teams to be in charge of maintaining, protecting, marketing, and collecting royalties for the particular trademark or media rights. Three of the largest licensing agencies in the United States are IMG's Collegiate Licensing Company (**CLC**), the Licensing Resource Group (**LRG**), and Learfield Sports.*

It is quite common for employees of licensing agencies to venture up and down avenues in towns during sports events to ensure that vendors selling merchandise bear an officially licensed symbol. Owners of trademarks must protect their marks against infringement or they risk losing ownership of the mark. One of the most important roles licensing companies play is to protect the trademark from illegitimate and unauthorized commercial use by others even if the intentions were innocent.

It is worth noting, for example, that Texas A&M University started the 12th Man in 1922. This is a tradition that shows fan and student support of the 11

men on the field during a football game. Texas A&M has twice registered trademarks for The 12th Man label, and the Buffalo Bills, Chicago Bears, and Seattle ***service mark***

mark used in sale or advertising of services to distinguish it from others
CLC

Collegiate Licensing Company

LRG

Licensing Resource Group

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Seahawks were all asked to cease and desist from using the trademarked phrase.

The Seahawks settled out of court by agreeing to pay a licensing fee to Texas A&M.

Counterfeiting

A particularly egregious form of trademark infringement is called ***counterfeiting****.*

Counterfeiting is a crime and consists of the use of a substantially identical copy of a registered trademark on the same goods or services for which the original mark is registered. There are special remedies for counterfeiting including seizure orders, treble damages, and statutory damages. Many counterfeit products or services seek to associate themselves with the authentic thing, even though they are not authorized to do so. Failure to regulate the sales of non-licensed products can lead to thousands of dollars in lost profits for the licensor. Undercover officers often work with licensing agencies to find violators and eliminate counterfeit or unlicensed products.

Trade Secrets

Trademarks should not be confused with a trade secret which consists of any formula, pattern, device, or compilation of information that is used in business, and that gives an opportunity to obtain an advantage over competitors who do not know or use it. All rights in a trade secret end once the trade secret is released to the public. Thus, laws involving trade secrets protect valuable commercial information (such as the formula for Coca-Cola). A civil action in state court for the tort of misappropriation of a trade secret is the usual claim. If the trade secret is revealed in violation of a non-disclosure agreement, one can obtain an injunction and sue for damages in a breach of contract action. Non-disclosure agreements are often referred to as confidentiality agreements or covenants not to compete.

Trade Dress

The term ***trade dress****, similar to trademark, encompasses the total image of a product as opposed to a product's individual parts or aspects. Trade dress protection may deal with the totality of features such as size, shape, color, color combinations, texture, or graphics. This could involve the design, shape and appearance of a product, including its packaging, as long as it is distinctive.*

In Bd. of Supervisors of La. State Univ. v. Smack Apparel Co., 438 F. Supp. 2d 653

(E.D. La. 2006), four universities (Louisiana State University, the University of Oklahoma, Ohio State University, University of South Carolina) sued Tampa-based Smack Apparel for trademark infringement following the 2004 Sugar Bowl.

The company had made novelty shirts that used color schemes and similar logos in violation of the universities' trademarks. On appeal, the Fifth Circuit Court of appeals upheld the decision and ruled that incorporating the colors (though not the names or logos) of college sports teams can create a probability of confusion in the mind of consumers, even if the color schemes themselves were not registered with the USPTO. Two other cases, Texas Tech v. Red Raider Outfitter, 461 F.

Supp. 2d 510 (N.D. Tex. 2006) and Univ. of Alabama Bd. of Trustees v. New Life Art ***counterfeiting***

crime which involves the unauthorized reproduction or copy of intellectual property manufactured and sold to others

trade dress

the total image and appearance of a product or service *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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Inc., 677 F. Supp. 2d 1238 (N.D. Ala. 2009) dealt with similar issues involving infringing colors and color schemes.

NCAA

The NCAA has trademarked numerous phrases including Final Four, The Big Dance, Sweet 16, Elite Eight, The Road to Indianapolis, and March Madness, the term for the annual NCAA Men's Division I Basketball Championship in the United States.

According to Bylaw 31.6.1, Names and Marks:

The NCAA owns or controls all rights and interests in its name, logo, seal, trademarks and service marks, whether registered or unregistered, including "National Collegiate Athletic Association," "NCAA," "National Collegiate Championships,"

"NCAAction," "College Sports USA," "The Final Four," "Women's Final Four,"

"College World Series," "Women's College World Series" and "Stagg Bowl." The NCAA will prosecute infringement of identical or confusingly similar marks. The NCAA shall maintain control over the nature and quality of the goods and services rendered under the marks; therefore, no use of the marks by others will be permitted in advertising, in association with commercial services or related to the sale of merchandise without the specific approval of the NCAA.

The NCAA has its own Trademark Protection Program to protect all its trademarks.

March Madness

*Arguably the most important trademarked phrase to the NCAA is March Madness though its history is circuitous and at times confusing. The trademark has actually been shared with the Illinois High School Athletic Association (**IHSA**).*

In March Madness Athletic Ass'n, LLC v. Netfire Inc., 120 Fed. Appx. 540, 2005

U.S. App. LEXIS 1475, 73 U.S.P.Q.2d (BNA) 1599 (5th Cir. Tex. 2005), a case involving who owned the rights to marchmadness.com, the court noted that IHSA had organized an annual boys' high school basketball tournament in Illinois since 1908, and used the term March Madness since the 1940s. The court discussed the history of the phrase and noted that the IHSA first attempted to register March Madness in 1990 but a company called Intersport had already registered the phrase on December 12, 1989. In 1995, IHSA and Intersport came to an agreement under which Intersport assigned its registered service mark to IHSA in return for a perpetual license to use March Madness for its sports programming and a share of royalty payments received by IHSA.

However, the NCAA started selling rights to use the phrase March Madness in 1988 as one of a set of marks relating to NCAA championships. Predictably, both IHSA and NCAA claimed that they had the right to use the phrase commercially and lawsuits commenced. In 1996, IHSA sued an NCAA licensee, GTE Vantage, that created a basketball video game that made use of the phrase, and the Seventh Circuit Court of Appeals rejected IHSA's claim in Illinois High Sch. Ass'n v. GTE

Vantage, 99 F.3d 244 (7th Cir. 1996).

*As a result of the ruling, the IHSA and NCAA formed the March Madness Athletic Association (**MMAA**) in 2000, and both parties transferred all rights in the phrase March Madness to MMAA. In return, each received a license to use the **IHSA***

Illinois High School Athletic Association

MMAA

March Madness Athletic Association

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term in relation to its basketball tournament. Then in 2011, the NCAA paid Intersport $17.2 million to relinquish the phrase altogether.

NCAA and Ethnic-Based Mascots

The NCAA has been at the forefront of promoting the termination of what it deems to be hostile or abusive nicknames and ethnic-based mascots by its membership. Stanford University and Dartmouth College, among many others, had previously retired their Indians team nicknames, but only after bitter fights with alumni.

In 2005, the NCAA required 31 schools to explain the necessity of the use of Native American tribes as mascots or nicknames. If the NCAA was not satisfied with the school's explanation for the use of the nickname or logo, it threatened to prevent a member from hosting post-season championship events or wearing those logos on their jerseys and uniforms during such contests. Some colleges had Native American nicknames but did not use mascots, such as the Central Michigan University Chippewas. The use of Chippewas without a Native American mascot was supported by the local tribe and the NCAA accepted its use.

*Florida State University (**FSU**) students have portrayed Chief Osceola riding the horse Renegade and planting a flaming spear at midfield before every Seminoles home football game since September, 1978. In 2005, the NCAA agreed with the 3,100-member Seminole Tribe of Florida and the Seminole Nation of Oklahoma, which had endorsed the nickname, that it should be removed from its list of hostile or abusive nicknames.*

However, the University of Illinois at Urbana-Champaign abandoned its use of Chief Illiniwek after the NCAA rejected its 2006 appeal that the mascot

was neither hostile nor abusive. The 1997 documentary In Whose Honor? produced by a University of Illinois professor explored the use of Chief Illiniwek and its effect on promoting stereotypes involving Native Americans. The Chief was officially retired in 2007

with his last dance broadcast nationally on ESPN. Still, the nickname-phrase Fighting Illini remains.

The College of William and Mary's use of the word Tribe was not acceptable to the NCAA so long as it was accompanied by two feathers, so it now uses the nickname Tribe but the mascot and logo has been changed to a griffin, a mythical crea-ture with the head and wings of an eagle and the body of a lion.

*In 2007 after multiple lawsuits, the University of North Dakota (**UND**) and the NCAA reached a settlement that gave the university three years to obtain approval from the Spirit Lake Sioux and Standing Rock Sioux tribes to continue to use the ornate Indian head logo and nickname Fighting Sioux. UND apparently had voted to drop the name and logo as a condition to joining the Summit League (Conference), but in 2011 North Dakota lawmakers passed a bill requiring the University of North Dakota to keep its Fighting Sioux nickname and Indian head logo. Then, the university president Robert Kelley said that it was time to drop the Fighting Sioux nickname and logo once-and-for all, though the battle continued to rage into late 2011.*

ethnic-based mascots

phrase used to describe athletic mascots that single out a race, gender, or culture

FSU

Florida State University

UND

University of North Dakota

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Promoting Cause

Students should ponder the motivation behind the NCAA's aggressive elimination of the use of Native American imagery among its membership. In 2002, the NCAA forbade its championship events from taking place in South Carolina or Mississippi because they (the states, not the universities) use the part of the Confederate flag, recalling slavery and the Civil War. Is it legitimate for the NCAA to promote certain socio-political causes and to enforce policies that combat negative racial stereotypes? Or should the universities themselves be the ones to decide on their nicknames or mascots, rather than the NCAA?

The University of Mississippi sidelined its own Colonel Rebel mascot in 2003. The southern gentleman who sported a white goatee, cane, and wide-brimmed hat was retired. Many believed that it was a politically correct move for the university to distance itself from its Confederate past. After national debate over what the new mascot should be the institution voted to use the Rebel Black Bear.

Students should ponder not only why the NCAA has made it part of its social agenda to minimize the use of Native American nicknames among its membership, but also why it has not pursued other universities that use ethnically descriptive nicknames and logos as well. This might include the

Vikings, Mongols, Aztecs, Warriors, Fighting Irish, Trojans, Highlanders, and others.

High Schools

In recent years, many colleges and universities have aggressively coerced high schools around the country that use their name, logo or mascot on helmets, basketball courts, uniforms, and fields to cease and desist from doing so. The colleges claim this is to protect their trademark and to fail to do so otherwise could cause the nickname or logo to lose federal protection. Most high schools do not have the financial means to fight against the colleges so they comply. Portland Public Schools in Portland, Michigan, were required to modify their Raider bird logo after Ball State University (Muncie, Indiana) alleged trademark infringement. However, some colleges have taken a more business-like approach to protect their mark, requiring the high school to pay a minimal licensing fee to the college for the right to do so.

Olympic Trademarks

*The International Olympic Committee (**IOC**) has exclusive rights to the Olympic symbol (the five rings), flag, motto, anthem, and the Games themselves in accordance with the Nairobi Treaty of 1981. Also, IOC grants exclusive marketing rights for summer and winter Olympic Games for a substantial fee as part of The Olympic Partners (**TOP**) program.*

*As discussed earlier in this text, the United States Olympic Committee (**USOC**) has exclusive rights to the word Olympic and Olympiad in the United States in the commercial context in accordance with the Amateur Sports Act of 1978*

and Ted Stevens Olympic and Amateur Sports Act of 1998. This also includes

***simulations** such Olympik. The USOC has been proactive in protecting its mark.*

In San Francisco Arts & Athletics, Inc. v. United States Olympic Comm. , 483 U.S. 522

IOC

International Olympic Committee

TOP

The Olympic Partners

USOC

United States Olympic Committee

simulations

similar but not identical uses of the word Olympic

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(1987), the Supreme Court affirmed an injunction against the use of the Gay Olympic Games. It is now known as the Gay Games.

In 1996, the USOC made a restaurant in Tonawanda, New York, change the name of its particular brand of salad dressing from Olympic Specialty Foods to Olympus Specialty Foods. Others who have lost their attempt to use the word Olympic in some way include the rock band Olympic Hopefuls (2005), the Ferret Olympics (2005), a comedy club in Chicago called the

ImprovOlympic (which changed its name to iO), and the Pole Olympics at a Colorado Springs strip club (2009). There are no more Seattle Oyster Olympics (2007) eating contest and no Camp Olympik either (2010). The ROBOlympics (robotics competition) had to change its name in 2005 and is now know as the RoboGames.

In United States Olympic Comm. v. International Fed'n of Bodybuilders, 1982 U.S.

Dist. LEXIS 10278, 219 U.S.P.Q. (BNA) 353 (D.D.C. Dec. 1, 1982), however, the court supported the decision that there would be no likelihood of confusion between the Mr. Olympia bodybuilding contest and the USOC's right to control the Olympic trademark.

- ***Right of Publicity***

The phrase right of publicity allows a plaintiff to protect others from ***commercial mis-***

appropriation*, or using their likeness without their consent for a commercial advantage. This includes state post-mortem rights which grant to protections to those who are no longer alive from others capitalizing on their familiar persona without their estate's consent. Still, there is no protectable interest for newsworthy events, since the First Amendment guarantees freedom of speech and the press. Put differently, the right of publicity must be balanced against First Amendment considerations.*

Recall that the phrase right of publicity was actually first used by Judge Jerome Frank in Haelen Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), cert. denied, 346 U.S. 816 (1953) in which two baseball-card and chewing gum manufacturers used a picture of a baseball player as part of the sale of their bubble-gum. In 1977, the Supreme Court of the United States held that the right of publicity was actually different than the right of privacy in Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) and ruled in favor of the Human Cannonball's stunt having been misappropriated by the local news broadcast.

Facenda

In Facenda v. NFL Films, Inc., 542 F.3d 1007 (3d Cir. 2008), the estate of John Facenda, also known as the Voice of God, demonstrated that N.F.L. Films, Inc. violated Pennsylvania's right of publicity statute (42 Pa. Cons. Stat. Ann. § 8316) by using his unique voice in a cable television production about The Making of Madden NFL 06, which was shown on the NFL Network eight times in a three-day span leading up to the release of the video game to retail stores. Pennsylvania's statute allows for a right of publicity claim for up to 30 years after a person's death. Though N.F.L. Films, Inc. did not violate the Lanham Act, the court felt that there was a violation of the state right of publicity statute. The case settled out of court in 2009.

commercial misappropriation

term used to describe the right of publicity, the right to protect one's own name, image or likeness without permission and for a commercial purpose
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Student-Athlete and Misappropriation

Today, student-athletes likenesses are being used in video games even though they are not being compensated for their use. In 2009, two lawsuits initiated by former student athletes might reshape commercial misappropriation in terms of the student-athlete altogether. First, Sam Keller, a former Arizona State quarterback who transferred to the University

of Nebraska, sued EA Sports in a class action lawsuit in a California federal court alleging EA Sports allowed clients to use NCAA players' names, pictures, and likenesses without their permission.

Then, Ed O'Bannon sued the NCAA and CLC in another class action lawsuit in California claiming that in addition to video games, commercial appropriation applies to all DVDs, photos, memorabilia, and advertising in general and that student athletes should receive a royalty. O'Bannon was the Most Outstanding Player of the 1995 Final Four for the University of California at Los Angeles (UCLA).

These two cases were merged into the case In re NCAA Student-Athlete Name & Likeness Litigation and only time will tell how this plays out.

Fantasy Sports Statistics

In C.B.C. Distrib. & Mktg. Inc. v. Major League Baseball Advanced Media, L.P. , 505

*F.3d 818 (8th Cir. 2007), Major League Baseball Advanced Media (**MLBAM**) claimed that it owned the statistics which are used in fantasy sports. MLBAM*

claimed that if a company such as C.B.C. Distribution and Marketing (C.B.C.) wanted to use the MLB statistics for fantasy sports, they would have to pay to obtain a license to use them. C.B.C. argued that statistics were public information (public domain) and using them did not constitute an infringement on the MLB

players' right of publicity. The Eighth Circuit Court of Appeals held that the First Amendment right to use this information outweighed any state rights involving rights of publicity. So, in essence, the names and statistics are not commercially protectable and they are part of the public domain for now.

- ***CASE 14***

*C.B.C. Distribution and Marketing, Inc., Plaintiff-Appellee, v. Major League Baseball Advanced Media, L.P., Defendant-Appellant, The Major League Baseball Players Association, Intervenor-Appellant **United States Court of***

Appeals for the Eighth Circuit *products violated rights of publicity belonging to major* ***June 14, 2007, Submitted***

league baseball players and that the players, through ***October 16, 2007, Filed***

their association, had licensed those rights to Advanced Media, the interactive media and Internet company of ***OPINION BY: ARNOLD, CIRCUIT JUDGE.***

major league baseball. The Major League Baseball

C.B.C. Distribution and Marketing, Inc., brought this Players Association intervened in the suit, joining in action for a declaratory judgment against Major League Advanced Media's claims and further asserting a breach Baseball Advanced Media, L.P., to establish its right to of contract claim against CBC. The district court granted use, without license, the names of and information

summary judgment to CBC, see C.B.C. Distrib. and Mktg., about major league baseball players in connection with Inc. v. Major League Baseball Advanced Media, L.P., 443 F.

its fantasy baseball products. Advanced Media counter-Supp. 2d 1077 (E.D. Mo. 2006), and Advanced Media and claimed, maintaining that CBC's fantasy baseball

the Players Association appealed. We affirm.

