

## **SURVEY**

### **2005 ANNUAL SURVEY:**

## **RECENT DEVELOPMENTS IN SPORTS LAW**

### **INTRODUCTION**

This article is a survey of sports-related cases that were decided between January 1, 2005 and December 31, 2005. Although this article does not purport to address every case related to sports that was decided in the past year, the cases summarized below represent decisions that will affect the practice and development of the sports law field. As the cases below demonstrate, the field of sports law continues to grow, and its decisions affect the legal system as a whole.

### **ALTERNATIVE DISPUTE RESOLUTION**

Alternative Dispute Resolution is a growing method of resolving conflicts in the legal system. The collective bargaining agreements of the major professional sports include clauses that require arbitration to resolve certain sorts of conflicts between players and management. As a result, the sports field is an area in which developments in the area of Alternative Dispute Resolution often emerge. This past year, the infamous Detroit Pistons/Indiana Pacers brawl resulted in challenges that addressed whether Alternative Dispute Resolution was a proper mode of determining or challenging the Commissioner's decisions on player discipline. This case, as well as other cases addressing arbitrability, including Ricky Williams's dispute with the Miami Dolphins, is discussed below.

*National Basketball Ass'n v. National Basketball Players' Ass'n*<sup>1</sup>

This action stemmed from an altercation involving several NBA players and spectators during a game in Detroit, in which a fan threw beer onto a player, players entered the stands, and spectators entered the court area. After the altercation, the NBA Commissioner, David Stern, suspended all players who were involved in the incident, pursuant to Article 35(d) of the NBA Constitution.<sup>2</sup> In response to the suspensions, the NBPA filed an appeal with the Grievance Arbitrator, under Article XXXI of the Collective Bargaining Agreement<sup>3</sup> (CBA), on behalf of the suspended players. The NBPA asserted that the punishment imposed by Stern was not consistent with the CBA terms and applicable laws and that it was without just cause. The NBPA also requested an arbitration hearing to be held before the Grievance Arbitrator. The NBA answered that the Grievance Arbitrator had no jurisdiction over this matter and that he had no jurisdiction to hear an appeal. The NBA contended that the authority to review the appeal fell to the Commissioner.

On December 3, 2004, the NBA brought this action seeking declarations that pursuant to the terms of the CBA (1) the Grievance Arbitrator did not have the authority to resolve the question of arbitrability, (2) the dispute submitted to the Grievance Arbitrator was not arbitrable and the arbitrator did not have jurisdiction over this dispute, and (3) the only remedy the NBPA had was to appeal to the Commissioner. On the same day, the Grievance Arbitrator issued an initial decision that he did have jurisdiction to decide whether the grievance could be properly heard in arbitration.

The court determined that the Grievance Arbitrator did have the authority to determine whether he had jurisdiction to hear the dispute. This conclusion was supported by the CBA language. The court also held that the issue in the case was one of procedural arbitrability and that, while substantive arbitrability issues are properly decided by the court, disputes concerning procedural questions are best heard before the Grievance Arbitrator. Lastly, the court determined that the Grievance Arbitrator did have authority to review the dispute on appeal.

*Smith v. IMG Worldwide, Inc.*<sup>4</sup>

The issue in this case is whether the defendant, an NFL agent, and his company, IMG, could compel arbitration according to the NFL Players'

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1. No. 04 Civ. 9528, 2004 U.S. Dist. LEXIS 26244 (S.D.N.Y. Dec. 30, 2004).

2. *Id.* at \*6.

3. *Id.* at \*7.

4. 360 F. Supp. 2d 681 (E.D. Pa. 2005).

Association Bylaws. The plaintiff argued that the defendant made defamatory statements about him and intentionally interfered with a prospective contract.

Both the plaintiff and defendant are certified NFL agents. The plaintiff asserted that the defendant told potential clients that the plaintiff had “alienated the general managers of NFL clubs by ‘playing the race card’ during contract negotiations.”<sup>5</sup> Because of the defendant’s actions, the plaintiff filed this lawsuit. There was exhaustive discovery for sixteen months, but the defendant did not file a motion to compel arbitration until after the discovery period was ending, claiming that he only then became aware that arbitration was an option.

The court concluded that arbitration was appropriate for this dispute because the defendant’s remarks could constitute defamation against the plaintiff; however, the plaintiff’s claim for interference with prospective contracts was precluded from arbitration under the NFL Bylaws.

