You Make the Call. . .

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STUDENT CANNOT SUE GUIDANCE COUNSELOR FOR NEGLIGENT ADVICE

Scott v. Savers Property and Casualty Insurance Company, et al., 663 N.W.2d 715 (Wis. 2003).

On June 19, 2003, the Wisconsin Supreme Court affirmed the decision of the court of appeals holding that Wisconsin's governmental immunity statute barred a high-school student's claim against his guidance counselor for incorrect advice that cost him an NCAA athletic scholarship.

Ryan Scott, a high school senior and promising hockey prospect at Stevens Point Area Senior High School, received an offer for an athletic scholarship to a Division I institution. Ryan and his parents met with a guidance counselor to ask whether "Broadcast Communication" would fulfill the NCAA's academic core English requirements. Contrary to information provided by the NCAA Initial Eligibility Clearinghouse, the counselor incorrectly advised Ryan that "Broadcast Communication" would satisfy the requirement. Ryan completed the "Broadcast Communication" class and graduated on schedule. After graduating, he played junior hockey and was offered a hockey scholarship contingent on NCAA certification that he satisfied the required core courses. However, the NCAA determined that the "Broadcast Communication" class failed to satisfy its core English requirement.

The Scotts sued the school district seeking damages for the value of the scholarship that was rescinded by the university. The school district filed a motion to dismiss all claims that the circuit court granted. After the court of appeals affirmed, the Scotts appealed to the Wisconsin Supreme Court.

The Scotts argued that the school district was not immune from tort liability because the guidance counselor could have easily provided the correct advice. The court refused to consider a high school guidance counselor's advice as "ministerial" because its performance was not one that was required by a specific legal obligation. The court also refused to apply the "professional discretion" exception because it is limited to the medical setting.

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The Scotts also argued that Ryan had a contract with the school district that was breached when the counselor provided incorrect advice. The court held that there was no consideration for the alleged breach of contract because the district had a pre-existing legal duty to provide college related advice.

Finally, the Scotts argued that relief could be granted under the doctrine of promissory estoppel because Ryan had a special relationship with the counselor, and the school district should have anticipated that Ryan would justifiably rely on the counselor's advice to his detriment. The court rejected this claim on public policy grounds because it was based on the same allegations as the prior claims and recognizing itwould contravene the government immunity policy of the state.

COURT APPROVES MSHAA TITLE IX COMPLIANCE PLAN

Communities for Equity v. Michigan High School Athletic Association, 2003 U.S. Dist. 2872 (W.D. Mich. 2003)

On February 27, 2003, the District Court for the Western District of Michigan approved the Michigan High School Athletic Association's (MHSAA) revised Title IX compliance plan.

Communities for Equity and several female student athletes filed a class action suit against the MHSAA alleging that it discriminates against female student-athletes by scheduling athletic seasons and tournaments for girls' sports during less advantageous times of the academic year than boys' sports in violation of the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972. The specific sports at issue included basketball, volleyball, tennis, soccer, Lower Peninsula golf, and Lower Peninsula swimming and diving (collectively "swimming").

The district court previously concluded that the current MSHAA sports scheduling system violated the female student athletes' equal protection rights under the Fourteenth Amendment and Title IX (*See Communities for Equity v. Michigan High School Athletic Association, 178 F.Supp.2d 805 (W. Dist. Mich., 2001) (Volume 4, Number 3)*. The court enjoined the MHSAA from continuing its current scheduling system, ordering it to create a schedule in which female and male high school student athletes equitably share the advantages and disadvantages of the new seasons.

Thereafter, the court reviewed the MSHAA's proposed compliance plan and observed it would still leave a greater percentage of female athletes in disadvantageous seasons because the sports selected in the plan were those that involved the smaller numbers of female athletes (*See Communities for Equity v. Michigan High School Athletic Association, 2002 U.S. Dist. LEXIS 14220 (W. Dist. Mich., 2002) (Volume 4, Number 3)*). The court provided MSHAA with three options for revising the plan.

After the court issued a final injunctive order accepting the MSHAA's amended compliance plan, plaintiffs requested reconsideration because it remained inequitable. They argued that boys have several sports to choose from in each athletic season while girls do not. Although there were

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some differences in the number of available sports, the court found that the plan provides for roughly equitable athletic opportunities for boys and girls.