(continued)

MLBAM

Major League Baseball Advanced Media

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Chapter Ten

I.

were infringing the players' rights of publicity, the first CBC sells fantasy sports products via its Internet web-amendment preempted those rights. Id. at 1091-1100.

site, e-mail, mail, and the telephone. Its fantasy baseball The court rejected, however, CBC's argument that fed-products incorporate the names along with perfor-

eral copyright law preempted the rights of publicity mance and biographical data of actual major league

claim. Id. at 1100-03. Finally, the district court held baseball players. Before the commencement of the

that CBC was not in violation of the no-use and no-

major league baseball season each spring, participants contest provisions of its 2002 agreement with the

form their fantasy baseball teams by "drafting" players Players Association because "the strong federal policy from various major league baseball teams. Participants favoring the full and free use of ideas in the public compete against other fantasy baseball "owners" who

domain as manifested in the laws of intellectual prop-have also drafted their own teams. A participant's suc-erty prevails over [those] contractual

provisions" (inter-cess, and his or her team's success, depends on the

nal quotations omitted). Id. at 1106-07.

actual performance of the fantasy team's players on

[…]

their respective actual teams during the course of the major league baseball season. Participants in CBC's fan-II.

tasy baseball games pay fees to play and additional fees ***A.***

to trade players during the course of the season.

An action based on the right of publicity is a state-law From 1995 through the end of 2004, CBC licensed its

claim. See Zacchini v. Scripps-Howard Broad. Co., 433 U.S.

use of the names of and information about major

562, 566, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977). In league players from the Players Association pursuant Missouri, "the elements of a right of publicity action to license agreements that it entered into with the asso-include: (1) That defendant used plaintiff's name as a ciation in 1995 and 2002. The 2002 agreement, which

symbol of his identity (2) without consent (3) and with superseded in its entirety the 1995 agreement, licensed the intent to obtain a commercial advantage." Doe v.

to CBC "the names, nicknames, likenesses, signatures, TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003), cert.

pictures, playing records, and/or biographical data of denied, 540 U.S. 1106, 124 S. Ct. 1058, 157 L. Ed. 2d each player" (the "Rights") to be used in association 892 (2004). The parties all agree that CBC's continued with CBC's fantasy baseball products.

use of the players' names and playing information after In 2005, after the 2002 agreement expired, the Players the expiration of the 2002 agreement was without con-Association licensed to Advanced Media, with some

sent. The district court concluded, however, that the exceptions, the exclusive right to use baseball players'

evidence was insufficient to make out the other two

names and performance information "for exploitation

elements of the claim, and we address each of these in via all interactive media." Advanced Media began pro-turn.

viding fantasy baseball games on its website, MLB.com, With respect to the symbol-of-identity element, the Mis-the official website of major league baseball. It offered souri Supreme Court has observed that "'the name

CBC, in exchange for a commission, a license to pro-

used by the defendant must be understood by the audi-mote the MLB.com fantasy baseball games on CBC's

ence as referring to the plaintiff.'" The state court had website but did not offer CBC a license to continue to further held that "[i]n resolving this issue, the fact-offer its own fantasy baseball products. This conduct by finder may consider evidence including 'the nature

Advanced Media prompted CBC to file the present

and extent of the identifying characteristics used by suit, alleging that it had "a reasonable apprehension the defendant, the defendant's intent, the fame of the that it will be sued by Advanced Media if it continues plaintiff, evidence of actual identification made by to operate its fantasy baseball games."

third persons, and surveys or other evidence indicating The district court granted summary judgment to CBC.

the perceptions of the audience.'" Doe, 110 S.W.3d at It held that CBC was not infringing any state-law rights 370 (quoting Restatement (Third) of Unfair Competition §

of publicity that belonged to major league baseball

46 cmt. d).

players. C.B.C., 443 F. Supp. 2d at 1106-07. The court Here, we entertain no doubt that the players' names

reasoned that CBCs fantasy baseball products did not that CBC used are understood by it and its fantasy base-use the names of major league baseball players as sym-ball subscribers as referring to actual major league bols of their identities and with an intent to obtain a baseball players. CBC itself admits that: In responding commercial advantage, as required to establish an

to the appellants' argument that "this element is met by infringement of a publicity right under Missouri law the mere confirmation that the name used, in fact,

(which all parties concede applies here). Id. at 1085-refers to the famous person asserting the violation,"

89. The district court further held that even if CBC

CBC stated in its brief that "if this is all the element Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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requires, CBC agrees that it is met." We think that by have a first amendment right to use information that is reasoning that "identity," rather than "mere use of a available to everyone. It is true that CBC's use of the name," "is a critical element of the right of publicity,"

information is meant to provide entertainment, but

the district court did not understand that when a name

"[s]peech that entertains, like speech that informs, is alone is sufficient to establish identity, the defendant's protected by the First Amendment because '[t]he line use of that name satisfies the plaintiff's burden to show between the informing and the entertaining is too elu-that a name was used as a symbol of identity.

sive for the protection of that basic right.'" Cardtoons, It is true that with respect to the "commercial advan-L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, tage" element of a cause of action for violating publicity 969 (10th Cir. 1996) (quoting Winters v. New York, 333

rights, CBC's use does not fit neatly into the more traU.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840 (1948)); see also ditional categories of commercial advantage, namely, Zacchini, 433 U.S. at 578. We also find no merit in the using individuals' names for advertising and merchan-argument that CBC's use of players' names and infor-

dising purposes in a way that states or intimates that the mation in its fantasy baseball games is not speech at all.

individuals are endorsing a product. Cf. Restatement We have held that "the pictures, graphic design, con-

*(Third) of Unfair Competition § 47 cmt. a, [**12] b. But cept art, sounds, music, stories, and narrative present in the Restatement, which the Missouri Supreme Court*

video games" is speech entitled to first amendment pro-has recognized as authority in this kind of case, see tection. See Interactive Digital Software Ass'n v. St. Louis Doe, 110 S.W.3d at 368, also says that a name is used County, Mo., 329 F.3d 954, 957 (8th Cir. 2003). Similarly, for commercial advantage when it is used "in connec-here CBC uses the "names, nicknames, likenesses, sig-tion with services rendered by the user" and that the natures, pictures, playing records, and/or biographical plaintiff need not show that "prospective purchasers data of each player" in an interactive form in connec-are likely to believe" that he or she endorsed the prod-tion with its fantasy baseball products. This use is no uct or service. Restatement (Third) of Unfair Competition §

less expressive than the use that was at issue in Interac-47 & cmt. a. We note, moreover, that in Missouri, "the tive Digital.

commercial advantage element of the right of publicity Courts have also recognized the public value of infor-focuses on the defendant's intent or purpose to obtain mation about the game of baseball and its players,

a commercial benefit from use of the plaintiff's

referring to baseball as "the national pastime." Card-identity." Doe, 110 S.W.3d at 370-71. Because we think toons, 95 F.3d at 972. A California court, in a case that it is clear that CBC uses baseball players' identities where Major League Baseball was itself defending its in its fantasy baseball products for purposes of profit, use of players' names, likenesses, and information

we believe that their identities are being used for com-against the players' asserted rights of publicity,

mercial advantage and that the players therefore

observed, "Major league baseball is followed by millions offered sufficient evidence to make out a cause of

of people across this country on a daily basis … The action for violation of their rights of publicity under public has an enduring fascination in the records set Missouri law.

by former players and in memorable moments from

previous games … The records and statistics remain

B.

of interest to the public because they provide context CBC argues that the first amendment nonetheless trumps that allows fans to better appreciate (or deprecate) the right-of-publicity action that Missouri law provides.

today's performances." Gionfriddo v. Major League Base-Though this dispute is between private parties, the state ball, 94 Cal. App. 4th 400, 411, 114 Cal. Rptr. 2d 307

action necessary for first amendment protections exists (2001). The Court in Gionfriddo concluded that the because the right-of- publicity claim exists only insofar

"recitation and discussion of factual data concerning as the courts enforce state-created obligations that were the athletic performance of [players on Major League

"never explicitly assumed" by CBC. See Cohen v. Cowles Baseball's website] command a substantial public inter-Media Co., 501 U.S. 663, 668, 111 S. Ct. 2513, 115 L. Ed.

est, and, therefore, is a form of expression due substan-2d 586 (1991).

tial constitutional protection." Id. We find these views The Supreme Court has directed that state law rights of persuasive.

publicity must be balanced against first amendment con-In addition, the facts in this case barely, if at all, impli-siderations, see Zacchini v. Scripps-Howard Broad., 433

cate the interests that states typically intend to vindicate U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977), and by providing rights of publicity to individuals. Eco-here we conclude that the former must give way to the nomic interests that states seek to promote include

latter. First, the information used in CBC's fantasy base-the right of an individual to reap the rewards of his ball games is all readily available in the public domain, or her endeavors and an individual's right to earn a and it would be strange law that a person would not

living. Other motives for creating a publicity right are (continued)

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the desire to provide incentives to encourage a per-

of the agreement (the no-challenge provision). CBC

son's productive activities and to protect consumers also agreed that, upon expiration or termination of

from misleading advertising. See Zacchini, 433 U.S. at the contract, it would "refrain from further use of the 573, 576; Cardtoons, 95 F.3d at 973. But major league Rights and/or the Trademarks or any further refer-baseball players are rewarded, and handsomely, too,

ence to them, either directly or indirectly" (the no-for their participation in games and can earn addi-

use provision). The Players Association maintains that tional large sums from endorsements and sponsorship

the no-challenge and no-use provisions of the 2002

arrangements. Nor is there any danger here that con-

agreement are fatal to CBC's claim. We disagree.

sumers will be misled, because the fantasy baseball

In holding the no-use and no-challenge provisions

games depend on the inclusion of all players and thus unenforceable as against public policy, the district cannot create a false impression that some particular court applied a Supreme Court decision dealing with

player with "star power" is endorsing CBC's products.

patents. In that case, the Supreme Court held that

Then there are so-called non-monetary interests that the doctrine of licensee estoppel (under which a

publicity rights are sometimes thought to advance.

licensee is estopped from contesting the validity of its These include protecting natural rights, rewarding

license, see Idaho Potato Comm'n v. M&M Produce Farm celebrity labors, and avoiding emotional harm. See

& Sales, 335 F.3d 130, 135 (2d Cir. 2003), cert. denied, 541

Cardtoons, 95 F.3d at 973. We do not see that any of U.S. 1027, 124 S. Ct. 2066, 158 L. Ed. 2d 642 (2004)), these interests are especially relevant here, where base-must give way when the "strong federal policy favoring ball players are rewarded separately for their labors, the full and free use of ideas in the public domain"

and where any emotional harm would most likely be

contained in federal patent law outweighs the "compet-caused by a player's actual performance, in which

ing demands … of contract law." Lear, Inc. v. Adkins, case media coverage would cause the same harm. We

395 U.S. 653, 674, 675, 89 S. Ct. 1902, 23 L. Ed. 2d also note that some courts have indicated that the right 610 (1969). The Lear balancing approach has been of publicity is intended to promote only economic

applied to other areas of federal intellectual property interests and that non-economic interests are more

law, see Idaho Potato, 335 F.3d at 137-39 (certification directly served by so-called rights of privacy. See, e.g. , marks); Beer Nuts, Inc. v. King Nut Co., 477 F.2d 326, id. at 967; Gionfriddo, 94 Cal. App. 4th at 409 (2001); see 328-29 (6th Cir. 1973), cert. denied, 414 U.S. 858, 94 S.

also Haelan Laboratories v. Topps Chewing Gum, 202 F.2d Ct. 66, 38 L. Ed. 2d 108 (1973) (trademarks); see also 866, 868 (2d Cir. 1953). For instance, although the Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816

court in Cardtoons, 95 F.3d at 975-76, conducted a sepa-F.2d 1191, 1200-01 (7th Cir. 1987) (copyright). The dis-rate discussion of non-economic interests when weigh-trict court's application of the Lear principles to a state ing the countervailing rights, it ultimately concluded law right-of-publicity action, however, was unique so far that the non-economic justifications for the right of as we can determine.

publicity were unpersuasive as compared with the inter-We do not reach the issue of whether Lear is applicable est in freedom of expression. "Publicity rights … are here, though, because we believe that the contested

meant to protect against the loss of financial gain, not contract terms are unenforceable for a different rea-mental anguish." Id. at 976. We see merit in this son. We first note that in its brief, CBC argued that it approach.

should be relieved of its no-use and no-challenge obli-Because we hold that CBC's first amendment rights in gations because the Players Association

breached a war-offering its fantasy baseball products supersede the ranty contained in § 1(b) of the 2002 agreement.

players' rights of publicity, we need not reach CBC's Section 1(b) of the agreement provides that "[the

alternative argument that federal copyright law pre-

Players Association] represents and warrants that it empts the players' state law rights of publicity.

has the authority to grant the rights licensed herein."

CBC argued that this was a warranty of title in the

III.

players' publicity rights and that the Players Association We come finally to the breach of contract issue. The breached this warranty, either because the players did 2002 contract between the Players Association and

not have publicity rights or because CBC's first amend-CBC specifically provided: "It is understood and agreed ment rights superseded any such publicity rights. We that [the Players Association] is the sole and exclusive find this argument meritless: Section 1(b) is not a war-holder of all right, title and interest in and to the ranty of title, it is merely a warranty that the Players Rights." CBC undertook not to "dispute or attack

Association is the agent of the players. That warranty the title or any rights of Players' Association in and to was not breached.

the Rights and/or the Trademarks or the validity of the Although the parties did not cite to it in their briefs, license granted," either during or after the expiration the agreement does contain what we believe is a

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warranty of title not in § 1(b), but in § 8(a). The agree-Association did in fact own the state law publicity rights ment provides that its interpretation will be governed at issue here. For the reasons given above, the Players by New York law. In New York, a contractual warranty is Association did not have exclusive "right, title and defined as " 'an assurance by one party to a contract of interest" in the use of such information, and it there-the existence of a fact upon which the other party may fore breached a material obligation that it undertook rely.' " CBS Inc. v. Ziff-Davis Publ'g Co., 75 N.Y.2d 496, in the contract. CBC is thus relieved of the obligations 503, 553 N.E.2d 997, 1000, 554 N.Y.S.2d 449 (1990) that it undertook, and the Players Association cannot (quoting Metropolitan Coal Co. v. Howard, 155 F.2d 780, enforce the contract's no-use and no-challenge provi-784 (2d Cir. 1946) (Hand, J.)). Section 8(a) of the sions against CBC.

agreement provides that the Players Association "is

the sole and exclusive holder of all right, title and interest" in and to the names and playing statistics of virtu-IV.

ally all major league baseball players. This is quite For the foregoing reasons, the district court's grant of obviously a representation or warranty that the Players summary judgment to CBC is affirmed.

▪ Future

The battle for the intellectual property rights remains one of the most intriguing and prevalent in sports law. Competition to raise revenue in the traditional brick-and-mortar (i.e., real world) facilities continues for

stadium naming rights, practice-facility naming rights, playing surface naming rights, and so on, in addition to broadcast rights. The advent of the Internet and smartphones has changed and heightened the need to protect the rights to ideas and inventions, whether copyrights, patents or trademarks. This presents challenges for creators, inventors, lawyers, current and even former players who allege that their names and images are being used in video games, on trading cards, highlight videos, memorabilia and so on.

- ***Ambush Marketing***

*The phrase **ambush marketing** refers to activities of companies when they attempt to associate themselves with an event, although they are not an official sponsor of the event. Put differently, it is a deliberate effort to capitalize on the reputation and popularity of an event by creating an association, without the authorization or consent of the parties involved and without paying the sponsorship fee. So despised is ambush marketing that it is sometimes referred to as freeloading, para-sitic marketing, guerilla marketing, or the unofficial games.*

Whether deliberate or not, it is not a violation of the Lanham Act per se, though it could create confusion on the part of the consumer. However, depending upon the circumstance, it could be considered unfair competition embodied in

§ 43(a) of the Lanham Act which prohibits the use of a false designation of origin or a false or misleading description or representation of fact. Using a conspicuous disclaimer might be enough to avoid liability or an injunction. NFL v. Delaware, 435

F.Supp. 1372 (D. Del. 1977).

ambush marketing

type of marketing in which a consumer is misled as to whether a company or sponsor is officially part of an event

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Ambush marketing often occurs with prominent events such as the NCAA's March Madness basketball tournament, the Olympics, the FIFA World Cup, NASCAR's Daytona 500, the Rose Bowl, Kentucky Derby and the Stanley Cup Playoffs. Indeed, the NCAA sued Coors Brewing Company in 2001 regarding Coors'

use of NCAA marks in an attempt to associate itself with NCAA championships.