*Miami Dolphins Ltd. v. Williams*<sup>6</sup>

This action deals with whether the court should affirm an arbitrator’s decision regarding the contract of professional football player Ricky Williams. The Dolphins were seeking to have the court affirm the arbitrator’s decision, which declared that Williams violated his contract by leaving the NFL prior to the exhaustion of the contract term. Further, the team wanted Williams to repay the incentive clauses in his original contract and an \$8 million signing bonus he had already received. The court held that the arbitrator’s decisions would not be overturned unless fraud, corruption, misconduct, or excessive abuse of power was present in the arbitrator’s decision. Further, the court evaluated whether the award was arbitrary and capricious, whether it was in violation of public policy, and whether it was in disregard of the law. After addressing all of these factors, the court determined that Williams failed to prove that the arbitrator’s decision was in violation of any of the factors; therefore, the arbitrator’s decision was upheld.

*Sproul v. Oakland Raiders*<sup>7</sup>

This case centers on the Oakland Raiders’ proposed ten-year personal seat license plan. When an individual paid the personal seat license, he or she became eligible to purchase Raiders’ season tickets. The main issue of this appeal revolved around a clause in the personal seat license that stated that any

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5. *Id.* at 683.

6. 356 F. Supp. 2d 1301 (S.D. Fla. 2005).

7. No. A104542/A106658, 2005 Cal. App. Unpub. LEXIS 7265 (Cal. Ct. App. Aug. 15, 2005).

dispute arising from the license would be settled via a neutral arbitrator and not a court of law. The plaintiffs in the case initially filed a putative class action lawsuit against the Raiders alleging violations of the Consumer Legal Remedies Act, which included claims of negligence and unjust enrichment and sought rescission, restitution, and declaratory relief.

In response to the proposed class action lawsuit, the Raiders filed a collateral estoppel motion to have the class lawsuit barred from being heard because of a prior case that addressed whether Raiders' fans could challenge the personal seat license. After the Raiders made its motion request, the plaintiffs made a motion to compel arbitration according to the clause found in their personal seat license agreements. In August 2003, the trial court concluded that the plaintiffs' motion for arbitration was proper once all the initial demurrers were settled and that the Raiders' claim of collateral estoppel did not apply to the present dispute.

After the trial court's decision, the plaintiffs filed an appeal arguing that their class action lawsuit should not be barred because of collateral estoppel. Along with the appeal, the plaintiffs reasserted their prior claims and also added additional alleged violations, including joint and several liability, breach of a covenant of good faith, and a claim for money received. The plaintiffs brought this appeal, asserting that the Raiders broke its promise to season ticket holders because there were season tickets available in the stadium that did not require a personal seat license.

In March 2004, the trial court again addressed the Raiders' demurrers coming from the second amended complaint and granted the Raiders' motion to strike the additional charges. The court also held that some of the charges were barred from being brought because they were moot. After this decision, the plaintiffs appealed on the grounds that the trial court exceeded its jurisdiction and that the trial court's decision was erroneous.

The appellate court concluded that the trial court did have jurisdiction to decide whether a class could be certified by addressing and distinguishing two recent cases that dealt with class action lawsuits. Moreover, the appellate court held also that the trial court did have the requisite jurisdiction to determine whether it had the authority to rule on the demurrers because it is a court's role to determine whether arbitration is applicable. Later, the court went on to look at the trial court's prior rulings on collateral estoppel. It concluded that based upon existing statutory law, the court's decision was not erroneous because the order was based upon the merits and the same issue. The final issue the court addressed on appeal was the demurrers, concluding that the trial court erred in some of the demurrers but not all of them. The final result allowed the arbitration to go forward on all of the individual claims.

## ANTITRUST

Antitrust law in the context of sports is unique. Because teams at all levels of sports competition must agree amongst themselves in order to produce the product of sports competition, some agreements, which might otherwise be considered illegal, are allowed in sports. However, there are limits to the sorts of agreements that are allowed among sports teams and within sports leagues. The cases below address instances in which such agreements were challenged as falling outside the protections provided in the sports context and instead are allegedly in violation of the antitrust laws.