The plaintiffs also alleged that number of sports where girls do not have the opportunity to participate in post-season tournaments is higher than the number of boys sports without this opportunity. Because the MSHAA selected a plan based on the court's order, the court would not critique such specific consequences of the compliance plan.

The plaintiffs argued that the plan will result in the demise of girls' soccer in the Upper Peninsula because there will not be enough teams to compete. The court called this conjecture and the possibility did not cause the plan to be inequitable.

Finally, the plaintiffs argued that the gap in how many girls' sports are scheduled in disadvantageous seasons (16.65%), as compared to boys' (9.53%), is still too large at almost 7%. The court found this gap insignificant.

Concluding that the MSHAA achieved proportional equity between both sexes consistent with its order within the bounds of permitted discretion, the court denied plaintiffs' motion for reconsideration and ordered the MSHAA to implement its plan.

NO CLAIM AGAINST UNIVERSITY FOR CUTTING MEN'S SPORTS

Miami University Wrestling Club, et al., v. Miami University, et al., 302 F.3d 608 (6th Cir. 2002).

On September 9, 2002, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court that the plaintiffs (representing the men's wrestling, tennis and soccer programs at Miami University of Ohio) failed to state either an equal protection or Title IX claim against Miami University of Ohio.

In 1994, as part of the University's Title IX self-evaluation, a task force issued a report revealing that in 1993 females constituted 54% of the Miami student body, while they made up only 29% of student-athletes. Four varsity female athletic teams were added between 1993 and 1997. While females constituted 55% of the student body in 1997, they were only 42% of the student athlete population. There still was unmet female interest in equestrian, crew, golf, lacrosse and water polo, and the school spent more on male than female athlete recruiting and financial aid.

In light of these numbers and disparities, the lack of funds to create additional women's teams, and the need to comply with Title IX, the university chose to eliminate some male varsity sports including golf, soccer, tennis and wrestling. Miami also increased the budget for financial aid to female students by $400,000.00.

In 1999, the plaintiffs sued claiming that the university's elimination of the men's sports programs violated Title IX and the Equal Protection Clause. The district court granted Miami's motion to dismiss all of the plaintiff's claims.

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The Sixth Circuit began its review by noting that "[i]f a university cannot afford to add sports teams in order to provide equal athletic opportunity for men and women, it may be forced to subtract in order to equalize. . . this approach may be the only way for an educational institution to comply with Title IX while still maintaining the other niceties of its mission, such as its academic offerings" (p. 612). Finding that the university eliminated men's teams to comply with the requirements of Title IX, the Sixth Circuit held that plaintiff's arguments were nothing more than an attack on validity of the statute and failed to state a proper equal protection claim.

The plaintiffs also argued that the university's use of gender to eliminate men's sports violated Title IX. As the court explained, Title IX provides opportunities for the underrepresented sex (women), it does not provide any rights for the historically overrepresented sex (men). In addition, because classification by gender is not a per se violation of Title IX, the fact that Miami based its decision on gender did not put it in violation of Title IX.

For these reasons, the Sixth Circuit affirmed the dismissal of the plaintiffs Title IX and equal protection claims.

TITLE IX DOES NOT ALLOW FOR RECOVERY OF PUNITIVE DAMAGES

Mercer v. Duke University, 50 Fed. Appx. 643 (4th Cir. 2002)

On July 12, 1999, the United States Court of Appeals for the Fourth Circuit held that, although a school is not required to permit a female to participate in a contact sport, Duke University was prohibited from discriminating based on gender when it allowed Heather Mercer to become a member of the football team(*Mercer v. Duke University*, 190 F.3d 643 (Volume 2, Number 2)). The court remanded the case to the trial court for further proceedings.

At trial the jury concluded that Duke University had discriminated against Mercer on the basis of her gender and was liable for violating Title IX. It awarded Mercer $1 in compensatory damages and $2,000,000.00 in punitive damages.

The university moved for judgment as a matter of law and for a new trial, while Mercer sought attorneys' fees and expenses. The trial court denied the university's motions and granted Mercer's motion for $ 388,799 in attorneys' fees. *Mercer v. Duke University*, 181 F.Supp.2d 525 (D. NC 2001).