Nat'l Collegiate Athletic Ass'n v. Coors Brewing Co., No. IP01-1768 (S.D. Ind. filed Nov. 27, 2001).

In 2010, the international soccer federation FIFA filed charges against a Dutch beer company because it claimed that at a World Cup match in Johannes-burg, female fans wore orange mini-dresses (the same the color of the Dutch national team) in an orchestrated attempt to allegedly promote the beer. In MasterCard Int'l, Inc. v. Sprint Commc'ns Co., 1994 WL 97097 (S.D.N.Y. 1994), aff'd, 23 F.3d 397 (2d Cir. 1994), MasterCard obtained an injunction against Sprint from issuing cards with World Cup '94 trademarks on it. So many instances of ambush marketing have been present in the last two decades, particularly involving the Olympic Games, that the IOC now requires host countries and cities to enact special-event legislation to curtail ambush marketing.

▪ ***Anticybersquatting Consumer Protection Act***

*The Internet has provided numerous challenges for courts with regard to protection of trademarks. Congress passed the Anticybersquatting Consumer Protection Act (**ACPA**) in 1999 to prevent an individual from registering a web domain name in order to profit from the name or mark in bad faith (15 U.S.C. § 1125(d)). The primary purpose of this act is again to prevent the likelihood of consumer confusion over which website is the official site. The statute amended the Lanham Act to make it a type of trademark infringement if a domain name containing a distinctive or famous trademark is registered in bad faith.*

*A **cybersquatter** is an individual who registers popular or trademarked names in the Internet name space with plans to either sell the names or keep them to turn a profit. The ACPA allows for substantial civil penalties against cybersquatters and enables a trademark or copyright holder to file a lawsuit to shut down a domain name. Prior to the enactment of the ACPA, cybersquatters could (and did) extort companies and individuals into paying substantial sums of money in order to regain Internet domain names.*

***Typosquatting** is a form of cybersquatting in which an owner speculates that someone will misspell an otherwise legitimate domain name and purchases that variation on the name in order to make a profit. For example, registering the domain name Goggle.com (a misspelling of Google.com) with the hope that someone making a typo will get to that site unexpectedly is typosquatting.*

***Anticybersquatting Consumer Protection Act (ACPA)** 1999 federal law amending the Lanham Act*

to create a cause of action against someone who intentionally registers an Internet domain name confusingly similar to a trademarked name

ACPA

Anticybersquatting Consumer Protection Act

cybersquatter

individual who intentionally registers an Internet domain name that is confusingly similar to a trademarked name

typosquatting

form of cybersquatting in which one attempts to capitalize on typing errors when searching for an otherwise legitimate domain name

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WIPO

*The World Intellectual Property Organization (**WIPO**) based in Geneva, Switzerland is responsible for the promotion of the protection of intellectual rights throughout the world. WIPO is involved in resolving cybersquatting and typosquatting cases to facilitate the resolution of private intellectual property disputes in general. Under the Uniform Domain-Name Dispute-Resolution policy (**UDRP**), trademark holders can file a case in an attempt to show that the registered domain name is identical or confusingly similar to their trademark, that the registrant has no legitimate interest in the domain name, and that the domain name is being used in bad faith.*

▪ *Summary*

Intellectual property involves protecting an owner's interest in a copyright, patent, or trademark. The advent of the Internet continues to present

challenges to protecting ideas, marks and domain name rights. Intellectual property issues have become vital to the success of an organization, particularly with regard to licensing of goods, services, or rights in general that may generate profits for a licensor.

Some have alleged that team names or mascots which present immoral, scandalous or deceptive concepts should lose trademark status. The NCAA has become proactive in eliminating the use of Native American imagery among its member institutions. Recent lawsuits involving fantasy sports statistics and student-athlete names, images and likenesses continue to shape intellectual property law.

The USOC continues to be vigilant in protecting its monopoly status on the commercial use of Olympic. The Anticybersquatting Consumer Protection Act in conjunction with WIPO protects domain names and other intellectual property issues on the Internet.

- ***Key Terms***

ambush marketing *type of marketing in which a consumer is misled as to whether a company or sponsor is officially part of an event*

Anticybersquatting Consumer Protection Act (ACPA) *1999 federal law amending the Lanham Act to create a cause of action against someone who intentionally registers an Internet domain name confusingly similar to a trademarked name* ***category of law pertaining to trademark, copyright, and patent rights collective mark*** *trademark of an association, union, or other group* ***commercial misappropriation*** *term used to describe the right of publicity, the right to protect one's own name, image or likeness without permission and for a commercial purpose*

copyright *property right in an original work of authorship such as literary, musical, artistic, or graphic work*

WIPO

World Intellectual Property Organization

UDRP

Uniform Domain–Name Dispute–Resolution policy

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counterfeiting *crime which involves the unauthorized reproduction or copy of intellectual property manufactured and sold to others* ***cybersquatter*** *individual who intentionally registers an Internet domain name that is confusingly similar to a trademarked name*

domain name *Internet address, usually followed by .com, .org, .net, .edu, etc., and registered as part of the Internet system*

ethnic-based mascots *phrase used to describe athletic mascots that single out a race, gender, or culture*

fair use *term used in the copyright context that allows reasonable yet limited use of a work without requiring the author's prior permission* ***indicia*** *term used to describe any distinguishable or identifying mark* ***infringement*** *act that interferes with one of the exclusive rights of a patent, copyright, or trademark owner*

intellectual property *category of law pertaining to trademark, copyright, and patent rights*

Lanham Act *1946 federal act that provides for a national system of registration of trademarks*

license *revocable permission to commit an act such as copying a trademark* ***patent*** *federal government's grant for the exclusive right to use, make, or sell an invention if the device is novel, useful, and not obvious* ***service mark*** *mark used in sale or advertising of services to distinguish it from others*

simulations *similar but not identical uses of the word Olympic* ***trade dress*** *the total image and appearance of a product or service* ***trademark*** *word, phrase, logo, slogan or symbol used to distinguish a product from others*

typosquatting *form of cybersquatting in which one attempts to capitalize on typing errors when searching for an otherwise legitimate domain name*

- ***Acronyms***

ACPA *Anticybersquatting Consumer Protection Act* ***CLC*** *Collegiate Licensing Company*

DMCA *Digital Millennium Copyright Act of 1998*

FSU *Florida State University*

IHSA *Illinois High School Athletic Association* ***IOC*** *International Olympic Committee*

LRG *Licensing Resource Group*

MLBAM *Major League Baseball Advanced Media*

MMAA *March Madness Athletic Association*

TOP *The Olympic Partners*

UDRP *Uniform Domain–Name Dispute–Resolution policy* ***UND*** *University of North Dakota*

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USOC *United States Olympic Committee*

USPTO *United States Patent and Trademark Office* ***WIPO*** *World Intellectual Property Organization* ***WMFH*** *work made for*

▪ ***Cases***

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▪ *Discussion and Review Questions*

1. *What is the difference between a copyright, a patent, and a trademark?*

2. *Why are sports logos so important today?*

3. *Do you think that the NCAA has the right to end what it deems to be hostile or abusive imagery or names related to Native Americans?*

4. *Give examples of how the right of publicity has become involved in sports law.*

5. *Provide some examples of cease and desist efforts made by the USOC involving the word Olympic.*

6. *Do you think that the best course of action for a university is to tell a high school which uses its logo to terminate its use in order to protect the trademark?*

7. *Should fantasy sports leagues have to pay a licensing fee in order to obtain statistical data from the various leagues or players' associations?*

8. *What is the difference between a cybersquatter and a typosquatter?*

9. *Describe ambush marketing and provide some examples.*

10. *What role does WIPO play in intellectual property rights in sports law?*

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CHAPTER ELEVEN

Alternative Dispute

Resolution

After reading this chapter you will be able to:

1. Describe the role of ADR in sports.

2. Define and differentiate the terms arbitrator, mediator, and ombudsman.

3. Describe established models of ADR.

4. Describe why arbitration is the most prevalent type of ADR in sports.

5. Discuss the history and role of the American Arbitration Association in resolving disputes in the context of sports.

6. Discuss the history of the Court of Arbitration for Sport (CAS) and its role in international legal disputes.

7. Provide examples of how ADR has helped or hindered legal disputes in professional and amateur sports.

8. Discuss why players associations (unions) and owners of teams and leagues use ADR to resolve differences.

*9. Explain why the **World Intellectual Property Organization** (**WIPO**) has become involved in resolving sports-related issues.*

10. Explain how the use of instant replay has become a form of ADR in sports.

- ***Introduction***

*This chapter provides a fundamental exploration of the various forms of **alternative dispute resolution** (**ADR**). The most important aspect of ADR, as opposed to litigation, is that final agreements or decisions are not made by judges or courts.*

Instead, disagreements between parties are resolved by alternative methods. This includes mediation and arbitration and their various forms. Generally speaking ADR resolves disputes more effectively and efficiently than litigation. It is also usually less costly.

WIPO

World Intellectual Property Organization

World Intellectual Property Organization (WIPO)

international organization dedicated to helping

ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are recognized and rewarded for their ingenuity ***ADR***

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR)

resolving disputes via arbitration, mediation, and other alternatives to litigation

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Chapter Eleven

Historically, litigation has often been the method to resolve the vast majority of sports disputes. This textbook has already presented some of the hallmark legal decisions which have helped to shape sports law. From the Federal Baseball decision in 1922 to Curt Flood's challenge over the reserve system in 1972, the U.S. legal system—driven by litigation—continues to shape the way in which businesses and leagues are organized and managed. The influence of the courts in sports should not be underestimated.

*However, times have changed significantly and ADR has become a more prominent part of sports law. All the Big Four professional sports use arbitration as a method to resolve grievances. The Olympic Movement uses the Court of Arbitration for Sport (**CAS**) to resolve disputes surrounding the Olympic Games, which might involve rule interpretations, eligibility and discipline disputes. Students and sports lawyers should be familiar with the*

way in which ADR has become part of the equation for resolving disputes in the context of sports law.

- ***ADR***

ADR refers to procedures for settling disputes by means other than litigation. The two basic forms of ADR are the fundamentally different processes of arbitration and mediation. The major difference between arbitration and mediation is that in arbitration an arbitrator is the decision-maker, whereas in mediation the mediator plays the role of settlement-facilitator.

***Litigation** is a process which uses the legal system to resolve of dispute. Lawyers are hired to advocate for their clients, judges make rulings on evidence and procedure, appeals are allowed, and precedent is created. However, litigation is not swift or efficient, especially if parties wish to resolve their disputes in a non-adversarial manner. Indeed, litigation is costly and can take years to reach a conclusion. Arbitration and mediation may be used by parties to attempt to settle a dispute without going to trial.*

Understanding ADR and how it differs from litigation can affect how one does business. Much of the reason that ADR is so effective is that the emphasis is less on lawyers and civil procedure and more on the needs of the parties themselves.

Mediation does not focus on who is right or wrong, a significant divergence from the adversarial mind-set of litigation. If the attempt to resolve differences through ADR fails, one or both parties may still resort to litigation.

*Beginning in the 1990s, emphasis was placed on the role of ADR with the enactment of the Administrative Dispute Resolution Act of 1990 (**ADRA**) that requires all federal agencies to establish policies for the use of ADR (5 U.S.C. §*

*571 et seq.). Prior to the ADRA, the 1925 Federal Arbitration Act (**FAA**) (9 U.S.C.*

§ 1 et seq.) and the model Uniform Arbitration Act (UAA) encouraged the use of ADR. Indeed, the FAA applies to all contracts that have an arbitration clause that gives up the right to litigate as a means of dispute resolution. The UAA has been adopted by most states since its enactment in 1955.

CAS

Court of Arbitration for Sport

litigation

process of carrying on a lawsuit via the courts

ADRA

Administrative Dispute Resolution Act of 1990

FAA

Federal Arbitration Act

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Alternative Dispute Resolution

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▪ ***Arbitration***

Arbitration is the most often used form of ADR to resolve conflict in sports law.

Arbitration *involves submitting a dispute to a neutral decision maker (arbitrator) for a final resolution of a disagreement. Arbitration can be characterized in several ways including binding arbitration, non-binding arbitration, mandatory arbitration, or voluntary arbitration. Regardless of its nomenclature, the agreement to arbitrate is usually contained in a clause found in a contract or as a paragraph in a collective bargaining agreement (**CBA**). The arbitrators make final, binding decisions unless otherwise agreed in advance by the parties.*

*Arbitration may mimic a trial and is adversarial in nature, but the rules of evidence and civil procedure are relaxed and the arbitrator is in control of the process without **judicial review** of the decision unless the arbitrator committed fraud or some other clearly egregious misconduct. The finality of an arbitration decision, as opposed to the numerous levels of appeals available in litigation, has caused significant dissonance and misunderstanding of the role of arbitration for some trial lawyers, their clients and even some judges.*

*Many athletic disputes are coordinated and resolved under the auspices of the **American Arbitration Association** (**AAA**), a not-for-profit educational organization dedicated to resolution of disputes of all sorts through arbitration, mediation, democratic elections, and other forms of ADR. The AAA, which was formed in 1926, is headquartered in New York City but has regional offices in cities throughout the United States.*

Process

*In the Big Four sports, arbitration begins with the filing of some sort of **grievance**.*

Grievances often focus on disagreements related to discipline, fines, franchise movement issues, injuries, and salaries. In fact, since the Big Four players associations (unions) certify sports agents, there have been several arbitrations related to the revocation of an agent's ability to represent a

player within that league. This has occurred primarily as discipline for stealing clients, criminal misconduct, or other unethical practices.

The process of selecting an arbitrator varies among the Big Four but it is usually a joint process. Depending upon the CBA, both sides agree on one arbitrator or a group (i.e., panel) of arbitrators. An arbitration policy may also specify certain requirements for the arbitrator, such as minimum years of experience as an arbitrator or in the particular field or industry involved in the dispute.

arbitration

submitting a dispute to a neutral decision maker for final and binding resolution ***CBA***

collective bargaining agreement

judicial review

the process in which the courts may review laws or regulations promulgated by the legislative or executive branches of government, but not usually afforded in binding arbitration unless a party can demonstrate a clearly erroneous decision or one made with undue influence over the arbitrator ***AAA***

American Arbitration Association

American Arbitration Association (AAA)

national organization that maintains a panel of arbitrators to hear labor and commercial disputes

grievance

the first step, usually in the context of a labor dispute, which asserts that management or labor has violated a term of the collective bargaining agreement *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic*

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The arbitrator selection process ultimately depends upon what the employer (owners) and employee (players) agree upon. In fact, sometimes the arbitration selection process provides that the they will select the arbitrator by taking turns striking names from a list obtained from a neutral administering agency (such as the AAA) until only one name remains.

Judicial Review

As already mentioned, an arbitrator's decision is not appealable to a court as a general rule. The finality of arbitration decisions, unlike in litigation, is well established in U.S. jurisprudence and supported by the FAA and the Supreme Court. However, some arbitrator's awards are appealable with the potential to be overturned (vacated) if they fit into a narrow exception provided. Decisions are appealable if: 1. the award was procured by corruption, fraud, or undue means; 2. there was evident partiality or corruption in the arbitrators; 3. the arbitrators were guilty of misconduct in refusing to postpone the hearing when there was good cause to postpone, or in refusing to hear pertinent and material evidence, or were guilty of any other misbehavior which may have prejudiced any party; or

4. the arbitrators exceeded their power so much so that a mutual, final, and definite award upon the subject matter submitted was not made. See Miami Dolphins v. Williams 356 F.Supp. 2d 1301 (S.D. Fla. 2005) citing FAA (9 U.S.C. § 10(a)).

▪ *Mediation*

Mediation *is the submission of a dispute to an impartial facilitator (the mediator) who assists the parties in negotiating a settlement of their dispute. It is used far less than arbitration in the Big Four sports. During the longest work stoppage in NFL history, the 2011 NFL lockout, the United States District Court for the District of Minnesota ordered mediation in Brady v. NFL so that the NFL and NFLPA could attempt to resolve their dispute without the courts having to become further involved.*

The parties in a mediation session are virtually in complete control of the process and may walk away at any time. In essence, the parties decide for themselves, though they may ask the mediator for proposed solutions to the issues.

Lawyers may be present during mediation, just as in arbitration, but it is the mediator who takes the lead not the attorneys.

It is quite common for the roles of all individuals during a mediation, including lawyers or other representatives, to be established by contract prior to the mediation session. All conversation and materials produced during a mediation session are strictly confidential, and the wise mediator has the parties sign a written statement attesting to the same.

Sometimes mediators might use the process of shuttle diplomacy by employing private ***caucuses*** *(i.e., meetings) in separate areas with the parties. During a caucus, each party has the chance to suggest possible solutions to the conflict, and the* ***mediation***

nonbinding method to resolve a dispute by involving a neutral third party who attempts to help the parties resolve their dispute

caucuses

the process of separating parties during a meditation into separate rooms so as to generate privacy in discussion with the mediator

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mediator's skills are useful in engaging with the parties to explore numerous options and suggestions for an ultimate compromise. Ultimately, the terms of a successful mediation will be reduced to a written contract between the parties, and any breach of that contract could then lead to litigation if either party fails to live up to its end of the bargain.