*Warnock v. National Football League*<sup>8</sup>

Warnock, a resident of Pittsburgh, alleged that the defendant violated the Sherman Antitrust Act<sup>9</sup> and the Clayton Act<sup>10</sup> by acting in concert to force NFL team host cities to build new football stadiums, including the Pittsburgh Steelers who built Heinz Field. The plaintiff also alleged that after building these new stadiums, host cities and counties leased the new stadiums to NFL teams under favorable lease terms. The plaintiff contended that the county had to agree to favorable lease terms in order to retain the Steelers franchise in Pittsburgh. As a result of these lease terms and a bar on public ownership of these new stadiums, the plaintiff contended also that the defendant forced the county to pay far more to build Heinz Field than a marketplace free of these restraints would have demanded. In response, the defendant answered that the plaintiff, as a municipal taxpayer who was suing on behalf of Allegheny County, lacked standing to bring his claims. In its motion to dismiss, the defendant asserted that the plaintiff would be unable to satisfy the constitutional standing requirement. The defendant went on to contend that even if the plaintiff had shown standing, the plaintiff would be prevented from bringing his claims “based upon prudential limitations to standing because [his] claims amount[ed] to (1) a generalized grievance shared by all Allegheny County taxpayers and/or (2) an attempt to assert the legal rights of a third party.”<sup>11</sup>

The court ultimately granted the NFL’s motion to dismiss on the grounds that the plaintiff had failed to allege any connection with the defendant beyond his status as a municipal taxpayer. The court relied on another case, *Rocks v.*

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8. 356 F. Supp. 2d 535 (W.D. Pa. 2005), *aff’d*, No. 05-1530, 2005 U.S. App. LEXIS 24167 (3d Cir. Nov. 9, 2005).

9. 15 U.S.C. §§ 1-2 (1994).

10. 15 U.S.C. § 15 (1994).

11. *Warnock*, 356 F. Supp. 2d. at 538.

*City of Philadelphia*,<sup>12</sup> in coming to this conclusion. The court in *Rocks* suggested that a plaintiff must establish more than an injury received. Warnock's final chance to establish standing, by showing third-party standing, failed also. Once again, the plaintiff failed to show that he had any special relationship with the defendant and that Allegheny County was unable to assert its own rights. In fact, both the county and the Sports and Exhibition Authority sent the plaintiff letters stating that neither wanted to join the plaintiff's suit against the defendant. Therefore, his attempt at third-party standing also was unsuccessful.

*American Needle, Inc. v. New Orleans Louisiana Saints*<sup>13</sup>

NFL Properties (NFLP) is a corporation that is responsible for licensing the trademarks of the NFL teams. NFLP decided to change its policies by granting an exclusive license for its trademarks for apparel to a single manufacturer. The plaintiff did receive a license to manufacture apparel with the NFL trademarks, so it sued claiming antitrust violations. The plaintiff claimed a *per se* violation of Section 1 of the Sherman Act and a monopolization claim under Section 2 of the Sherman Act. The court held that a *per se* claim is inappropriate against the NFL because sports league cases are analyzed under the rule of reason standard. Therefore, the plaintiff must establish an affected market for an antitrust violation. The plaintiff alleged that the policy affects the licensing, manufacturing, and wholesale markets for NFL teams' trademarks. The court held that the NFL teams' trademarks were not a relevant market for antitrust violations because the teams' trademarks are not interchangeable. Consumers generally do not view the different teams' logos as reasonable substitutes for one another, or any other sports team's logo.

The court discussed only the relevancy of the market for an antitrust violation. It did not go into further discussion about the merits of the antitrust claim, and the defendant's motion to dismiss was denied.

*National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*<sup>14</sup>

The Ontario Hockey League allows its teams to have only three twenty-year-old players on its roster. Additionally, in order to be placed on an OHL roster, a twenty-year-old player must have previously been registered with the Canadian Hockey Association (CHA) or USA Hockey. Because NCAA rules

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12. 868 F.2d 644 (3d Cir. 1989).

13. 385 F. Supp. 2d 687 (N.D. Ill. 2005).

14. 419 F.3d 462 (6th Cir. 2005).

forbid a collegiate hockey player from registering with the CHA and USA Hockey, OHL teams are prevented from adding twenty-year-old NCAA hockey players. This rule, the “Van Ryn” rule, was implemented after Mike Van Ryn signed with an OHL club, the Sarnia Sting. Initially, Van Ryn had been drafted by the New Jersey Devils, but he chose to return to college to compete. By staying in college and then signing with an OHL team, Van Ryn was allowed to explore free agency, and he eventually signed a contract with another NHL team.