On appeal, Duke argued that punitive damages are not an available remedy in private actions to enforce Title IX. Noting that Title IX is modeled after Title VI which does not allow punitive damage awards, the Fourth Circuit followed Supreme Court precedent and held that punitive damages are not available under Title IX. The court vacated the punitive damages award, leaving Mercer with only the jury's award of one dollar in compensatory damages.

Duke argued that this nominal damage award was insufficient to support an award of attorneys' fees. Noting that such an award normally is inappropriate under the circumstances, the Fourth

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Circuit vacated the award of attorneys' fees and remanded the case to the trial court for reconsideration.

TITLE IX DOES NOT IMPLY A PRIVATE RIGHT OF ACTION FOR INDIVIDUALS WHO ARE RETALIATED AGAINST FOR COMPLAINING ABOUT GENDER DISCRIMINATION SUFFERED BY OTHERS

Jackson v. Birmingham Board of Education, 309 F. 3d 1333 (11th Cir. 2002)

On October 21, 2002, the Eleventh Circuit Court of Appeals held that htere is no impliead private right of action for retaliation arising out of complaints asserting Title IX violations by an educational institution.

Roderick Jackson was hired as a physical education teacher and girls' basketball coach. While coaching, he perceived that the girls' team was denied equal funding and access to sports facilities and equipment. After complaining to his supervisors, he began to receive negative work evaluations until he was relieved of his coaching duties. Jackson sued claiming that the Board of Education retaliated against him in violation of Title IX, but the trial court dismissed his complaint.

On appeal, the United States Court of Appeals for the Eleventh Circuit assumed that the Board did retaliate against Jackson for complaining about possible Title IX violations and focused on whether Title IX provides a private right of action and remedy for such retaliatory action.

Jackson argued that a private right of action should be implied from the statute and 34 C.F.R. §100.7(e), which both prohibit retaliation against anyone who complains about a Title IX violation. The Eleventh Circuit noted that Title IX and §100.7(e) do not provide any private rights of action. Instead, following the Supreme Court, the Eleventh Circuit held that Title IX only implies a private right of action for direct victims of gender discrimination. Because Jackson was not a victim of direct gender discrimination he had no private right of action against the Board.

The Eleventh Circuit court affirmed the dismissal of Jackson's claim. The Supreme Court granted certiorari in this case on October 6, 2003.

NO UNIVERSITY DUTY TO ENSURE STUDENT ATHLETE'S ACADEMIC ELIGIBILITY

R. J. Hendricks v. Clemson University, 578 S.E.2d 711 (S.C. 2003)

On March 17, 2003, the Supreme Court of South Carolina held that Clemson University owes no duty to ensure a student athlete's academic eligibility to participate in a sport.

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R.J. Hendricks began his college baseball career at Division II school St. Leo University. After his junior year he transferred to Division I Clemson University. Hendricks had earned 80 of the 130 credits necessary to graduate from St. Leo and knew that he would have to return to St. Leo for a final semester in order to graduate with his original major.

Prior to registration at Clemson, Hendricks met with an academic advisor who advised him to enroll in fifteen hours in another major for the fall semester because Clemson did not offer his original major. Early on in the semester the advisor realized that she had not evaluated whether Hendricks was in compliance with the NCAA's 50% rule (this rule requires a student athlete to complete at least 50% of the course requirements toward his major to be eligible to compete during his fourth year of college enrollment). After reevaluating his situation she advised him to drop one course and take two additional courses. A few days before the semester ended, she realized she had miscalculated the number of electives Hendricks could take and that he would not comply with the 50% rule. She immediately filed a waiver with the NCAA admitting her mistakes asking the NCAA to waive the rule so Hendricks could play baseball. The NCAA denied this request. As a result, Hendricks was not allowed to play baseball at Clemson. He returned to St. Leo the next fall where he graduated on schedule and played baseball in the spring semester.

Hendricks sued Clemson for negligence, breach of fiduciary duty, and breach of contract as a result of its academic advisor's mistakes that resulted in his ineligibility. The trial court granted Clemson's motion for summary judgment on all claims, but the court of appeals reversed because there were genuine issues of material fact with regard to each of Hendricks' claims.