▪ ***Med-Arb/Arb-Med and Minitrials***

Mediation-arbitration, also known as ***med-arb*** *(or* ***arb-med****), is a hybrid of mediation and arbitration. Med-arb is used in complex disputes that involve numerous issues. The parties generally agree to resolve disputes first during a mediation phase but unresolved issues may then be presented to an arbitrator. Sometimes, the parties agree that the mediator will also serve as the arbitrator, but that is not always the case and may, in fact, be unwise. A* ***minitrial*** *is a structured dispute resolution method in which senior executives, or the parties involved in legal disputes, meet in the presence of a neutral advisor who, after hearing presentations of the merits of each side of the dispute, attempts to formulate a voluntary settlement.*

▪ ***Professional Sports***

Unlike arbitration, mediation is used rarely in team sport disputes since the collective bargaining agreement mandates arbitration as the means of settling disputes.

Still, mediation might be a first resort (or required) under a contractual agreement between private sponsor and a professional athlete, for example.

In the Big Four professional sports, an arbitration clause is found in the respective CBAs, which do change over time. In MLB, the CBA has used last best offer arbitration in which both the team and the player involved submit their last offers to an arbitrator who must pick one (or the other) of the submitted figures.

Sometimes this is referred to as final-offer arbitration, baseball arbitration or high-low arbitration and it is unique since the arbitrator's hands are tied. Although the number of players filing for salary arbitration varies per year, the majority of cases are settled before the arbitration hearing.

Seitz Decision

Sometimes the decisions of Big Four arbitrations reaches national discussion. Recall the decision from Chapter 9 in which arbitrator Peter Seitz ruled in 1975 that baseball's reserve clause granted a team only one additional year of service from a player, putting an end to perpetual renewal right for the clubs. This opened the door for players Andy Messersmith and Dave McNally to become free agents, which influenced the commencement of free agency in other professional sports leagues. The following examples provide insight as to the benefit (or detriment) of the arbitration process.

med-arb

hybrid form of alternative dispute resolution involving both mediation and arbitration ***minitrial***

a non-binding trial in which decision makers, such as senior executives, might see how an actual trial might play out and causing the parties to possibly arrive at a private solution instead

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NFL

NFL star wide-receiver Terrell Owens was suspended for four games in 2005 with pay for "conduct detrimental to the team." Owens had been involved in numerous public and private disputes related to his relationship with his employer, the Philadelphia Eagles, coaches and teammates. Owens filed a grievance with the support of the NFLPA against the Eagles alleging that his punishment was too harsh.

Arbitrator Richard Bloch determined in a 38-page decision that the four-game suspension with pay, a decision by Owens not to return to the team, and the subsequent de-activation (meaning he would be paid but could not play) was justified.

Bloch held that the Eagles proved, by clear and convincing evidence, that Owens' suspension was legitimate and for just cause. The grievance was denied and Owens'

behavior was characterized by Bloch as "unparalleled detrimental misconduct." In the end, Owens lost his arbitration and about $800,000 of his salary, but he continued his NFL career with several other teams.

NBA

On December 1, 1997, NBA player Latrell Sprewell was suspended for a full year and had his guaranteed contract terminated for allegedly choking Golden State Coach P.J. Carlesimo during a practice. The NBPA challenged the NBA's discipline in an arbitration proceeding and on March 4, 1998

arbitrator John Feerick, dean of Fordham University Law School, issued a ruling in favor of the NBPA and Sprewell. Feerick reinstated Sprewell's guaranteed contract and reduced his suspension from a full calendar year (82 games) to the remainder of the NBA season (68 games). This allowed Sprewell to attend training camp and begin the next season on time.

As demonstrated by the Owens and Sprewell arbitrations, the outcomes are unpredictable, yet final and binding. The following Supreme Court decision involving MLB player Steve Garvey demonstrates the deference given to arbitration decisions and the difference between litigation, arbitration and the scope of judicial review.

▪ ***CASE 15***

Major League Baseball Players Association v. Steve Garvey ***Supreme Court of the United States***

certiorari and reverse. The motions for leave to file ***May 14, 2001, Decided***

briefs amicus curiae of the National Academy of Arbitrators and the Office of the Commissioner of Baseball are ***OPINION***

granted.

PER CURIAM

In the late 1980's, petitioner Major League Baseball The Court of Appeals for the Ninth Circuit here

Players

Association

(Association)

filed

grievances

rejected an arbitrator's factual findings and then

against the Major League Baseball Clubs (Clubs),

resolved the merits of the parties' dispute instead of claiming the Clubs had colluded in the market for

remanding the case for further arbitration proceed-

free-agent services after the 1985, 1986 and 1987 base-ings. Because the Court's determination conflicts with ball seasons, in violation of the industry's collective-our cases limiting review of an arbitrator's award

bargaining agreement. A free agent is a player who

entered pursuant to an agreement between an

may contract with any Club, rather than one whose

employer and a labor organization and prescribing

right to contract is restricted to a particular Club. In a the appropriate remedy where vacation of the award

series of decisions, arbitrators found collusion by the is warranted, we grant the petition for a writ of

Clubs and damage to the players. The Association and Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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Clubs subsequently entered into a Global Settlement

and found that Garvey had not shown a specific offer Agreement (Agreement), pursuant to which the Clubs

of extension. Ibid. He concluded that:

established a $280 million fund to be distributed to injured players. The Association also designed a

"'the shadow cast over the credibility of the Smith

"Framework" to evaluate the individual player's claims, testimony coupled with the absence of any other

and, applying that Framework, recommended distribu-

corroboration of the claim submitted by Garvey

tion plans for claims relating to a particular season or compels a finding that the Padres declined to

seasons.

extend his contract not because of the constraints

of the collusion effort of the clubs but rather as a The Framework provided that players could seek an

baseball judgment founded upon [Garvey's] age

arbitrator's review of the distribution plan. The arbitra-and recent injury history.'" Ibid.

tor would determine "only whether the approved

Framework and the criteria set forth therein have

Garvey moved in Federal District Court to vacate the been properly applied in the proposed Distribution

arbitrator's award, alleging that the arbitrator violated Plan." Garvey v. Roberts, 203 F.3d 580, 583 (CA9 2000) the Framework by denying his claim. The District Court (Garvey I). The Framework set forth factors to be con-denied the motion. The Court of Appeals for the Ninth sidered in evaluating players' claims, as well as specific Circuit reversed by a divided vote. The court acknowl-requirements for lost contract-extension claims. Such edged that judicial review of an arbitrator's decision in claims were cognizable "'only in those cases where evia labor dispute is extremely limited. But it held that dence exists that a specific offer of an extension was review of the merits of the arbitrator's award was war-made by a club prior to collusion only to thereafter ranted in this case, because the arbitrator "'dispensed be

withdrawn

when

the

collusion

scheme

was

his own brand of industrial justice.'" Id. at 589. The initiated.'" Id. at 584.

court recognized that Smith's prior testimony with

Respondent Steve Garvey, a retired, highly regarded

respect to collusion conflicted with the statements in first baseman, submitted a claim for damages of

his 1996 letter. But in the court's view, the arbitrator's approximately $ 3 million. He alleged that his contract refusal to credit Smith's letter was "inexplicable" and with the San Diego Padres was not extended to the

"bordered on the irrational," because a panel of arbi-1988 and 1989 seasons due to collusion. The Associa-

trators, chaired by the arbitrator involved here, had tion rejected Garvey's claim in February 1996, because previously concluded that the owners' prior testimony he presented no evidence that the Padres actually

was false. Id. at 590. The court rejected the arbitrator's offered to extend his contract. Garvey objected, and reliance on the absence of other corroborating evian arbitration hearing was held. He testified that the dence, attributing that fact to Smith and Garvey's direct Padres offered to extend his contract for the 1988

negotiations. The court also found that the record pro-and 1989 seasons and then withdrew the offer after

vided "strong support" for the truthfulness of Smith's they began colluding with other teams. He presented

1996 letter. Id. at 591-592. The Court of Appeals a June 1996 letter from Ballard Smith, Padres' Presi-reversed and remanded with directions to vacate the

dent and CEO from 1979 to 1987, stating that, before award.

the end of the 1985 season, Smith offered to extend

The District Court then remanded the case to the arbi-Garvey's contract through the 1989 season, but that

tration panel for further hearings, and Garvey

the Padres refused to negotiate with Garvey thereafter appealed. The Court of Appeals, again by a divided

due to collusion.

vote, explained that Garvey I established that "the con-The arbitrator denied Garvey's claim, after seeking

clusion that Smith made Garvey an offer and subse-

additional documentation from the parties. In his

quently withdrew it because of the collusion scheme

award, he explained that "'there exists … substantial was the only conclusion that the arbitrator could draw doubt as to the credibility of the statements in the from the record in the proceedings." No. 00-56080,

*Smith letter.'" Id. at 586. He noted the "stark contra-2000 WL 1801383, at *1 (Dec. 7, 2000), judgt. order*

dictions" between the 1996 letter and Smith's testimony to be reported at 243 F.3d 547. (Garvey II). Noting that in the earlier arbitration proceedings regarding collu-its prior instructions might have been unclear, the

sion, where Smith, like other owners, denied collusion Court clarified that Garvey I "left only one possible and stated that the Padres simply were not interested in result--the result our holding contemplated--an award extending Garvey's contract. Ibid. The arbitrator deter-in Garvey's favor." Ibid. The Court of Appeals reversed mined that, due to these contradictions, he "'must

the District Court and directed that it remand the case reject [Smith's] more recent assertion that Garvey did to the arbitration panel with instructions to enter an not receive [a contract] extension'" due to collusion, award for Garvey in the amount he claimed.1

(continued)

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The parties do not dispute that this case arises under result." 484 U.S. at 40-41, n. 10. That step, we

§ 301 of the Labor Management Relations Act, 1947,

explained, "would improperly substitute a judicial

61 Stat. 156, 29 U.S.C. § 185(a), as the controversy determination for the arbitrator's decision that the involves an assertion of rights under an agreement

parties bargained for" in their agreement. Ibid.

between an employer and a labor organization.

Instead, the court should "simply vacate the award,

Although Garvey's specific allegation is that the

thus leaving open the possibility of further proceed-arbitrator violated the Framework for resolving

ings if they are permitted under the terms of the

players' claims for damages, that Framework was

agreement." Ibid.

designed to facilitate payments to remedy the

To be sure, the Court of Appeals here recited these

Clubs' breach of the collective-bargaining agreement.

principles, but its application of them is nothing short Garvey's right to be made whole is founded on that

of baffling. The substance of the Court's discussion agreement.

reveals that it overturned the arbitrator's decision Judicial review of a labor-arbitration decision pursuant because it disagreed with the arbitrator's factual find-to such an agreement is very limited. Courts are not ings, particularly those with respect to credibility. The authorized to review the arbitrator's decision on the Court of Appeals, it appears, would have credited

merits despite allegations that the decision rests on fac-Smith's 1996 letter, and found the arbitrator's refusal tual errors or misinterprets the parties' agreement.

to do so at worst "irrational" and at best "bizarre." Gar-Paperworkers v. Misco, Inc., 484 U.S. 29, 36, 98 L. Ed.

vey I, 203 F.3d at 590-591.But even "serious error" on 2d 286, 108 S. Ct. 364 (1987). We recently reiterated the arbitrator's part does not justify overturning his that if an "'arbitrator is even arguably construing or decision, where, as here, he is construing a contract applying the contract and acting within the scope of and acting within the scope of his authority. Misco, his authority,' the fact that 'a court is convinced he supra, at 38.

committed serious error does not suffice to overturn In Garvey II, the court clarified that Garvey I both his decision.'" Eastern Associated Coal Corp. v. Mine Work-rejected the arbitrator's findings and went further, ers, 531 U.S. 57, 62, 148 L. Ed. 2d 354, 121 S. Ct. 462

resolving the merits of the parties' dispute based on (2000) (quoting Misco, supra, at 38). It is only when the the court's assessment of the record before the arbi-arbitrator strays from interpretation and application of trator. For

that reason, the court found further arbi-the agreement and effectively "dispenses his own

tration

proceedings

inappropriate.

But

again,

brand of industrial justice" that his decision may be established law ordinarily precludes a court from

unenforceable. Steelworkers v. Enterprise Wheel & Car resolving the merits of the parties' dispute on the

Corp., 363 U.S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct.

basis of its own factual determinations, no matter

1358 (1960). When an arbitrator resolves disputes how erroneous the arbitrator's decision. Misco, supra, regarding the application of a contract, and no dishon-at 40, n. 10; see also American Mfg. Co., 363 U.S. at 568.

esty is alleged, the arbitrator's "improvident, even silly, Even when the arbitrator's award may properly be

factfinding" does not provide a basis for a reviewing vacated, the appropriate remedy is to remand the

court to refuse to enforce the award. Misco, 484 U.S.

case for further arbitration proceedings. Misco, supra, at 39.

at 40, n. 10. The dissent suggests that the remedy In discussing the courts' limited role in reviewing the described in Misco is limited to cases where the

arbi-merits of arbitration awards, we have stated that

trator's errors are procedural. Post, at 1 (opinion of

"'courts … have no business weighing the merits of

STEVENS, J .) Misco did involve procedural issues, the grievance [or] considering whether there is equity but our discussion regarding the appropriate remedy

in a particular claim.'" Id. at 37 (quoting Steelworkers v.

was not so limited. If a remand is appropriate even American Mfg. Co., 363 U.S. 564, 568, 4 L. Ed. 2d 1403, when the arbitrator's award has been set aside for

80 S. Ct. 1343 (1960)). When the judiciary does so, "it

"procedural aberrations" that constitute "affirmative usurps a function which … is entrusted to the arbitra-misconduct," it follows that a remand ordinarily will tion tribunal." Id. at 569; see also Enterprise Wheel & be appropriate when the arbitrator simply made fac-Car Corp., supra, at 599 ("It is the arbitrator's construc-tual findings that the reviewing court perceives as

tion [of the agreement] which was bargained for … ").

"irrational." The Court of Appeals usurped the arbi-

Consistent with this limited role, we said in Misco trator's role by resolving the dispute and barring fur-that "even in the very rare instances when an arbitrather proceedings, a result at odds with this governing tor's procedural aberrations rise to the level of affir-law.2

mative misconduct, as a rule the court must not

For the foregoing reasons, the Court of Appeals erred foreclose further proceedings by settling the merits in reversing the order of the District Court denying the according to its own judgment of the appropriate

motion to vacate the arbitrator's award, and it erred Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).

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further in directing that judgment be entered in Gar-Co., 240 U.S. 251, 258, 60 L. Ed. 629, 36 S. Ct. 269, vey's favor. The judgment of the Court of Appeals is 1916 Dec. Comm'r Pat. 281 (1916).

reversed, and the case is remanded for further pro-

2. In any event, no serious error on the arbitrator's ceedings consistent with this opinion.

part is apparent in this case. The fact that an ear-

lier panel of arbitrators rejected the owners' testimony as a whole does not compel the conclusion

FOOTNOTES

that the panel found Smith's specific statements

1. Garvey contends that, because the Association's

with respect to Garvey to be false. The arbitrator's petition was filed more than 90 days after Garvey I, explanation for his decision indicates that he sim-we cannot consider a challenge raising issues

ply found Smith an unreliable witness and that, in

resolved in that decision. But there is no question

the absence of corroborating evidence, he could

that the Association's petition was filed in suffi-

only conclude that Garvey failed to show that the

cient time for us to review Garvey II, and we have Padres had offered to extend his contract. The

authority to consider questions determined in ear-

arbitrator's analysis may have been unpersuasive

lier stages of the litigation where certiorari is

to the Court of Appeals, but his decision hardly

sought from the most recent of the judgments of

qualifies as serious error, let alone irrational or

the Court of Appeals. Mercer v. Theriot, 377 U.S.

inexplicable error. And, as we have said, any such

152, 12 L. Ed. 2d 206, 84 S. Ct. 1157 (1964) (per error would not justify the actions taken by the

curiam) ; Hamilton-Brown Shoe Co. v. Wolf Brothers & court.

NCAA

Since student-athletes are not considered employees by United States courts and have not bargained collectively, not much attention has been given to an alternative dispute resolution process among student-athletes. On the other hand, the NCAA has its own form of private justice which involves

*allegations and appeals internally under the auspices of its Committee on Infractions (**COI**). The NCAA also has an Infractions Appeals Committee to hear appeals of findings of major violations as discussed in Chapter 1.*

Claims involving disputes related to coaching terminations at individual institutions can go to arbitration or mediation as the case may be. After former Texas Tech University coach Mike Leach was terminated due to his conduct in punishing a student-athlete, Leach filed a lawsuit alleging breach of contract, libel and slander. Soon thereafter, a state court judge ordered an attempt to mediate the difference between the parties.

ADR has been used by the NCAA itself, as in the restricted-earnings for coaches antitrust case Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998), in which the NCAA reached a $54.5 million settlement in 1999 via mediation. The NCAA had filed an appeal with the Tenth Circuit Court of Appeals on what it argued were mistakes made by the District Court during the damages phase of the trial. The mediation services of the court became available when the petition for appeal was entered, and the agreement was later reached through mediation.