The plaintiff hockey players, represented by the National Hockey League Players Association, alleged that there was a conspiracy among OHL teams to adopt the Van Ryn Rule in violation of the antitrust laws. After determining that the relevant market was for sixteen to twenty-year-old hockey players in North America, the circuit court affirmed the lower court’s dismissal of the suit because the OHL’s rule does not have anticompetitive effects on the relevant market. The court stated that “harm to athletic competition is not a cognizable anti-competitive effect under the Sherman Act.”<sup>15</sup> This is because diminishing the quality of play does not cause an injury that impacts economics. Simply because the rule “causes players not to be able to achieve free agency in the NHL. . . . [it]does not cause anti-competitive effects.”<sup>16</sup>

*Warnock v. NFL*<sup>17</sup>

The plaintiff, Robert Warnock, was a citizen of Pittsburgh, Pennsylvania at the time of the action. He alleged that the NFL member teams violated the antitrust laws by conspiring to require member cities and their citizens to publicly fund the building of stadiums and further requiring they then lease the stadiums back to the member teams.

Defendants moved to dismiss the claim based on a lack of standing. After the district court held that plaintiff had standing because he was bringing a derivative claim on behalf of the city and county, it decided that he still lacked standing because there was an insignificant nexus between the plaintiff’s injury and the conduct of the league. The district court then found that the suit could not succeed based on the limitations of the municipal taxpayer doctrine. The court of appeals agreed, stating that the antitrust standing requirements had not been met.

The court decided that the county was the direct victim of the injury, not the taxpayers. Since the taxpayers were only indirect victims, and “allegations

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15. *Id.* at 473

16. *Id.* at 476.

17. No. 05-1530,2005 U.S. App. LEXIS 24167 (3d Cir. 2005).

of political influence or conspiracy on the part of the government are not sufficient for standing,"<sup>18</sup> the suit failed.

Finally, the court held that because Warnock was not a competitor or customer of the league, because he was not a prospective owner and because the conduct was not inextricably intertwined with the allegations of conspiracy, a general grievance was not enough to establish antitrust standing.

#### CONSTITUTIONAL LAW

Historically, the protections of the United States Constitution are fiercely protected. However, under certain circumstances, individuals give up some of their constitutional protections based on their choice to participate in certain activities, including sports competition. The cases below explore the balance that must be struck between maintaining an individual's constitutional rights and allowing a sports league or team to manage its own athletic competition by creating participation rules and requirements.

#### *Hickman v. Little League Baseball, Inc.*<sup>19</sup>

Jimmy and Garrett Hickman alleged that they were molested as children by one of Little League Baseball's (LLB) adult volunteers. They filed suit, alleging unfair business practices and false advertising. The Hickmans claimed that LLB knew that pedophiles used volunteer positions in youth sports to molest children but failed to take reasonable steps to protect the child participants and held LLB out as a safe activity for children. LLB argued that their advertising materials were protected by the First Amendment and moved to strike the Hickmans' complaint. The lower court granted LLB's motion to strike the complaint, and the Hickmans appealed the decision.

The Court of Appeals of California held that Little League Baseball (LLB) did not meet its burden of showing that the plaintiff's complaint was based on LLB's exercise of free speech and reversed the order of the lower court that struck down the complaint. The court held that only a cause of action arising from an act in furtherance of freedom of speech in a matter of public importance is subject to protection under the First Amendment.

#### *Stone v. Romo*<sup>20</sup>

The plaintiff worked as a ticket manager at a university. As part of her

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18. *Id.* at \*4.

19. No. E035160, 2005 Cal. App. Unpub. LEXIS 2279 (Cal. Ct. App. Mar. 15, 2005).

20. No. SA-03-CA-964-XR, 2005 U.S. Dist. LEXIS 2407 (W.D. Tex. Feb. 15, 2005).

duties, she was responsible for a procurement card (credit card) that could be used to purchase items for her job. Other employees had access to her credit card. On numerous occasions, the plaintiff reported credit card compliance problems to her supervisors. The supervisors, in turn, took little action. When the university was audited, it was determined that the plaintiff's credit card had the most egregious problems. Subsequently, the school's athletic director terminated the plaintiff. The plaintiff alleged a § 1983 retaliation claim because of her reporting the compliance problems.