The supreme court focused on Hendricks' argument that Clemson assumed a duty of care when it advised him regarding the courses to take to maintain NCAA eligibility. The court characterized Hendrick's claim as similar to an assertion of educational malpractice, which generally has been rejected by other jurisdictions. The court refused to recognize a duty owed by advisors because of concerns about the potential flood of litigation that schools would face.

Hendricks argued that the university owed him a fiduciary duty. Noting that it had typically found fiduciary relationships to only exist in a limited category of legal and business settings, the court did not recognize the relationship between advisor and student as fiduciary in nature.

Hendricks also argued that his breach of contract claims are valid. The court noted that several jurisdictions have recognized that the relationship between student and a university is in part contractual. However, Hendricks could not prove that Clemson promised to ensure his academic eligibility to participate in intercollegiate athletics. Therefore, the court found that no such contract existed or was breached.

The supreme court reinstated the trial court's grant of summary judgment in favor of Clemson University.

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SPECTATORS SITTING IN UNPROTECTED SEATS ASSUME RISK OF BEING HIT BY BASEBALL

Thurmond v. Prince William Professional Baseball Club, Inc., 574 S.E.2d 246 (Va. 2003)

On January 10, 2003, the Supreme Court of Virginia held a spectator assumed the risk of being struck by a batted foul ball at a minor league baseball game.

In August of 1997 Donna Thurmond attended a Prince William Cannons night baseball game and sat in bleacher seating on the third base side. Warning signs were posted at the entrances to all seating areas detailing the risk of being struck by objects batted or thrown from the field, and the back of each ticket included a printed warning. This was Thurmond's first visit to the stadium; she did not read the back of her ticket or know that she could have requested different seating in a screened area of the stadium. She nevertheless was familiar with the game of baseball. During the eighth inning, a foul ball hit Thurmond in the face causing serious injury.

Thurmond sued the team alleging that her injury was caused by the team's negligence in failing to provide adequate warnings and failing to operate and maintain the stadium in a safe condition to prevent injuries to invitees. The team filed a motion for summary judgment claiming that Thurmond assumed the risk of injury because she chose to sit in an unscreened area of the stadium, and the trial granted the motion.

The supreme court initially observed that in Virginia the voluntary assumption of risk of a known danger operates as a complete bar to recovery for a defendant's alleged negligence. The court also explained that no person of ordinary intelligence could watch a baseball game without realizing that batters cannot control the direction of the ball at all times. In addition, the court adopted the general rule that as a matter of law, a spectator assumes the normal risks of watching a baseball game, which includes the possible danger of being hit by a ball in an unscreened spectator area. Therefore, because Thurmond was familiar with the game of baseball, remained in the unscreened area for seven innings before her injury, and knew the risk of being hit by a batted ball, she assumed the risk of being injured.

The Supreme Court affirmed the trial court's grant of summary judgment.

COURT FINDS JOINT OWNERSHIP OF BARRY BONDS' 73RD HOME RUN BALL AND ORDERS ITS SALE

Popov v. Hayashi, 2002 WL 31833731 (Ca. Sup. Ct. 2002).

On October 7, 2001, Alex Popoz and Patrick Hayashi attended the San Francisco Giants game at PacBell Park where Barry Bonds hit his 73rd home run, thereby setting a new Major League Baseball record. When Bonds hit the home run, it landed in the webbing of Popov's glove. As he attempted to take the ball out of his glove, he was tackled, thrown to the ground, and the ball was dislodged. Hayashi picked up the ball and put it in his pocket, then showed that he had the ball in

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view of a nearby television camera. Popov sued claiming that Hayashi had wrongfully converted the ball to his own possession.

The court defined conversion as the wrongful exercise of dominion over the personal property of another. In order to succeed in such a claim, Popov had to demonstrate that he actually achieved possession or the right to possession as he attempted to catch and hold the ball. The court found that Popov could not show that he would have retained full control of the ball after all momentum ceased and after incidental contact with people or objects, therefore, he did not achieve full possession of the ball. However, the court recognized that the contact that caused Popov to lose the ball was not merely incidental in nature. Rather, it was an illegal assault by a mob. Therefore, the court found that Popov had a cognizable pre-possessory interest in the ball supporting his claim of conversion. But, Hayashi did not assault Popov; he merely picked up the ball and obtained unequivocal possession of it.