Olympic Movement

*Arbitration is the method of choice for conflict resolution in the Olympic Movement and the USOC. In 1998, the Ted Stevens Olympic and Amateur Sports **COI***

Committee on Infractions

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Chapter Eleven

*Act (**TSOASA**) re-emphasized the use of arbitration to resolve Olympic and amateur sports disputes. The TSOASA grants the USOC the authority "to provide swift resolution of conflicts and disputes involving amateur athletes." The Act also recognizes the American Arbitration Association as the dispute-resolution administrator.*

There are three major classes of disputes involving the Olympics that are resolved through arbitration and the AAA:

1. eligibility of an athlete to compete in the Olympics or the Pan-American Games;

*2. determination of the appropriate National Governing Body (**NGB**) for a particular amateur sport; or*

3. positive findings of drug use during out-of-competition testing.

*Additionally, the USOC Athlete **Ombudsman** provides free advice to athletes related to the Olympic Movement, Paralympic and Pan American Games, world championship competitions, or other protected competitions as defined by the USOC*

Bylaws.

ADR has been used in many instances to resolve disputes involving the Olympic Movement. However, it has not always been that way. Legal battles involving positive drug tests, disagreements over team selection, and the failure to send a U.S. team to the Moscow Olympics in 1980 led to numerous lawsuits in U.S. courts.

However, the lack of consistency among decisions coupled with whether or not U.S. courts had jurisdiction in the first place caused great concern for NGBs, the USOC, USADA, and the IOC over who was "in charge." Litigation was costly, lengthy, and often controversial. How to deal with mandated arbitration policy of the USOC as opposed to the pro-litigation

attitude of U.S. society became extremely contentious during the selection process of the United States 2000 Sydney Olympics wrestling team.

Lindland

In Lindland v. United States Wrestling Ass'n, 230 F.3d 1036 (7th Cir. 2000), the selection of who would represent the United States in the 167.5 (76 kilogram) weight class of Greco-Roman wrestling became an out of control ADR. Both Sgt. Keith Sieracki (U.S. Army) and Matt Lindland (University of Nebraska) believed they were entitled to represent the United States. Lindland lost to Sieracki in the U.S.

trials in Dallas in June 2000, by a score of 2-1 in overtime. Lindland protested the results of this match, and commenced arbitration against USA Wrestling under the TSOASA.

An arbitrator ordered a rematch in which Lindland won the rematch by a score of 8-1, but USA Wrestling did not accept the results of this rematch and instead presented Sieracki as its nominee to the USOC, which then sent Sieracki's name to the IOC. The refusal to comply with the arbitrator's decision by the USOC coupled with a different arbitrator's decision in the same case prompted judicial review of the entire matter as described in the following case, a decision by the Seventh Circuit Court of Appeals.

TSOASA

Ted Stevens Olympic and Amateur Sports Act

NGB

National Governing Body

Ombudsman

position at the USOC designed to address athlete complaints involving Olympic Movement issues

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▪ ***CASE 16***

Matt Lindland, Plaintiff-Appellee, v. United States of America Wrestling Association, Inc., United States Olympic Committee, and Keith Sieracki, Defendants-Appellants. Keith Sieracki, Plaintiff-Appellant, v. United States of America Wrestling Association, Inc., and United States Olympic Committee, Defendants-Appellees

United States Court of Appeals

its nominee on the basis of his victory in the first ***for the Seventh Circuit***

match. USA Wrestling had no excuse for following

August 30, 2000, Submitted (No. 00-3220);

Arbitrator Campbell's unreviewed award rather than a ***September 1, 2000, Submitted (No. 00-3236)***

decision of a federal court confirming Arbitrator

Burns's award, and on August 25 we issued a writ of

September 1, 2000, Decided;

*mandamus requiring the district court [**3] to ensure* ***September 5, 2000, Opinion Issued***

that USA Wrestling implemented the Burns Award

[…]

"immediately and unconditionally." Lindland v. USA Wrestling Association, Inc., 230 F.3d 1036, 2000 U.S. App.

EASTERBROOK, CIRCUIT JUDGE.

LEXIS 22213, No. 00-3177 (7th Cir. Aug. 25, 2000), slip Readers of our prior opinions (or the sports pages)

op. 2. On August 26 USA Wrestling finally complied,

know that Keith Sieracki and Matt Lindland both

but the USOC then refused to accept Lindland as a

believe that they are entitled to be the U.S. entrant in member of the team, asserting that USA Wrestling's

the 76 kilogram weight class of Greco-Roman wrestling nomination of Lindland was untimely because Sieracki's at the 2000 Olympic Games. They have met twice in

name already had been sent to the International

championship bouts where the Olympic spot was the

Olympic Committee (IOC) in Lausanne, Switzerland.

victor's reward: Sieracki won the first by a score of 2-1; Lindland then returned to the district court, asking it Lindland won the second by a score of 8-0. Each claims to compel the USOC to send his name to the IOC.

that his victory entitles him to the slot in Sydney. Lind-Sieracki fought back by asking a different district

land protested the result of the first match through the court (in Denver, Colorado) to confirm the Campbell

hierarchy of USA Wrestling, the national governing

Award. The district judge in Denver sensibly trans-

body for amateur wrestling. After USA Wrestling

*ferred that request to the Northern District of Illinois rejected his protests, Lindland commenced arbitration, under 28 U.S.C. § 1404, consolidating all proceedings which was his right under the [*1002] Ted Stevens*

arising out of the dispute. The Northern District

Olympic and Amateur Sports Act. See 36 U.S.C. §

ordered the USOC to request the IOC to substitute

220529(a). Arbitrator Burns ordered the rematch, Lindland for Sieracki. The USOC has done so, and

which Lindland won. USA Wrestling was unwilling to

the IOC has made the substitution. The Northern Dis-

*accept [**2] this outcome; instead of sending Lind-*

trict also denied Sieracki's petition to confirm the land's name to the United States Olympic Committee

Campbell Award. Two appeals ensued. We expedited

(USOC) as its nominee for the Games, it told the USOC

*the briefing and affirmed [**4] both decisions on Sep-to send Sieracki and listed Lindland only as a person tember 1, promising that this opinion would*

follow

eligible to compete in the event of injury. Lindland with an explanation.

then sought confirmation of the Burns Award under §

Although Lindland now is a member of the U.S. team,

9 of the Federal Arbitration Act, 9 U.S.C. § 9, and in an and the IOC's deadline for making changes has

opinion issued on August 24 we held that Lindland is expired, the dispute is not moot. The Games begin at entitled to that relief--which, we pointedly added,

4 a.m. on September 15 (Chicago time), and the 76

means that he is entitled to be USA Wrestling's nomi-kilogram classification in Greco-Roman wrestling does nee to the USOC. Lindland v. USA Wrestling Association, not get underway until September 24. The IOC

Inc., 230 F.3d 1036, 2000 U.S. App. LEXIS 21754 (7th Cir.

accepted a substitution of Lindland for Sieracki after 2000).

its deadline, remarking that it was willing to make the Later that day, USA Wrestling informed the USOC that change because the USOC acted under judicial order.

Sieracki remained its nominee. Its explanation for this This implies that if we now confirmed the Campbell

defiance was that a second arbitrator, in a proceeding Award (including its provision annulling the Burns

initiated by Sieracki, had disagreed with Arbitrator Award) and directed the USOC to substitute Sieracki

Burns and directed USA Wrestling to make Sieracki

for Lindland, the IOC would accept that change as

(continued)

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well. We therefore address the merits—starting with

which Campbell could disagree. But this may not be a what is logically the first issue, whether to confirm the complete answer. If the Campbell Award is understood Campbell Award.

*[**7] to vacate the Burns Award, then confirmation of Lindland had argued to Arbitrator Burns that USA*

the Campbell Award logically entails vacating the prior Wrestling's grievance proceedings were flawed. Arbitra-confirmation of the Burns Award. That step would not tor Burns agreed and ordered the rematch as a remedy leave USA Wrestling under conflicting judicial instruc-in lieu of directing USA Wrestling to reconsider Lind-tions. (Nor is it clear that conflict is an irremediable land's protest to the judging of his match with Sieracki.

*evil. Injunctions create property rights, which may be Arbitrator Campbell went over the same ground, [**5]*

altered by private agreements. Bargaining among Sier-disagreeing with Arbitrator Burns about the adequacy acki, Lindland, and USA Wrestling could lead to a setof USA Wrestling's processes and adding that, in his tlement that would relieve USA Wrestling of any

*view, the [*1003] result of the first match (which every-incompatible obligations. See Guido Calabresi & A.*

one calls "Bout # 244") had not been affected by any Douglas Melamed, Property Rules, Liability Rules, and errors in applying the scoring rules for Greco-Roman Inalienability: One View of the Cathedral, 85 Harv. L.

wrestling. It is not a surprising view for Arbitrator Rev. 1088 (1972).)

Campbell to have taken, because the proceedings

Definitive resolution of the right way to handle conflict-began amicably. Sieracki initiated the arbitration to ing awards, after one has been confirmed, may await

defend his initial victory, and USA Wrestling, the

another day. The Campbell Award could not be con-

respondent, likewise defended both the scoring of the firmed even if it were the sole award. It is doubly

match and the conduct of its internal appeals. (Lind-flawed: first, the entire proceeding appears to have land intervened to defend the Burns Award, but, hav-been ultra vires; second, the award violates the Coming already won the rematch, was more interested in

mercial Rules of the American Arbitration Association, preserving that victory than in litigating from scratch.) under which the proceeding was conducted. 36 U.S.C.

What is surprising was that Arbitrator Campbell not

§ 220529(b)(2). Because Arbitrator Campbell exceeded only approved the result of the original Bout # 244

*his powers, his award cannot be [**8] confirmed.*

and the adequacy of USA Wrestling's grievance proce-

9 U.S.C. § 10(a)(4).

dures but also directed it to ignore the result of the Sieracki initiated an arbitration not to contest a final rematch--that is, Arbitrator Campbell directed USA

decision by USA Wrestling but to protest the Burns

Wrestling not to implement the Burns Award.

Award. Sieracki filed his demand for arbitration on

Sieracki argues that the Campbell Award is no less con-August 11, two days after the Burns Award and three

firmable under the standards of the Federal Arbitration days before his rematch with Lindland (and thus

*Act than was the Burns Award, see 9 U.S.C. § 10, [**6]*

before any issues associated with that bout could have and if he is entitled to confirmation of the Campbell arisen). The Stevens Act does not authorize arbitration Award then we should set aside the confirmation of the about the propriety of another arbitrator's decision.

Burns Award (because relief from the Burns Award is

Section 220529(a) provides:

part of the Campbell Award). Certainly there is no eviA party aggrieved by a determination of the corpo-

dence that the Campbell Award is the result of "corrup-ration under section 220527 or 220528 of this title tion," "fraud," "evident partiality," or any similar bar to may obtain review by any regional office of the

confirmation. The district court refused to enforce the American Arbitration Association.

Campbell Award because the Burns Award had been

enforced already, and it read Consolidation Coal Co. v.

What is arbitrable is "a determination of the corpora-United Mine Workers, 213 F.3d 404 (7th Cir. 2000), as pre-tion under section 220527 or 220528 of this title". Arbi-cluding enforcement of incompatible awards. Only one trator Burns is not "the corporation" (a term defined in of these athletes can be on the Olympic Team, and the

§ 220501 as the USOC, though some of its powers have district judge thought that federal courts should not been delegated to national governing bodies such as

order the USOC to send both. Sieracki replies that

USA Wrestling); what is more, neither he nor USA

arbitrators

need

not

follow

judicial

notions

of

Wrestling (in implementing the Burns Award to the

preclusion--a good point about arbitrators, see Brother-extent of scheduling the rematch) rendered "a deter-

*hood of Maintenance of Way Employees v. Burlington North-mination … under section 220527 or 220528 of this ern R.R., 24 F.3d 937 (7th Cir. 1994), but not about title". Section 220528 [**9] deals with applications to judges. Once the Burns Award was confirmed, it was*

replace national governing bodies. Section 220527 spe-no longer simply the view of a fellow arbitrator with cifies remedies that athletes have within national

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governing bodies such as USA Wrestling. Lindland

the proceedings before Arbitrator Campbell were

exhausted his remedies within USA Wrestling and

parties to the Burns proceedings. By the time Camp-

obtained "a determination of the corporation under

bell acted, the Burns Award had "already decided"

section 220527 … of this title", and thus was entitled to that the nomination to the Olympic Team would

arbitrate his grievance. Sieracki, by contrast, did not depend on a rematch between Sieracki and Lindland.

initiate any proceedings within the scope of § 220527.

Whatever powers Campbell possessed vis-a-vis Sier-

Although § 220527(b)(1) allows athletes to forego acki, he lacked the power to order USA Wrestling to

exhaustion when time is too short to allow decision, it nominate anyone other than the winner of the

does not allow bypass of a claim under § 220527--that is, rematch. The Campbell Award therefore is not entia contention that a national governing body has failed tled to confirmation.

"to comply with sections 220522, 220524, and 220525 of

[…]

*this title". 36 U.S.C. § 220527(a). Sieracki did not have When on August 15 it originally sent to the IOC the full such a claim and therefore was not entitled to arbitra-list of USA Wrestling's [*1007] nominees (a list that tion under the Stevens Act even if it was proper to pre-included Sieracki despite Lindland's victory on August termit administrative remedies. No other provision of 14), the USOC did not make an independent decision*

which we are aware supports arbitration whose sole

about their athletic skills; instead the certification says subject is the decision of a prior arbitrator. The Stevens that the list (and the USOC's approval) is "based on Act would be self-destructive if it authorized such

pro-the selection criteria devised and previously approved ceedings, which would lead to enduring turmoil (as

*by the USOC" and in particular that "the selection of happened [**10] here) and defeat the statute's func-the NGB athlete nominations were [sic] conducted in*

tion of facilitating final resolution of disputes, see §

our estimation according to the policies and proce-

220529(d).

dures approved by the USOC for the 2000 Olympic

Even if the second arbitration had been authorized,

Summer Games." In other words, the USOC investi-

however, the outcome would have been forbidden by

gated only to ensure that USA Wrestling followed the the rules under which it was conducted. Rule 48 of

rules for selecting its nominees. One of these rules the AAA's Commercial Rules provides that an "arbi-

(quoted in our August 24 opinion) specifies that the trator is not empowered to redetermine the merits of winner of Bout # 244 would be USA Wrestling's nomi-any claim already decided." Sieracki stresses, as our nee in the 76 kilogram classification. Lindland is the opinion of August 24 acknowledged, that judicial

winner of Bout # 244 and the recipient of USA Wres-

ideas about issue and claim preclusion need not

tling's (belated) nomination. Under the USOC's own

apply in arbitration. But arbitrators assuredly are

rules, therefore, Lindland is entitled to the position bound by the contracts and other rules that give

on the Olympic Team. This makes it very hard to

them power to act. An arbitrator who throws aside

understand the USOC's position as anything other

those rules and implements his "own brand of indus-

than a continuation of the view disparaged in our

trial justice" oversteps his powers, and the resulting August 24 opinion: a belief by the USOC that athletes award must be set aside. Steelworkers v. Enterprise who pursue their rights under the Stevens Act should Wheel & Car Corp., 363 U.S. 593, 597, 4 L. Ed. 2d be penalized. The district court was entitled to prevent 1424, 80 S. Ct. 1358 (1960); Paperworkers v. Misco, the USOC from carrying out that view under the pre-Inc., 484 U.S. 29, 36, 98 L. Ed. 2d 286, 108 S. Ct. 364

text that USA Wrestling's nomination of Lindland

(1987). What the Steelworkers Trilogy declared about arrived too late.

*"industrial justice" is equally true of commercial or Nonetheless, the USOC insists, it is entitled to do as it athletic justice. Arbitrators are not ombudsmen; they pleases—defying injunctions to its heart's content--if it are authorized to resolve disputes under [**11] con-manages to stall until only three weeks remain before tracts and rules, not to declare how the world should the Games. For this proposition it relies on another work in the large. Arbitrator Campbell did not misin-part of the Stevens Act, 36 U.S.C. § 220509(a): terpret Rule 48; he decided to ignore it utterly. The whole point of the Campbell proceeding was to*

The corporation shall establish and maintain pro-

redecide the issues that had been before Arbitrator

visions in its constitution and bylaws for the swift Burns, and the Campbell Award directs USA Wres-and equitable resolution of disputes involving any

tling to disregard the Burns Award. Campbell

*of its members and relating to the [**20] opportu-*

observed, correctly, that Sieracki was not a party to nity of an amateur athlete, coach, trainer, man-the Burns proceedings, but the other participants in ager, administrator, or official to participate

(continued)

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in the Olympic Games, the Paralympic Games,

the USOC had to do was implement this court's deci-

the Pan-American Games, world championship

sion of August 24 (enforcing the Burns Award of

competition, or other protected competition as

August 9); all we hold is that delay in compliance

defined in the constitution and bylaws of the cor-

with an obligation judicially articulated before the poration. In any lawsuit relating to the resolution

21st day does not entitle the USOC to escape that

of a dispute involving the opportunity of an ama-

obligation. To put this in the statutory language,

teur athlete to participate in the Olympic Games,

the prohibition applies only if "such dispute"—that

the Paralympic Games, or the Pan-American

is, a dispute to be handled under the USOC's

Games, a court shall not grant injunctive relief

procedures—can't be resolved in the time remaining

against the corporation within 21 days before the

before the games. When no "such dispute" survives

beginning of such games if the corporation, after

into the three-week period (because it had been

consultation with the chair of the Athletes' Advi-

resolved earlier), § 220509(a) does not preclude sory Council, has provided a sworn statement in

enforcement of the outstanding decision.

writing executed by an officer of the corporation

Senator Stevens himself may have a different view

to such court that its constitution and bylaws can-

about the effect of § 220509(a). At the behest of the not provide for the resolution of such dispute

USOC, he wrote a letter asking the district judge to prior to the beginning of such games.

vacate its order. Our reading of the letter implies

Saturday, August 26, was the 21st day before the "begin-that the USOC misinformed the Senator about the

ning" of the Sydney Olympics. The USOC filed in the

nature of the controversy and the reason the district district court an affidavit parroting the statutory terms judge had ordered the USOC to send Lindland's

and insists that, as a result, the district court was power-name to the IOC, but no matter. Legislative history

less to enforce the Burns Award.