The court stated that for a retaliation claim the plaintiff must prove that "her speech involved a matter of public concern; her interest in commenting on such matters outweigh[ed] the defendant's interest in promoting efficiency; and the speech motivated the adverse employment action."<sup>21</sup>

The court ruled that the plaintiff's speech was of public concern because her speech was alleging that public university employees were not following purchasing policies and the speech was not related to a concern for just her personal employment. Furthermore, the plaintiff's interest in her protected speech outweighed the university's interest in efficiency because the speech did not damage morale or harm efficiency. However, the court found that the plaintiff failed to prove that the speech motivated the adverse employment decision because the athletic director terminated the plaintiff's position entirely to streamline the athletic department and increase productivity. The court ruled that the plaintiff's position would have been terminated regardless of her reporting the compliance problems. Accordingly, the plaintiff's claim was dismissed.

*Tampa Sports Authority v. Johnston*<sup>22</sup>

This case involves a motion to vacate the automatic stay of a preliminary injunction. Johnston was a long-time season ticket holder of the Tampa Bay Buccaneers. In September 2005, the Tampa Sports Authority ("TSA"), which is the entity that maintains Raymond James Stadium, enacted a policy of suspicionless pat-down searches of fans entering Buccaneers's games. This policy was in accordance with the National Football League's initiative that all teams were to have such a policy at home games in response to the potential threat of terrorist attacks in a large group setting. These searches were conducted by screeners who physically pat down each fan as he or she entered the stadium. Generally, the searches were conducted above the waist, but if the screeners noticed bulges in a fan's pockets, then the screener could ask the

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21. *Id.* at \*17.

22. 914 So. 2d 1076 (Fla. Ct. App. Nov. 30, 2005).

fan to empty his or her pockets.

Johnston complained to the Buccaneers about this search policy. The Buccaneers responded that he would not receive a refund for his season tickets, and even if he did, he would lose his seat deposit and be placed at the bottom of the Buccaneers's extremely long season ticket waiting list. Johnston sought a preliminary injunction to stop these suspicionless searches alleging that these searches violated his Florida constitutional rights. The lower court granted Johnston's motion for a preliminary injunction. However, TSA had this injunction automatically stayed until TSA's appeal was heard in accordance with Florida law. Johnston filed this lawsuit to vacate the automatic stay.

The court vacated the stay based on numerous factors. First, the court found that Johnston would suffer irreparable harm if the stay were not vacated. The court stated that Johnston would suffer the irreparable harm of enduring pat-down searches for the remainder of the Buccaneers season if the injunction was not enforced. Furthermore, even if Johnston later won the appeal, he still would have lost because he would have been forced to endure the searches or not attend the game during the interim period. Next, the court determined that TSA likely would not successfully overturn the injunction on appeal. To overturn the injunction, TSA would have to demonstrate "that the injunction was not founded on substantial competent evidence, that it resulted from an incorrect application of law, or that the circuit court abused its discretion when entering it."<sup>23</sup> The court held that TSA would not succeed on any of these fronts.

Finally, the court determined that Johnston's interests in upholding the injunction heavily outweighed TSA's interests in staying the injunction. If the injunction were stayed, Johnston would be deprived of his constitutional right to be free of unreasonable searches when entering Buccaneers games. Johnston had no adequate legal remedy and his only option was to not attend Buccaneers games. TSA's interests in protecting its facility were genuine, however, the terrorist threat was general and speculative, and the threat was one that pat-down searches may not stop. The court stated that there has never been a terrorist threat to Raymond James Stadium and only two harmless potential threats to other NFL stadiums. Furthermore, the court determined that precluding TSA from using pat-down searches would not prevent TSA from protecting its facility. The court cited a Department of Homeland Security Bulletin that listed a number of security measures that should be taken in large, public places, and pat-down searches were not listed. Moreover, TSA already had other safety measures in place to protect the

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23. *Id.* at \*9.

stadium. According, the court decided to vacate the automatic stay.

#### CONTRACTS

Sports is an industry that contains contracts in various forms. Whether it is the multi-million dollar professional athlete contract or the waiver by participants in a recreational league hockey game, the enforceability of contracts is constantly in question in the sports arena. This section discusses the circumstances under which parties will attempt to enforce contractual provisions as well as the contexts in which courts will decline to enforce contractual provisions.