In balancing the respective interests, the court conclued that both parties were equally legally entitled to the ball. Holding that both Popov and Hayashi have equal and undivided interests in the ball, the court ordered it to be sold with the proceeds to be divided equally between them.

{*The ball was eventually sold for $517,500.00 including seller commissions.*}

MATTERS RELATED TO PLAYER DISCIPLINE AND SALARY CAP SUBJECT TO CBA ARBITRATION PROVISIONS

East Coast Hockey League, Inc. v. Professional Hockey Players Association, 322 F.3d 311 (4th Cir., March 12, 2003).

On March 12, 2003, the United States Court of Appeals for the Fourth Circuit ruled that two disputes between a players association and professional hockey league are subject to arbitration, rather than judicial resolution.

The Professional Hockey Players Association and East Coast Hockey League agreed to a collective bargaining agreement (CBA) that contains a grievance and arbitration procedure for resolution of "any dispute, controversy, claim or disagreement" related to the agreement, the standard players contract, any condition of employment, or any matter involving the league, a club or the Association. The CBA also incorporates the standard player's contract which also requires arbitration.

The current case involves two disputes. In the Tallahassee dispute, the Players Association, as the bargaining representative of the players on the Tallahassee club, asserted that the Tallahassee club's management violated the salary cap during the 2000/2001 regular hockey season by paying a weekly club salary greater than the CBA permitted. Independently of the Association's claim the League president imposed a fine on the Tallahassee management and deducted a sufficient number of points from the club in the League standings to prevent Tallahassee from participating in the play-off rounds thereby causing the Tallahassee players to suffer a loss of play-off bonuses. The Association demanded that its claim against Tallahassee arising from the

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violation of the salary cap be resolved by arbitration but the League refused to submit the dispute to arbitration.

The Sugden dispute involves a player who was suspended for life from the league because he threw a hockey stick at a patron. The Association disputed the basis for and length of the suspension and asked that this dispute be submitted to arbitration. The league again refused.

The league brought the present action contending that neither dispute is arbitrable. The Association counterclaimed and requested that the court compel the league to arbitrate. A magistrate judge ruled in the league's favor.

Regarding the Tallahassee dispute, the Association did not challenge the president's authority to impose punishment for salary cap violations, instead it argued that the issue of whether there was a violation of the salary cap must be submitted to arbitration. The Fourth Circuit court agreed and found that an alleged violation of the salary cap would be a breach of the CBA, which must be resolved by arbitration.

The Association also challenged the punishment imposed in the Sugden dispute. The court noted that the league's rules allow for the president, in his sole discretion, to impose penalties on players who are guilty of conduct prejudicial or detrimental to the league. The court found it important that the Association did not challenge the president's power to suspend a player, instead it challenged the actual punishment imposed. The court found no inconsistency in the president being given this discretion, and the actual punishment imposed being reviewable in an arbitration proceeding as required by the CBA.

The Fourth Circuit remanded the case for a declaration that both disputes are subject to arbitration.

MAJOR LEAGUE BASEBALL'S PROPOSED CONTRACTION PLAN IS NOT SUBJECT TO ANTITRUST SCRUTINY

Major League Baseball v. Crist, 331 F.3d 1177 (11th Cir. 2003).

On May 27, 2003, the United States Court of Appeals for the Eleventh Circuit held that Major League Baseball's contraction plan is not subject to federal or state antitrust scrutiny, and that the Florida Attorney General cannot conduct an antitrust investigation relating thereto.

On November 6, 2001, a supermajority of Major League Baseball (MLB) clubs voted in favor of eliminating two current teams. The Florida Marlins and Tampa Bay Devil Rays were the only teams to oppose contraction. In an effort to keep baseball in Florida, Florida Attorney General Robert Butterworth issued several civil investigative demands pursuant to Florida's antitrust statute to MLB, Commissioner Bud Selig, the Marlins, and the Devil Rays. Asserting antitrust immunity that exempted their conduct from investigation, MLB and the other plaintiffs sued to avoid responding to these demands.

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The district court held that baseball's antitrust exemption covers the business of baseball and state antitrust laws do not apply to the proposed contraction of teams.