*is a chancy subject; subsequent legislative history is weaker still... Letters written after a statute's enact-Section 220509(a) is designed [**21] to prevent a ment were not presented in the course of debate*

court from usurping the USOC's powers when time

and so are not the sort of views that may be credible is too short for its own dispute-resolution machinery because other members of the legislature rely on

to do its work. The premise of the USOC's argument

them and may impose penalties on those who misrep-

is that the dispute among Lindland, Sieracki, and

resent, or misunderstand, [the text. Compare William USA Wrestling is one to be resolved by the USOC's

N. Eskridge, Jr., Dynamic Statutory Interpretation

internal processes, which can't be done at this late 210-38 (1994), and McNollgast, Positive Canons: The

date. This is just another variation of the USOC's misun-Role of Legislative Bargains in Statutory Interpreta-derstanding about the genesis of the district court's tion, 80 Geo. L.J. 705 (1992), with John F. Manning, order. Lindland has not asserted a private right of action Textualism as a Nondelegation Doctrine, 97 Colum.

to enforce the Stevens Act, nor has he attempted to ini-L. Rev. 673 (1997).

tiate a new dispute-resolution process before the USOC.

His claim depends on the Burns Award, which was

A letter from a Member of Congress telling a judge

issued on August 9, well outside the 21-day window,

how to decide a pending case reflects a misunder-

and the decision of this court, also issued before the standing of the difference between legislative and

21st day. The only question on the table is whether

judicial functions. Senator Stevens played a leading USA Wrestling and the USOC will comply with obliga-role in the creation of § 220509, but he has no role tions that had been established before that three-week in adjudication. Giving weight to such a letter would period. The USOC's

liability stems from its obligation as only invite other litigants to pester Members of

an entity "in active concert or participation with" USA Congress for expressions of support--or Members of

Wrestling to avoid frustrating the order enforcing the Congress to pester the courts with their latest views Burns Award.

about how laws should be implemented and cases

decided. It is best, we think, for each institution to We do not for one second believe that Congress set

hew to its constitutional function. See Bread PAC;

out to reward intransigence, so that the USOC can

Abbott v. Virginia Beach, 879 F.2d 132, 136 (4th Cir.

protect scofflaws among the national governing

1989); Environmental Defense Fund, Inc. v. Wheelabrator bodies, or itself defy judicial orders if, on the 21st Technologies, Inc., 725 F. Supp. 758, 769-70 (S.D. N.Y.

day before the Olympic torch enters the stadium,

1989); Stephen F. Williams, Legislative History and the President of the USOC is not already in prison

the Problem of Age, 66 Geo. Wash. L. Rev. 1366,

for contempt. There is no dispute for the USOC to

1369 & n.12 (1998).

resolve, so its inability under its constitution and bylaws to act on short notice is not important. All

Affirmed

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Lindland shows an ultimate clash between litigation and ADR. The court forcefully reminded the parties that ADR means ADR not litigation, and the Supreme Court denied a further review. Additionally, it demonstrated that the use of ADR

to resolve subjective, judgment calls by officials in sports might not be appropriate.

At the Sydney Olympics, Lindland earned a silver medal after his 3-0 loss to a Russian for the Olympic gold medal.

Court of Arbitration for Sport (CAS)

The most prominent international arbitration organization in sports law is the Court of Arbitration for Sport (CAS). In 1983, the IOC established CAS to resolve issues under its jurisdiction in order to reduce litigation by athletes and countries for numerous disputes arising out of the Olympic Movement. CAS was designed to

"bring order to the chaotic and inconsistent world of international sports adjudications." It is a sport-specific forum and intended to be a final,

*neutral decision-making arbitration body and the only means for Olympic athletes and international sports federations (**IFs**) to resolve their disputes.*

*The International Council for Sports Arbitration (**ICAS**) was established in 1994 to oversee the CAS to avoid perceived conflicts of interest. CAS is also the chosen arbitration body for prominent international events and leagues including the Tour de France and FIFA, the international soccer federation.*

There are three venues to resolve disputes under the CAS: Lausanne, Switzerland, Sydney, and New York. Arbitrators must be familiar with sports law, particularly at an international level. The official languages are English and French just like the Olympic Movement in general. CAS also has an ad hoc division for on-site, final and binding arbitration, which deals with issues at the Olympic Games themselves. Two of the most common disputes involving doping appeals and field-of-play disputes.

Doping Disputes: Landis

Floyd Landis was a prominent American cyclist who won the 2006 Tour de France.

However, Landis was stripped of his title after testing positive for synthetic testosterone levels during the race. Landis, in a hearing conducted at Pepperdine University law school under the auspices of the AAA, attempted to show that the work of the French lab that performed two separate tests on Landis's samples were problematic. That panel, in a 2-1 decision, ruled there were problems with the first test but not with the backup ("B") sample. The panel was convened by USADA after its Anti-Doping Review Board refused to dismiss his case.

Landis appealed the decision to CAS as a last resort, and the three-lawyer panel upheld the decision. Landis was suspended for two years (retroactive) and had to pay the USADA $100,000 to reimburse it for attorney fees. Landis's battle was over in a published decision on June 30, 2008.

Field-of-Play Decisions: Ohno

At the Salt Lake City Olympics in 2002, the Korean Olympic Committee appealed the disqualification of skater Kim Dong-Sung, who crossed the

finish line first in the 1,500m short-track speed-skating finals, for impeding (blocking) United States ***IF***

International Federations

ICAS

International Council for Sports Arbitration

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skater Apolo Anton Ohno who was awarded the gold medal. Korean officials protested the decision to lead referee, but he declined to accept the protest.

Korean officials then appealed to the CAS ad hoc Division insisting on a video replay review. CAS held that before a CAS panel will review a field-of-play decision, there must be direct evidence of bad faith. The CAS panel recognized that this would be difficult to prove, and it did not want to open the flood-gates for every dissatisfied Olympic competitor who wanted an appeal. As a result, Kim's application for a review was denied.

Hamm

*At the 2004 Athens Olympics, Korean gymnast Yang Tae Young was awarded the bronze medal in the all-around gymnastics competition by the International Gymnastics Federation (****FIG****). He contested the judging that*

resulted in the American, Paul Hamm, receiving the gold medal. The judges had miscalculated Yang's parallel bars routine, giving him a 9.9 start value rather than the 10.0 he should have had for degree of difficulty. The difference was enough to give Hamm the gold and Yang the bronze.

After an appeal to CAS, the arbitration panel stated that an error identified with the benefit of hindsight, whether admitted or not, cannot be grounds for reversing the result of a field-of-play decision during competition.

Video Replay

The issue of whether and how to use of video technology to review decisions made by Olympic referees and judges has been at the forefront of discussion for many years. Certainly, CAS gives great deference to the referee and the rules within the sport itself when it comes to field-of-play decisions and the use of video replay analysis. In a sense, the use of instant replay has become a form of ADR.

In professional sports, the initial use of video technology to assist in field-of-play disputes was met with some resistance. Today, instant replay has become a part of most professional sports, including professional tennis. In 2007, the NFL voted to permanently use instant replay as an officiating tool after having experimented with it starting in 1986. The test is indisputable visual evidence in order to overturn an on-field call. In 2006, the NCAA approved the use of standardized instant replay for football. MLB adopted instant replay for home run calls or fan interference, requiring clear and convincing evidence to overrule a call. The NHL began using instant replay during the 1991–92 season to check goals, and the NBA began using instant replay for last-second shots beginning in the 2002–03 season. Even Little League International announced a limited system of replay for use on home run calls in the Little League World Series in 2008.

Still, instant replay is not used for review of every field-of-play dispute. In some cases, it would have gotten the on-the-field call correct. In 2010, Detroit Tigers pitcher Armando Galarraga would have had a perfect game had instant replay been used for the final out, in which umpire Jim Joyce admittedly made the wrong call on a play at first base. Also in 2010, during

the FIFA World Cup, Germany beat England 4-1. However, English player Frank Lampard was denied ***FIG***

International Gymnastics Federation

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Alternative Dispute Resolution

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a clear goal even though video replays showed to millions around the world that the ball hit the cross-bar and then bounced well over the goal line when it hit the ground.

▪ ***World Intellectual Property Organization (WIPO)*** *Established in 1994, the WIPO Arbitration and Mediation Center offers clauses, rules and neutrals related to ADR procedures. It administers procedures for the resolution of disputes related to the abusive registration (those registered in bad faith) and otherwise illegitimate use of Internet domain names. As discussed earlier in the text, WIPO often becomes involved with resolving cybersquatting and typosquatting disputes. WIPO can determine ownership of domain names, but it cannot levy fines.*

In United States Olympic Committee v. MIC, WIPO Case No. D2000-0189, for example, WIPO ordered a private company that registered the domain name

"usolympicstore.com" to surrender it to the USOC, since the USOC has exclusive rights to the word Olympic and its simulations.

Not all domain name disputes have been settled by WIPO, however. NBA player Chris Bosh sued cybersquatter Luis Zavala in 2009 for the rights to chrisbosh.com. A California Court agreed with Bosh that Zavala, who had also registered more than 800 other celebrity names followed by dot-com, was not entitled to the domain name and ordered Zavala (who never appeared in court) turn over the domain name and pay $120,000 in damages.

ODR

*One area of dispute resolution that is still evolving is online dispute resolution (**ODR**). That is, a virtual method to resolve disputes as opposed to meeting face-to-face as in mediation and arbitration. Advantages of ODR might include convenience, cost and time savings, and reducing the likelihood of physical or verbal intimidation. Disadvantages of ODR include possible security breaches and the inability to discern tone, inflection and facial expressions. Still, there is no reason to assume that ODR will not have its place in sports law in some circumstances. For example, in the mid-2000s several ODR services appeared to assist fantasy sports participants to resolve fantasy sports disputes for a fee. Some of the sites included fantasydispute.com, rotoruler.com, rotoumpire.com, and sportsjudge.com.*

- ***Summary***

*Litigation is the conventional method for settling disputes and has shaped sports law. However, not all disputes require litigation and its adversarial approach to be successfully settled or to come to a resolution. Understanding the differences between arbitration, mediation, and their hybrid forms is important. In recent years, there has been an increased emphasis on using ADR to settle a variety of **ODR***

online dispute resolution

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issues at international, federal, and state levels. Arbitration and mediation are usually more efficient, less costly, and more effective than litigation. Mediation is certainly more confidential. Understanding other various federal laws is important when applying ADR.

The Big Four professional sports leagues have consistently used arbitration as a means of resolving a variety of disputes and individual player grievances. The Olympic Movement, through the Court of Arbitration for Sport and the World Intellectual Property Organization, use ADR as the preferred and sometimes sole method of resolving doping, eligibility and domain name disputes. The advent and growth of the Internet has provided a market for the natural evolution of online dispute resolution, though settlement negotiations that do not involve face-to-face meetings have both advantages and disadvantages.

ADR is not a perfect system and presumes, especially in mediation, that both parties wish to explore a compromise. In ADR, less emphasis is placed on "win at all costs," and more emphasis is placed on problem solving and settlement. In the end, the parties often feel much more satisfied, especially if the parties are willing to compromise from the start of an ADR session. However, particularly in mediation, settlement can only be reached if the parties are sincere in their commitment to reach an agreement.

▪ *Key Terms*

alternative dispute resolution (ADR) *resolving disputes via arbitration, mediation, and other alternatives to litigation*

American Arbitration Association (AAA) *national organization that maintains a panel of arbitrators to hear labor and commercial disputes* ***arbitration*** *submitting a dispute to a neutral decision maker for final and binding resolution*

caucuses *the process of separating parties during a meditation into separate rooms so as to generate privacy in discussion with the mediator* ***grievance*** *the first step, usually in the context of a labor dispute, which asserts that management or labor has violated a term of the collective bargaining agreement* ***judicial review*** *the process in which the courts may review laws or regulations promulgated by the legislative or executive branches of government, but not usually afforded in binding arbitration unless a party can demonstrate a clearly erroneous decision or one made with undue influence over the arbitrator* ***litigation*** *process of carrying on a lawsuit via the courts* ***med-arb*** *hybrid form of alternative dispute resolution involving both mediation and arbitration*

mediation *nonbinding method to resolve a dispute by involving a neutral third party who attempts to help the parties resolve their dispute* ***minitrial*** *a non-binding trial in which decision makers, such as senior executives, might see how an actual trial might play out and causing the parties to possibly arrive at a private solution instead*

Ombudsman *position at the USOC designed to address athlete complaints involving Olympic Movement issues*

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World Intellectual Property Organization (WIPO) *international organization dedicated to helping ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are recognized and rewarded for their ingenuity*

- ***Acronyms***

AAA *American Arbitration Association*

ADR *Alternative Dispute Resolution*

ADRA *Administrative Dispute Resolution Act of 1990*

CAS *Court of Arbitration for Sport*

CBA *collective bargaining agreement*

COI *Committee on Infractions*

FAA *Federal Arbitration Act*

FIG *International Gymnastics Federation*

ICAS *International Council for Sports Arbitration* ***IF*** *International Federations*

NGB *National Governing Body*

ODR *online dispute resolution*

TSOASA *Ted Stevens Olympic and Amateur Sports Act* ***WIPO*** *World Intellectual Property Organization*

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▪ ***Discussion and Review Questions***

1. *What does the phrase alternative dispute resolution (ADR) mean?*

2. *Do you think that alternative dispute resolution is effective in sport? Why or why not?*

3. *What are the differences between arbitration and mediation?*

4. *Do you think that the Court of Arbitration for Sport has been effective?*

5. *Why might litigation be more effective than ADR? Why might ADR be more effective than litigation?*

6. *What is the American Arbitration Association?*

7. *Why is it that mediation is rarely used in sports law, as opposed to arbitration?*

8. *Provide examples of ADR in the Olympic Movement.*

9. *What do you feel the role of instant replay is with regard to settling field-of-play disputes during sports competition.*

10. *What does ODR stand for? Do you believe it will be used more frequently?*

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CHAPTER TWELVE

Religion and Sports

After reading this chapter you will be able to:

1. Discuss the how the Establishment clause and the Free Exercise clause of the Constitution relate to sports law.

2. Describe the three major judicial tests used when confronting a state action claim endorsing religion.

3. Explain how the First and Fourteenth Amendments become involved in sports law.

4. Discuss how the NCAA addresses Sunday competition while recognizing that certain members are opposed to participation on that day of the week.

5. Discuss the various concerns over coach-led or student-led prayer prior to sports contests.

6. Discuss how the federal circuits have come to different conclusions with regard to prayer prior to graduation ceremonies and sport contests.

7. Provide examples of where personal religious beliefs have come into conflict with professional and amateur athletic participation.

8. Debate whether or not religion and sports should be treated differently at the interscholastic, intercollegiate, and professional levels of sports competition.

9. Discuss how singing God Bless America or the Star Spangled Banner have become an issue for some spectators.

10. Summarize how religion might impact employment law and related issues.

▪ *Introduction*

The Constitution of the United States of America provides for numerous rights and freedoms, including the freedom of religion. Indeed, the Constitution is the fundamental legal document to this country. The Constitution has been amended 27 times and has been shaped by the decisions of the Supreme Court for the past two centuries. Much of the legal history surrounding the Constitution involves the exercise of religion. The focus of this chapter is to provide a history and outline of the fundamental issues and cases involving how sports law and religion have intersected.

The study of religion and sports law often raises more questions than clear-cut answers. For example, can prayers be held publicly prior to sports contests at high schools, colleges, and universities? Courts say there is a difference between prayers in the locker room and prayers during graduation, express concern over what prayer is (is it religious or just team-bonding moment), whether the prayer is led ***429***

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by (initiated by) the students, and whether the prayer is led by a ***state actor*** *(an arm of the state) such as a public school coach. Indeed, it is very important to recognize the potential constitutional issues involved, especially*

if the organization is deemed a state actor. As mentioned earlier in this text, the NCAA is not deemed to be a state actor per se.