#### *Eudy v. Universal Wrestling Corp.*<sup>24</sup>

The plaintiff, Sidney Eudy, was a professional wrestler who performed under the name “Sid Vicious” for the World Championship Wrestling Corporation (WCW). In January 2001, after performing a choreographed move, Eudy suffered a compound fracture of his left tibia and fibula. After his injury, WCW reduced Eudy’s pay, and in June 2001, WCW terminated his contract. Following his termination, Eudy brought suit against WCW and the employee who choreographed the move that injured him, alleging breach of contract, breach of fiduciary duty, negligence, negligent infliction of emotional distress, and tortious interference with contractual relations. WCW responded that all of its actions were allowed under Eudy’s contract.

The “Independent Contractor Agreement” between Eudy and WCW specifically spelled out the terms of compensation and performance. The parties had even anticipated the possibility of an injury in the contract, agreeing that after thirty days of incapacitation, WCW could terminate the agreement and had the choice to pay Eudy either one-third of his compensation or one-half of his normal compensation for non-wrestling services. The contract also provided that WCW could terminate the agreement with or without cause after giving Eudy three months notice.

The Georgia court of appeals held that because the defendant had complied with the terms of the employment contract, which unambiguously set out the consequences if the wrestler became injured, granting WCW summary judgment was proper concerning the issues of improper reduction in pay, failure to pay full compensation, and improper contract termination. With regard to the plaintiff’s tort claims, the court found that both the Workers’ Compensation Act and Eudy’s contract foreclosed any tort claims.

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24. 611 S.E.2d 770 (Ga. Ct. App. 2005).

*Holloway v. King*<sup>25</sup>

Rory Holloway and John Horne, former managers for boxer Mike Tyson, brought suit against promoter Don King, alleging that he breached an oral agreement, known as the “Team Tyson Agreement,” which gave each of the plaintiffs ten percent of all of King’s earnings from promoting Tyson’s fights. The initial “Team Tyson Agreement” was executed in January 1995. Several months later, in December 1995, the plaintiffs, along with Tyson and King, executed another agreement that set out the terms and conditions of “Team Tyson” with respect to an agreement with Showtime Television and the MGM Grand Hotel in Las Vegas. This agreement was to supersede all prior agreements. In 1997, Tyson repudiated the “Team Tyson Agreement” and fired King as his promoter and the plaintiffs as his managers. It was then that the plaintiffs realized that they had not received any money as a result of King’s worldwide promotion of the six Tyson fights that were to be fought pursuant to the “Team Tyson Agreement.” From 1997 to 2004, the plaintiffs continuously asked King for a full accounting of the promotion earnings and for the ten percent that was owed to both of them. In response to their request, King made periodic payments to the plaintiffs in excess of \$1.5 million, in turn alleviating the plaintiffs’ concerns that King would repudiate his promise. In March 2004, the plaintiffs contended that King did repudiate his promise to pay them their percentage. Holloway and Horner then brought suit, alleging breach of contract and unjust enrichment, and sought an accounting. King asserted (1) that all of these claims were barred by the statute of limitations, (2) that the contract claim was barred by the statute of frauds and failed under the parole evidence rule, (3) that the fraud and breach of fiduciary duty claims failed to set forth essential elements of those causes of action, (4) that the fraud claims were not pleaded with particularity, and (5) that the unjust enrichment and accounting claims were redundant of the contract claim.

The court found that the contract was unenforceable, holding that “an oral agreement which by its own terms must continue for more than a year unless terminated by its breach is void.”<sup>26</sup> The court said that the contract was covered by the statute of frauds because the contract was not in writing. On the plaintiffs’ fraudulent inducement claims, the court reasoned that the allegations failed to state a claim upon which relief could be granted. Also, the plaintiffs’ breach of fiduciary duty claim failed because they had not established that King owed them any fiduciary duty. As the court noted, “[a]

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25. 361 F. Supp. 2d 351 (S.D.N.Y. 2005).

26. *Id.* at 358 (quoting *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 472 N.E.2d 992, 995 (N.Y. 1984)).

conventional business relationship, without more, does not become a fiduciary relationship by mere allegation.”<sup>27</sup> In the end, King’s motion to dismiss was granted.

*LeMond Cycling, Inc. v. PTI Holding, Inc.*<sup>28</sup>

In *LeMond*, the United States District Court for the District of Minnesota denied the defendant company’s summary judgment motion, holding that the production of annual marketing plans and sales reports was material to the plaintiff company’s case. The court held further that the expert testimony offered by the defendant should not be excluded as a determining factor for breach of contract damages.