The Eleventh Circuit noted that the proposed contraction plan is central to baseball's league structure and therefore, the business of baseball. As a result, this is exempt from federal antitrust scrutiny. The Attorney General of Florida argued that even if the business of baseball is immune from federal antitrust prosecution, state enforcement agencies could nevertheless invoke state antitrust law as a basis for investigatory authority. In response, the court held that a universal antitrust exemption exists under the Supremacy Clause, and the plaintiffs are immune from state antitrust laws.

Observing that an exemption from prosecution does not entail a concomitant right to be free from any investigation, the Eleventh Circuit held that Florida law prevents the Attorney General from conducting baseless investigations premised solely on legal activity. Therefore, because any contraction of clubs by MLB would not violate state or federal antitrust laws, an investigation based on contraction is baseless in violation of the Fourth Amendment and Florida law.

PGA TOUR RULES LIMITING DISTRIBUTION OF TOURNAMENT SCORES NOT AN ANTITRUST VIOLATION

Morris Communications Corporation v. PGA Tour, Inc., 235 F.Supp.2d 1269 (Fla. D.C. 2002).

The PGA Tour has created the "Real-Time Scoring System," by which large numbers of volunteers follow contestants and relay their scores by radio back to PGA media centers where they are compiled and posted on score boards for viewing by credentialed members of the media. During a tournament, real-time scores can only be acquired from the PGA media center by anyone with media credentials.

Morris Communications Corporation publishes online and print newspapers. Morris historically received credentials to cover PGA tournaments, which provided them with access to PGA media centers and the ability to obtain tournament scores. Morris used its access to sell tournament scores to CNN/SI and others, while also making them available on Morris' own website.

In 1999, the PGA instituted Online Service Regulations applicable to all credentialed media invitees. Under these regulations, scoring information obtained from the media center at any event may be published on any web site, but not sooner than 30 minutes after the actual occurrence of the shots. The PGA then modified this rule to allow scores to be posted no sooner than 30 minutes after they occur or when the information becomes available to the public. The PGA agreed to allow Morris to immediately publish scores obtained from the media center on its own website, but not on the websites of non-credentialed third parties. The PGA also required that no "real time" scoring information could be used without the PGA's prior written consent.

In May 2000, the PGA learned that Morris was planning to sell scoring information to the Denver Post in violation of the regulations. After discussions with Morris, the PGA agreed to allow it to syndicate scores to the Denver Post for only one tournament. In August of 2000, the PGA agreed to allow Morris to sell real-time scores to third parties on the condition that it collect the scores from pgatour.com rather than the media center. Morris found this system unworkable and asked that it be allowed to syndicate scores directly from the media center. The PGA refused.

Thereafter, Morris Communications sued the PGA Tour alleging that its regulations violated the federal antitrust laws. The district court denied Morris' motion for a preliminary injunction because it failed to show a substantial likelihood of success on the merits of its antitrust claims. Specifically, it could not show that the PGA lacked a legitimate business justification for its restrictions on syndication of real-time scores.

Morris subsequently sought summary judgment on its claim that the PGA was illegally monopolizing the market for real-time PGA tournament golf scores. The Tour asserted that valid business reasons justified the exclusionary practices found in the regulations because they are necessary to protect its property right in the scores. The court noted that Morris free-rides on the PGA Tour's efforts in compiling the scores at no cost to Morris itself. The court held that the PGA Tour has a valid property right in these scores because it controls the right of access to the scoring information and can place restrictions on those attending its private events, however, this property right ends when the scores enter the public domain. The court found that the Tour has a right to sell or license its product, championship golf, and a corresponding right to sell or license the derivative product, golf scores, in the same way it sells its rights to television broadcasts.

Regarding its claim under Section 2 of the Sherman Act, Morris had to show that the PGA Tour possessed monopoly power in a relevant market, here real-time golf scores. However, the court found that the PGA had not reduced the output of these scores and did not have the requisite monopoly power. Morris also could not show a willful acquisition and maintenance of any such monopoly power because the PGA Tour has a legitimate business reason for establishing the regulations.

The court concluded that the PGA had not illegally monopolized the market for real-time tournament scores and denied Morris' motion for summary judgment.

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