One of the basic philosophical and legal principles in the United States is the separation between church and state. Put differently, the United States government may not promote, endorse, or advance a particular religion. While the United States is tolerant to a wide variety of religious beliefs and tenets, it is unacceptable for the state to impose one religion over another.

In all, this chapter will attempt to organize the important issues involving religion, sports, and the law. Since the law in this area is constantly changing and often unclear, students should appreciate that decisions often rest on facts and issues on a case-by-case basis. Different rulings and interpretations among the federal circuits continue to raise questions about this difficult issue, as the legal analysis continues to evolve. No doubt, current views and perceptions related to religious tolerance, patriotism, and sports reflect changes in societal attitudes following the events of the U.S. on September 11, 2001. Before exploring the sports law cases, understanding the clauses relating to religion in the Constitution is important.

- ***First Amendment***

In order to understand the basics of the freedoms afforded by our Constitution, one must start at with the Bill of Rights and the ***First Amendment****. The First Amendment to the United States Constitution states:*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(U.S. CONST. amend. I, cl. 1.).

Two clauses found in the First Amendment of the Constitution are the focus of the subject of religion and sports: the ***Establishment clause*** *and the* ***Free Exercise clause****.*

The former prohibits the government from establishing religion while the latter guarantees the individual the right to practice his or her religion. Many refer to these two clauses as the religion clauses of the Constitution. The First Amendment to the Constitution is powerfully broad has been subject to centuries of debate and discussion.

state actor

a body or action that is considered acting on behalf of the government thereby raising constitutional issues and rights

First Amendment

constitutional amendment providing for freedom of the press, freedom of assembly, and freedom of religion

Establishment clause

"Congress shall make no law respecting an establishment of religion"

Free exercise clause

"…or prohibiting the free exercise thereof;"…

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Freedom of Speech

While the First Amendment contains the religion clauses, it also provides for the freedom of speech. In sports law, state colleges, universities, coaches and administrators have had legal challenges related to sponsoring prayer of any sort before, during or after a sports contest or practice. Some say that team prayers constitute freedom of speech as opposed to religion. However, the protections of freedom of speech are limited in part by the Establishment clause. Others say that a team prayer merely demonstrates team unity and is not used to preach or proselytize a particular religion. However, consider a sports participant who is of a different religion, or not religious at all, during such a prayer moment. Might they be fear retribution for non-participation in the prayer or objecting to its use?

Given that many arenas and stadiums on college campus are publicly funded, attempts to hold public prayer have been opposed because the Constitution limits state action which might endorse religion. At a public stadium or arena, is prayer prior to a sports contest an excessive entanglement with religion?

Fourteenth Amendment

Although the First Amendment expressly limits only congressional action, individual states through the application of the Fourteenth Amendment's Equal Protection clause must also preserve the freedom of religion established in the Bill of Rights.

Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

States, of course, might have statutes and constitutional provisions that address religion specifically. For example, the state of Michigan Constitution provides: Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.

The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief. (MICH. CONST. 1963, art 1, § 4).

Discussion of religion in any context can bring out strong emotions. Litigation related to sports law and religion have been some of the most hotly contested and most lengthy.

Federal Circuits

Since the federal judicial system is made up of 13 total circuits, it is worth noting which states and territories are located in each one before proceeding. This might assist you in understanding how or why different circuits come to different conclusions, especially when the Constitution is involved.

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Chapter Twelve

The Federal Circuits

1st Circuit: Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico 2nd Circuit: Connecticut, New York, Vermont

3rd Circuit: Delaware, New Jersey, Pennsylvania, Virgin Islands 4th Circuit: Maryland, North Carolina, South Carolina, Virginia, West Virginia 5th Circuit: Louisiana, Mississippi, Texas

6th Circuit: Kentucky, Michigan, Ohio, Tennessee

7th Circuit: Illinois, Indiana, Wisconsin

8th Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota 9th Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington

10th Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming 11th Circuit: Alabama, Florida, Georgia

D.C. Circuit: The administrative agency law capital of the federal circuits Federal Circuit: Patent, Trademark and international issues ***Prayer***

The decisions, policies and interpretations of religion in the context of sports law cannot be analyzed in a vacuum. The impact of precedential Supreme Court decisions cannot be underestimated. For example, in Engel v. Vitale, 370 U.S. 421

(1962), the Court held that New York state officials may not mandate that a prayer be recited at the beginning of each school day, even if the prayer is denominationally neutral and student participation is optional. The prayer at issue was: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen." Students might consider whether or not this is even truly a non-denominational prayer. What about students who are polytheistic, or

atheist? The Court held that students can engage in voluntary prayer activities on state property, however, but the teacher-led prayer was considered to be directed by the government and therefore deemed unconstitutional.

In Wallace v. Jaffree, 472 U.S. 38 (1985), the Supreme Court struck down an amendment to an Alabama statute adding "or voluntary prayer" authorizing a period of silence for meditation in the Alabama public schools. The Court found that the state statute was motivated entirely by a religious purpose—to encourage prayer in schools—and therefore unconstitutional.

Pledge of Allegiance

Is the Pledge of Allegiance a religious prayer or a patriotic statement? Written in 1892

by Baptist minister Francis Bellamy, the Pledge became an established part of U.S.

public school programs. In Newdow v. United States Cong. , 328 F.3d 466 (9th Cir.

2003), a divided Ninth Circuit Court of Appeals determined the 1954 insertion by Congress of the phrase "under God" into the Pledge of Allegiance violated the First Amendment's Establishment Clause. This decision, resulting from the claim by Michael Newdow who is an atheist, conflicted with an earlier decision by the Seventh Circuit Court of Appeals, which found no such constitutional violation in Sherman v.

Comm. Consolidated Sch. Dist. 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992).

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The Supreme Court ruled in Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1

(2004), a unanimous decision which reversed the lower-court, that Newdow could not challenge the Pledge of Allegiance and held that Newdow lacked standing.

Further, Chief Justice Rehnquist characterized Newdow's claim as a "heckler's veto" and that though the Pledge of Allegiance contains the phrase under God to declare it as a violation of the Establishment clause would have the unfortunate effect of prohibiting a commendable patriotic observance. Of course, removing the 1954 cold-war era addition of under God would not prevent the recitation of the original Pledge, and cases continue to be brought on this issue. Most recently, in Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007 (9th Cir. 2010) the Ninth Circuit upheld the use of under God in the Pledge of Allegiance.

▪ ***Three Tests***

There are three significant Supreme Court cases dealing with religion issues that have helped to shape the U.S. legal landscape with regard to the relationship between state action, prayer and religion in general. Courts use at least one of these analyses to determine whether prayers in schools or any state action are valid. Note the date of the decisions.

1. ***The Lemon test:*** *The Lemon test springs from Lemon v. Kurtzman, 403 U.S. 602*

(1971), in which the U. S. Supreme Court coined the phrase excessive entanglement between the government and religion. The Court said that a

total separation between church and state is not required, but a lower court must invalidate a state statute if it lacks a secular legislative purpose. Put differently, a statute is only acceptable if 1) the primary purpose of a statute is secular (i.e., non-religious); 2) its principal or primary effect neither advances nor inhibits religion; and 3) it must not foster an excessive entanglement with religion.

2. ***The Endorsement test:*** *According to this test, the government cannot endorse, favor, promote, or prefer any religious belief or practice County of Allegheny v.*

American Civil Liberties Union, 492 U.S. 573 (1989). That is, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. This test was first proposed in Lynch v. Donnelly, 465 U.S. 668 (1984).

3. ***The Coercion test:*** *According to the coercion test in Lee v. Weisman, 505 U.S. 577*

(1992), the government may not coerce anyone to support or participate in religion or its exercise. For example, prayer at a public school ceremony such as graduation violates the Establishment clause when state officials (e.g., a school principal or teacher) control the religious exercise and make attendance and participation in it mandatory. In this case, the principal of a Providence, ***Lemon test***

test of constitutionality providing that an act of government must (1) be primarily secular in purpose, (2) neither advance nor inhibit religion, and (3) avoid excessive entanglement with religion

Endorsement test

legal standard in which a court considers whether the government intends to communicate, and whether an imaginary "reasonable observer" would receive, a message of

"endorsement" of a particular religion and/or an act of disapproval toward any other religion ***Coercion test***

examination of a religious practice to determine whether pressure is applied to force or coerce individuals to participate

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Rhode Island middle school invited a rabbi to give a benediction at graduation ceremony. In a 5-4 decision, the Supreme Court ruled that the graduation prayer violated the Establishment Clause.

The following sections explore religion in the context of interscholastic, intercollegiate and professional sport environments. Where the Supreme Court has not definitively ruled on a specific scenario involving religion and sports law, the different federal circuits and the various states have come to different conclusions about the nature and acceptability of the relationship between religion, prayer, and students. This continues to create confusion, though it appears that the Supreme Court views high school graduation and sports contests differently than college, university or professional environments.

▪ *Interscholastic Environment*

At the interscholastic (high school) level, there are two areas that dominate the discussion of religion: prayers related to sports practice and competition, and religious exercises conducted at the high school graduation ceremony. While prayers before sports contests and graduation ceremonies have been commonplace in the United States for years, recent legal

challenges to such organized prayers have forced the courts to consider whether such prayers are constitutional. Indeed, it is a widely held tradition in U.S. society that a prayer of some sort is said at high school and college graduation ceremonies.

There are numerous situations that occur around a sports context that call into question whether or not there may be a violation of the principle of separation between church and state. That is, the state may not advance, support or endorse religion or any particular religion in general. Consider the following examples:

1. A coach asks her players to join hands in prayer prior to a sports contest; 2. A school broadcasts a prayer over the stadium loudspeaker prior to the game; 3. Fans in the stands pray together by holding hands and bowing their heads in prayer;

4. Students at a sporting event hold their own prayer; 5. A player reads from a religious book, alone, in the team's locker room; 6. A player preaches to other teammates.

The following sections explore summaries of some of the more prominent classic and contemporary cases involving religion at the interscholastic level. Some are sports-law specific, others are not. Again, it is worth noting the date of the decisions and the federal circuit which made them.

Classic Cases

***Menora v. Ill. High Sch. Ass'n**, 683 F.2d 1030 (7th Cir. 1982): A few orthodox Jewish players desired to wear a yarmulke during basketball games. The Illinois High School Association forbade hats or headgear other than head-bands. In the end, the plaintiffs failed to prove their religious practices were subject to an undue burden, and yarmulkes remained banned from high school basketball.*

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Jones v. Clear Creek Indep. Sch. Dist*., 977 F.2d 963 (5th Cir. 1992): The Fifth Circuit Court of Appeals held that student-led prayer at high school graduation is acceptable. The student-led prayer that was approved by a vote of the students and was deemed non-sectarian and non-proselytizing. In later cases the Fifth Circuit made it clear that the Clear Creek rule (also known as the Clear Creek Prayer Policy) applied only to high school graduations and that school-encouraged prayer was constitutionally impermissible at school-related sporting events .*

Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995): A Fifth Circuit court held that a coach cannot lead prayers before and after games, but high school graduation is different: it is a one-time event. A middle school basketball coach's practice of leading and participating in prayers with basketball team before and after games was found to be unconstitutional. The court differenti-ated between athletic events and high school graduation, which is "a significant, once in-a-lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary." The middle school basketball coach had recited the Lord's Prayer with the players during practices and after games, and on the bus rides to and from the games.*

ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ*., 84 F.3d 1471 (3d Cir. 1996): The Third Circuit Court of Appeals struck down a school board policy that allowed the high school senior class officers to conduct a poll of the graduating class to determine whether seniors wanted "prayer, a moment of reflection, or nothing at all" to be included in their graduation ceremonies. The policy had allowed the students to decide how they would*

determine the form of prayer, and provided that printed programs are to include a disclaimer. The court held that graduation ceremonies are not public forums and, applying the Lemon test, the court decided that the policy could not be justified because it sought to accommodate the preference of some at the expense of others and thereby crossed the required line of neutrality.

***Santa Fe Indep. Sch. Dist. v. Doe**, 530 U.S. 290 (2000): The Supreme Court held that prayer in a public school over a loudspeaker before each varsity home game violated the Establishment Clause, even if led by a pre-determined student, the student council chaplain. The Fifth Circuit Court of Appeals said that nonsectarian and nonproselytizing student-led prayer, which was approved by the majority of students, was permitted at high school graduation ceremonies, but not at school related sporting events. The Supreme Court affirmed in a 6-3 decision, and looked to Lee v. Wiseman for guidance.*

***Adler v. Duval Cnty. Sch. Bd**., 851 F. Supp. 446 (M.D. Fla. 1994) ("Adler I"); 174*

F.3d 1236 (11th Cir. 1999), vacated, 531 U.S. 801 (2000) ("Adler II"); 112 F.3d 1475 (11th Cir. 1997) ("Adler II"), vacated, 531 U.S. 801 (2000); 206 F.3d 1070

(11th Cir. 2000) ("Adler III"); 250 F.3d 1330 (11th Cir. 2001) ("Adler IV"): In never-ending litigation, the Eleventh Circuit Court of Appeals held that a student's message at Jacksonville high school graduation was okay (even if it is religious) because the students make the choice, not school officials. Opponents of the practice had called it official school prayer in disguise. A group of students and their parents sued alleging that the policy amounted to a government establishment of religion. The Eleventh Circuit Court of Appeals ultimately upheld the policy after the Supreme Court had vacated a previous decision and remanded the case to the Eleventh Circuit for further consideration in *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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light of its recent decision in Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290

(2000). That case held that student-led prayers at public high school football games were unconstitutional. The Eleventh Circuit reconsidered the case and held that student-led prayer is acceptable in Duval County noting that the differences between the two cases (Adler and Santa Fe) were substantial and material.

Contemporary Cases

Lassonde

In Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979 (9th Cir. 2003), Nicholas Lassonde, the plaintiff-student, was invited to deliver a speech at his high school graduation ceremony. Lassonde was a devout Christian. The school principal asked him to submit a draft of the speech to him for review, but the principal did not allow those portions of the plaintiffs' speech that were considered to be proselytizing. There were numerous references to the Bible. The principal, after consultation with legal counsel, disallowed the various passages in the speech, since he was advised that would violate the Establishment clause of both the United States and the California Constitutions. However, he did allow the closing statement,

"Good Luck and God Bless!"

Lassonde protested and filed suit asserting that his free speech rights had been violated. The district court granted summary judgment in favor of the various defendants and concluded that the school officials' acts were

necessary to avoid violating the Establishment clause. The Ninth Circuit Court of Appeals held that allowing the speech to go forward would have violated the Establishment clause because of the school district's complete control over the ceremony including choosing who would speak, reviewing and approving the speeches beforehand, and otherwise controlling the content of the ceremony. The Ninth Circuit affirmed the decision and held that presentation of the speech in its original form would have amounted to a coerced participation in a religious practice and therefore Lassonde's speech was unconstitutional. The Supreme Court denied ***certiorari****.*

Borden

New Jersey high school football coach Marcus Borden was a Catholic by faith and a tenured Spanish teacher at East Brunswick High School. Coach Borden resigned (and then was reinstated) after school administrators told him that he could not lead the team in prayer prior to sports contests or team dinners anymore.

Borden filed a lawsuit and won at the district court level, but the case was reversed by the Third Circuit Court of Appeals in Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153 (3d Cir. 2008). The court held that because the community knew he led the team in prayer for twenty-three seasons, a reasonable observer would perceive the display as a government endorsement of religion (a violation of the Establishment clause). Certiorari was denied by the Supreme Court in 2008, and Borden was banned from leading his team in prayer and prohibited from participating in a student-led team prayer.

certiorari

discretionary writ (order) issued, usually by a supreme court, telling a lower court that the case will be reviewed by the higher court

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Other Recent Examples

Not all religious disputes go to litigation in the interscholastic environment. Issues also involve members of many faiths. These days, however, many of them attract national attention. For example, in Catoosa County, Georgia, cheerleaders created controversy in 2009 when they held religious banners for football players to run through before football games. The school decided to end the practice after complaints because the cheerleaders were perceived as representing the interests of the school. One of the signs said, "I press on toward the goal to win the prize for which God has called me in Christ Jesus. Proverbs 3:14"

In 2010, Fordson High School in Dearborn, Michigan decided to hold pre-season football practices between 11 p.m. and 4 a.m. in order to accommodate the celebration of Ramadan for its predominately Muslim squad. The same year, a Kentucky parent expressed outrage that her son was allegedly baptized on a trip led by the high school head football coach.

The study of religion and sports law is indeed a study in U.S. history. Despite the decades of decisions and litigation, what can be said and who can say it at the interscholastic level remains unclear. This may be due to the fact that cases have, for the most part, only been decided at the appellate court level. It appears, however, that courts do view prayers or religious-speech at graduation remarkably different than prayers at sports contests. This may reflect the courts' concern about adults (teachers, coaches, principals, administrators) who might use their position of authority over minors to influence their religious beliefs. Such concerns do not appear to be as

troublesome at the intercollegiate level at which students and student-athletes, even if they are at publicly funded institutions, are considered adults who seemingly have the ability to better decide their own religious beliefs.