Former professional cyclist, Greg LeMond, founded LeMond Cycling, Inc. (LCI) to handle cycling licensing agreements. PTI Holding, Inc. (PTI) manufactures and distributes cycling accessories. PTI wanted to develop its own brand of cycling accessories and inquired about licensing LeMond’s name. LCI permitted PTI to use the LeMond name, and the parties executed a contract for a ten-year term, with PTI having the option to renew the agreement for two five-year periods. LCI was to receive \$500,000 per year for the first ten years and a six percent royalty on annual net sales exceeding \$8.33 million.

The LeMond products did not perform well in stores, and LCI claimed that PTI failed to adequately promote and advertise the products and to use “commercially reasonable efforts”<sup>29</sup> to create a demand for the products. LCI also claimed that PTI failed to keep it informed that the products were struggling in stores. PTI offered to buy out the remainder of the LCI deal, but the offer was rejected.

The court determined that PTI’s failure to give reports to LCI did not frustrate the purpose of the contract because there is no connection between the failure to produce the reports and LCI’s lost profits. The court held also that there was a question about the meaning and standard of care as to which actions by PTI were “commercially reasonable.”<sup>30</sup> Finally, the court denied LCI’s *Daubert*<sup>31</sup> motion because the motion did not challenge the admissibility of PTI’s expert testimony.

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27. *Id.* at 360 (quoting *Argunaut P’ship v. Bakers Trustee Co.*, No. 96 Civ. 1970, 2001 U.S. Dist. LEXIS 7100, at \*9 (S.D.N.Y. May 30, 2001)).

28. No. 03-5441, 2005 U.S. Dist. LEXIS 742 (D. Minn. Jan. 14, 2005).

29. *Id.* at \*6.

30. *Id.*

31. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

*Cole v. Valley Ice Garden, LLC*<sup>32</sup>

In 1997, William Martel purchased a Junior A American West Hockey League Team, the Ice Dogs, and hired David Cole as the head coach and general manager. Cole drew up the employment contract, per Martel's request, for a five-year term unless Cole was fired for cause. The Ice Dogs were successful during Cole's first season as coach, but success and attendance fell during his second season. At Cole's suggestion, Martel spent a substantial amount of money to improve the team after the disappointing 1998-99 season, but the team still began the next season with a 1-6 record. Martel fired Cole after the poor start and offered Cole \$15,000 in severance pay. Cole accepted the severance pay but refused to sign a liability release form. Cole then asked Martel to provide him with a written statement detailing his reasons for firing Cole, which Martel did. After receiving the statement, Cole sued Martel for breach of contract. Both Cole and Valley Ice Garden (VIG) filed motions for partial summary judgment. The district court, in denying VIG's motion, held that Cole was terminated without cause and awarded Cole damages of \$199,193. VIG appealed the ruling, and Cole cross-appealed.

VIG and Martel claimed that they had good cause to fire Cole for poor job and team performance, but Cole argued that because the contract did not specify that he could be fired based on his win/loss record, the termination was without cause. The court held that coaches are routinely fired for poor records and team performance in sports and that Cole was terminated for cause, thus reversing the decision of the district court. The Montana Supreme Court held that an employment contract between a team and a coach did not have to specify what would constitute termination for cause in order for a team to fire a coach based on poor team performance.

*Jamsports & Entertainment, LLC v. Paradama Prods., Inc.*<sup>33</sup>

From 1997 to 2001, ClearChannel promoted the AMA Supercross Series. In 2001, AMA Pro began soliciting bids from other promoters, including Jamsports, because the promotion contract with ClearChannel was going to end at the conclusion of the 2002 season. AMA Pro and Jamsports entered into an agreement whereby Jamsports agreed to promote AMA Supercross for the 2003-09 seasons. AMA Pro sent a letter to several motor sports venues to announce the Jamsports partnership. A written contract was never signed, and

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32. 113 P.3d 275 (Mont. 2005).

33. 360 F. Supp. 2d 905 (N.D. Ill. 2005).