- ***Intercollegiate Sports***

There has been a wide-variety of religious issues at the intercollegiate level. Public institutions must continue to be aware that promoting or advancing a particular religion or a religious organization, no matter how small the involvement, will likely raise eyebrows and could even be the subject matter of a passionate lawsuit.

This section explores some of the interesting cases and issues that have arisen among colleges and universities.

Chaudhuri

*In Chaudhuri v. State of Tennessee, 130 F. 3d 232 (6th Cir. 1997), the Sixth Circuit Court of Appeals considered legal challenges to prayers at Tennessee State University (**TSU**) functions and the recitation of The Lord's Prayer at their graduation ceremony. A lawsuit was filed by mechanical engineering professor Dilip Chaudhuri, a Hindu. He objected to prayers at graduation exercises, faculty meetings, dedica-tion ceremonies, and guest lectures at the Nashville school.*

*In response, TSU officials decided that all such prayers at university events would be nonsectarian. Unsatisfied, Chaudhuri then filed suit in federal district court. After he filed the lawsuit, TSU changed its policy to include a moment of silence rather than a verbal prayer at graduation exercises. The district court **TSU***

Tennessee State University

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dismissed the claims, and the Sixth Circuit Court of Appeals upheld saying that generic prayers have a secular purpose of dignifying or memorializing a public event, that they do not entangle church and state, and that they do not impermissibly advance or inhibit religion.

Air Force Academy

In 2004, at the federally funded U.S. Air Force Academy in Colorado Springs, Colorado, head football coach Fisher DeBerry hung a banner in the locker room that displayed a poem by the Fellowship of Christian Athletes. This poem was called the Competitors Creed, and reads in part, "I am a Christian first and last, I am created in the likeness of God Almighty to bring Him Glory, I am a member of Team Jesus Christ, I wear the colors of the cross." The full poem is found at the end of this chapter.

DeBerry hung the banner November 2004 before the final game of the season, after consulting with his team captains. The banner stayed up for one day before the coach was asked to remove it by Academy officials. The full poem is found at the end of this chapter. Do you think it crossed the line to display it prominently in the locker room at the federally funded military academy?

BYU

*Brigham Young University (**BYU**), a Mormon institution sponsored by the Church of Jesus Christ of Latter-Day Saints, maintains a policy against Sunday competition in accordance with its religious philosophy. BYU takes this competition principle very seriously. In fact, Eli Herring, a devout*

Mormon and football star at BYU, refused to play on Sundays despite the Oakland Raiders drafting him in the sixth round of the 1995 NFL draft.

As a result of BYU's religious beliefs, the NCAA has for decades attempted to accommodate BYU (and other institutions) in what has become known as the BYU

Rule. The rule can be found in Bylaw 31.1.4.1, Institutional Policy, which reads:

***31.1.4.1 Institutional Policy.** If a participating institution has a written policy against competition on a particular day for religious reasons, it shall submit its written policy to the governing sports committee on or before September 1 of each academic year in order for it or one of its student-athletes to be excused from competing on that day. The championship schedule shall be adjusted to accommodate that institution, and such adjustment shall not require its team or an individual competitor to compete prior to the time originally scheduled.*

In essence, the rule calls for teams to formally register their refusal to play on certain days with the NCAA before the beginning of the academic year so that the NCAA can respect the no-play policy for Sundays.

BYU's policy has caused a few problems for student-athlete participating in intercollegiate competitions. Most recently, one of its divers, Brandon Watson, could not compete on Sunday at the 2010 NCAA Swimming and Diving Championships (Austin, Texas). Watson earned All-American status in the 1 meter and 3 meter, but did not participate in the Sunday platform event due to a scheduling change by the NCAA during the Division I Men's Swimming and Diving Championships. Participants from various schools all caught a viral infection on to the plane traveling to the event. Watson was offered the chance to dive alone on Saturday, but declined.

BYU

Brigham Young University

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The NCAA also has a policy which allows a student-athlete to request an additional year of eligibility if he or she goes on a religious mission. The rule can be found in various places in the NCAA Manual including Bylaw 14.2.1, Five-Year-Rule, which reads:

***14.2.1 Five-Year Rule**. A student-athlete shall complete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program of studies in a collegiate institution, with time spent in the armed services, on official religious missions or with recognized foreign aid services of the U.S. government being excepted. For international students, service in the armed forces or on an official religious mission of the student's home country is considered equivalent to such service in the United States.*

Many students at BYU and other institutions do participate in religious missions and are granted an extra year of eligibility to accommodate such practices.

Team Chaplains

*In some instances, college sports programs have signed up team chaplains for a variety of reasons. However, is that appropriate for a publicly funded institution to do? Does this violate the principle of separation between church and state? In 2007, Iowa State University (**ISU**) dealt with this issue when then head football coach, Gene Chizik, expressed his desire to have someone in that position. Public outrage by some faculty and the ISU*

Athletics Council ensued, and a petition against institutionalizing a team chaplain drew moderate national attention. ISU's President, Gregory L. Geoffroy, supported creating the new position of team chaplain, but insisted that the new position had to be a volunteer (called Volunteer Life Skills Assistant), could not promote any particular religious group or belief, and had to be committed to working with people of a variety of faiths. In addition, to measure the effectiveness of the position he requested that exit interviews be conducted with student-athletes about their experiences with the new assistant.

Andrea Armstrong

Of course, not all intercollegiate issues involve Christians. For example, former University of South Florida (USF) women's basketball player Andrea Armstrong, at that time a Muslim, wanted to wear clothes on the court during practice and games to comply with her religious beliefs. She quit the team in 2004 after initially being told that she could not wear such clothing. USF asked the NCAA for an exemption to its uniform policy in order to allow her to wear long pants, a top with long sleeves and a scarf during games, and a few days after her leaving, she was told she could indeed wear the clothing. She quit the team soon thereafter (again) after a series of episodes that apparently divided the team, the campus and the community.

Tim Tebow Rule

Tim Tebow, a Heisman Trophy winner and quarterback from the University of Florida, regularly wore eye black referencing Biblical verses as a student-athlete.

Interestingly, former University of Southern California running back Reggie Bush ***ISU***

Iowa State University

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also wore eye black which contained the numbers "619" in recognition of his hometown of San Diego. After Tebow's departure to the NFL as a first-round draft choice in 2010, the NCAA changed its rules to prevent eye black messages entirely containing no words, logos, numbers or other symbols. Some now refer to this as the Tim Tebow Rule.

▪ *Professional Sports*

There usually is not state action involved in a professional sports contest, though there have been attempts to demonstrate state action based upon use of public stadiums by professional sports teams. Therefore, there are fewer examples of conflict between religion and sports law in the professional sports context from a constitutional perspective.

In professional sports, an important difference is, of course, is that the participants are usually adults and employees. A more frequent area of contention has occurred when religion, patriotism and employment issues have collided. This has happened in several prominent instances surrounding the use of the word God. There has also been concern over what some refer to as forced patriotism, involving songs at professional sporting events like God Bless America and even The Star Spangled Banner.

Islam

In 2010, Muslim NFL player Husain Abdullah of the Minnesota Vikings kept his observance of Ramadan and practiced football without food or water. For devout Muslims, consuming food and drink during Ramadan is only acceptable before sunrise and after sunset. The Vikings allowed him to

practice in the summer heat despite his refusals. Former NBA star Hakeem Olajuwon observed the fasting practice as well.

Judaism

Particularly in baseball, Jewish athletes and fans have made headlines for observing religious holidays. In 1934, MLB player Hank Greenberg sought advice from local rabbis over whether or not to play on Rosh Hashanah, the Jewish New Year. The Detroit News ran a headline announcing the decision, stating Talmud Clears Greenberg for Holiday Play. Greenberg skipped batting practice, but chose to play and hit two home runs in the Detroit Tigers 2-1 victory over the New York Yankees.

Sandy Koufax regularly pitched on the Jewish Sabbath (sundown Friday to sundown Saturday), but never pitched on the first day of Passover or Rosh Hashanah. In 1961, Yom Kippur (the annual atonement for sins) began at sundown on September 19 and ended at sundown September 20. On the night of the 20th, he pitched the Dodgers to a win with a 13-inning, 15-strikeout, 205-pitch performance.

However, in 1965, Koufax refused to pitch in game one of the World Series because it was Yom Kippur. Yom Kippur encourages fasting (no food or drink) for a 25-hour period. Instead of pitching that day, Koufax attended synagogue in Minneapolis. In 2009, the New York Jets football team changed a game start time from 4:15 p.m. to 1 p.m. to accommodate fans observing Yom Kippur, which began at sundown that day.

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God Bless America

This chapter has previously explored litigation related to The Pledge of Allegiance which states, "One Nation…. under God." The Supreme Court has held that it is more of an act of patriotic observance than a government endorsement of religion even though the word God is mentioned. God is mentioned nowhere in the Constitution though the word Creator is found in the Declaration of Independence. There are other references to God as in The Pledge of Allegiance and on coins and currency in the phrase In God We Trust, the national motto established in 1956.

On September 11, 2001, members of the U.S. Congress gathered on the steps of Capitol Hill for a news conference and sang Irving Berlin's 1918 song (revised 1938) God Bless America. Since then, the song has commonly been sung during the seventh-inning stretch in Major League Baseball games upon the request of MLB

Commissioner Bud Selig, who supported using it instead of Take Me Out to the Ball Game. But is God Bless America a religious song or one of patriotism? Singing this song has created some controversy.

*In 2009, for example, the New York Yankees changed their policy and decided to allow spectators to go to the restroom while the song was being sung after a federal lawsuit was filed by the New York Civil Liberties Union (**NYCLU**) and Queens resident Bradford Campeau-Laurion who was thrown out of the stadium in 2008*

after leaving his seat to go to the bathroom. Claiming that this was that this was an act of compelled patriotism, Campeau-Laurion, who was a Boston Red Sox fan, received a financial settlement and his legal fees. The NYCLU claimed it was an act of political and religious discrimination.

The Star Spangled Banner

The Star Spangled Banner, the national anthem since 1931, has also caused some controversy at sporting events. In 1996, Mahmoud Abdul-Rauf, of the NBA's Denver Nuggets, refused to stand when the song was played, as is the tradition, before sporting events. In 2003, Toni Smith of NCAA Division III Manhattanville College in Purchase, New York, stood but turned her back on the flag during the playing of the national anthem.

In 2010, Goshen College, a small Christian College with ties to the Mennonite Church, decided to play The Star Spangled Banner for the first time in the school's history at a sporting event: a college baseball game. This Indiana school took issue with the national anthem and its apparent elevation of love for country over love for God. Indeed, many Mennonites, who are religious pacifists, claim that the lyrics celebrate war and military action. Due to this, the college ended up playing only an instrumental version rather than singing the lyrics. However, just one year later in 2011, the college reversed its decision to play the song and stated that it indeed compromised its vision.

Employment Law Issues

In the employment setting, Title VII of the Civil Rights Act of 1964 requires an employer to reasonably accommodate the religious practices of an employee or prospective employee unless doing so would create an undue hardship for the ***NYCLU***

New York Civil Liberties Union

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employer. This could include leave for religious observances, time and a place to pray, and permission to wear religious clothes. Again, these issues are not easily addressed and courts must deal with concerns on a case-by-case basis. Undue hardship is often couched in terms of cost to the employer and whether or not the policy was a business necessity if an otherwise reasonable accommodation was not instituted.

▪ *Summary*

The study of religion and sports offers some of the most interesting and unclear cases in sports law. One of the founding principles of U.S. society remains the separation of church and state. Such principles can be found in the Constitution of the United States and the First Amendment, which assures the freedom of religion.

Courts have reached inconsistent decisions involving school prayer and school graduation events. Such prayers present extremely difficult challenges for the courts in determining whether a violation of the First Amendment to the Constitution has occurred. It appears that there is no definitive rule in this area, but U.S.

courts employ guidelines such as the Lemon test, the endorsement test, and the coercion test to determine whether the state might be advancing a particular religion on a case-by-case basis. Still, student-led, student-initiated prayers at graduation ceremonies appear to be constitutional. Courts have recognized differences between prayers in the locker room and prayers during graduation.

Concerns over religion in sports law often focus on freedom from the imposition of religious beliefs, especially at the interscholastic level. Issues related to the freedom to practice religion have appeared at amateur and professional levels. No doubt, religious issues in sports law often have a political bent as well especially after the events of September 11, 2001. The NCAA appears to be amenable to accepting the religious policies of

individual institutions, but it now restricts the personalized display of speech during a sports contest such as displaying conspicuous Bible verses on faces and uniforms. In general, the challenges and protests related to the singing of God Bless America or the playing of The Star Spangled Banner continue to reflect battles related to freedom of speech and freedom of religion in U.S. society as well as in sports law.

- ***The Competitors Creed***

I am a Christian first and last.

I am created in the likeness of

God Almighty to bring Him glory.

I am a member of Team Jesus Christ.

I wear the colors of the cross.

I am a Competitor now and forever.

I am made to strive, to strain,

to stretch and to succeed

in the arena of competition.

I am a Christian Competitor

and as such, I face my challenger

with the face of Christ.

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Religion and Sports

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I do not trust in myself.

I do not boast in my abilities

or believe in my own strength.

I rely solely on the power of God.

I compete for the pleasure of

my Heavenly Father, the honor of Christ

and the reputation of the Holy Spirit.

My attitude on and off

the field is above reproach—

my conduct beyond criticism.

Whether I am preparing,

practicing or playing;

I submit to God's authority

and those He has put over me.

I respect my coaches, officials,

teammates and competitors

out of respect for the Lord.

My body is the temple of Jesus Christ.

I protect it from within and without.

Nothing enters my body that

does not honor the Living God.

My sweat is an offering to my Master.

My soreness is a sacrifice to my Savior.

I give my all—all of the time.

I do not give up. I do not give in.

I do not give out. I am the Lord's warrior—

a competitor by conviction

and a disciple of determination.

I am confident beyond reason

because my confidence lies in Christ.

The results of my efforts

must result in His glory.

LET THE COMPETITION BEGIN.

LET THE GLORY BE GOD'S.

▪ ***Key Terms***

certiorari *discretionary writ (order) issued, usually by a supreme court, telling a lower court that the case will be reviewed by the higher court*

Coercion test *examination of a religious practice to determine whether pressure is applied to force or coerce individuals to participate*
Endorsement test *legal standard in which a court considers whether the government intends to communicate, and whether an imaginary "reasonable observer" would receive, a message of "endorsement" of a particular religion and/*

or an act of disapproval toward any other religion

Establishment clause *"Congress shall make no law respecting an establishment of religion"*

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First Amendment *constitutional amendment providing for freedom of the press, freedom of assembly, and freedom of religion*

Free exercise clause *"… or prohibiting the free exercise thereof;"…*

Lemon test *test of constitutionality providing that an act of government must (1) be primarily secular in purpose, (2) neither advance nor inhibit religion, and (3) avoid excessive entanglement with religion*

state actor *a body or action that is considered acting on behalf of the government thereby raising constitutional issues and rights*

▪ ***Acronyms***

BYU *Brigham Young University*

ISU *Iowa State University*

NYCLU *New York Civil Liberties Union*

TSU *Tennessee State University*

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▪ *Discussion and Review Questions*

1. *Do you think that the events of September 11, 2001 have affected how U.S. society views religion and sport?*

2. *What Constitutional Amendments are primarily at work when considering a religion and sport case?*

3. *What are the major "tests" that U.S. courts have used to analyze religion and sport cases?*

4. *Do you think that state colleges and universities should use team chaplains for their intercollegiate squads?*

5. *Should teams with religious names or mascots be changed?*

6. *Do you think that religious-based jewelry, such as a cross or Star of David, should be banned from high school practice and athletic competition?*

7. *Do you think it is appropriate for e-mail messages to contain religious expressions or quotes from the Bible as part of the message signature?*

8. *Provide examples of how religious beliefs have affected professional sports over the years.*

9. *Discuss how the songs God Bless America and the Star Spangled Banner have become a legal issue in sports law.*

10. *How might religion and sports law intersect in the context of employment law?*

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APPENDIX A

Amendments to the

United States Constitution

The Conventions of a number of the States having, at the time of adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution;

Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States; all or any of which articles, when ratified by three-fourths of the said Legislatures, to be valid to all intents and purposes as part of the said Constitution, namely:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put ***449***

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Appendix A

in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XI

(1798)

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Amendment XII

(1804)

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person

have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII

(1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

(1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a *Copyright 2012 Cengage Learning. All Rights Reserved. May not be copied, scanned, or duplicated, in whole or in part. Due to electronic rights, some third party content may be suppressed from the eBook and/or eChapter(s).*

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member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in

insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

(1870)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI

(1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census of enumeration.

Amendment XVII

(1913)

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII

(1919)

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

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Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

Amendment XIX

(1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX

(1933)

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which

one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission.

Amendment XXI

(1933)

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

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Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

Amendment XXII

(1951)

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission to the states by the Congress.

Amendment XXIII

(1961)

Section 1. The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be

considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV

(1964)

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV

(1967)

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

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Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

(1971)

Section 1. The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XXVII

(1992)

No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened.

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