AMA Pro eventually signed a deal with ClearChannel. Jamsports claimed that ClearChannel knew about Jamsports's exclusive right to negotiate with AMA Pro, yet it interfered with the prospective business relationship nonetheless.<sup>34</sup>

Following the conclusion of Jamsports's case, ClearChannel moved for judgment as a matter of law on the claim for tortious interference with prospective economic advantage. ClearChannel alleged that the claim can be based only on actions that are directed at a third party with whom Jamsports had an expectation of business. The court disagreed with ClearChannel and held that a jury must decide if ClearChannel intended and succeeded in damaging the AMA Pro-Jamsports business relationship. The court ultimately denied ClearChannel's motion for judgment as a matter of a law.

*City of Anaheim v. Superior Court of Orange County*<sup>35</sup>

This case is an appeal by the City of Anaheim regarding the rejection of a preliminary injunction that Anaheim sought to enjoin "Angels Baseball, L.P. (ABLP) from changing the name of its baseball team from the Anaheim Angels to the Los Angeles Angels of Anaheim."<sup>36</sup> Preliminary injunction analysis requires the trial court to weigh two factors: "the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm the parties may suffer from the issuance or nonissuance of the injunction."<sup>37</sup> The trial court denied Anaheim's preliminary injunction request.

On appeal, Anaheim's principal argument centered on the interpretation of the lease between Anaheim and the previous Angels' owner, Disney. "The source of [the] controversy is section 11(f) of the Lease, which states: 'Tenant will change the name of the Team to include the name 'Anaheim' therein . . . .'"<sup>38</sup> Anaheim argued that this provision should be interpreted to preclude the use of Los Angeles anywhere in the team's name. Anaheim argued also that it was the custom of Major League Baseball teams to have only one geographic city or state in the name of each respective team and to have the geographic name precede the nickname. Furthermore, Anaheim asserted that it negotiated for "Anaheim" to be featured prominently in the team's name. Moreover, Anaheim claimed that Disney gave up the right to associate the team "with any

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34. For all background facts related to this case, see *Jamsports & Entm't, LLC v. Paradama Prods., Inc.*, No. 02C2298, 2003 U.S. Dist. LEXIS 6100 (N.D. Ill. Apr. 15, 2003).

35. No. G035159, 2005 Cal. App. Unpub. LEXIS 5625 (Cal. Ct. App. June 27, 2005).

36. *Id.* at \*1-2.

37. *Id.* at \*5 (citing *Hunt v. Superior Court*, 21 Cal. 4th 904, 999 (1999)).

38. *Id.* at \*10-11.

city other than Anaheim when it agreed to section 11(f) of the Lease.”<sup>39</sup> and breached the implied covenant of good faith by adding “Los Angeles” to the team’s name.

The court held that ABLP did not breach the lease because the name Los Angeles Angels of Anaheim fulfills section 11(f) by including Anaheim in the team’s name. Furthermore, the court held that Anaheim and Disney did not negotiate the custom of Major League Baseball names into the lease because Disney explicitly rejected Anaheim’s request to name the team “Anaheim Angels.” Disney reserved the right to change the name, possibly to Angels of Anaheim. Moreover, the court held that Anaheim did not negotiate “Anaheim” to be featured prominently in the team’s name. Rather, the court stated that Anaheim negotiated to have “Anaheim” only in the team’s name and on the stadium. Additionally, the court held that ABLP did not breach the implied covenant of good faith because the lease provided the team owner “with sole discretion in how to conduct its marketing campaigns.”<sup>40</sup> The court stated that “ABLP implemented the name change solely to exploit marketing opportunities in the greater Los Angeles region.”<sup>41</sup> Accordingly, the court concluded that the name change was not in bad faith and was only to capitalize on marketing opportunities.

*Ford Motor Co. v. Kahne*<sup>42</sup>

Ford Motor Co. brought an action against Kasey Kahne, a professional race car driver, alleging breach of a personal services contract. In 2000, Kahne entered into his first contract with Ford, which was to be effective until August 2002. This contract provided that Kahne would race with Ford or a Ford-supported racing team. Also, the contract provided Ford the opportunity to match any racing-related or driving-related employment offer that Kahne might receive during the term of the agreement. On February 4, 2002, Kahne executed a “Contract for Services” with Robert Yates Racing (RYR), which provided that Kahne would drive exclusively for RYR in the NASCAR sanctioned racing series.

The key disputed terms of the Kahne-Ford contract were: “DRIVER (Kasey Kahne) agrees to participate in one or more racing series as a driver of ‘Ford’ branded vehicles and/or Ford powered vehicles. FORD agrees to provide DRIVER with opportunities to participate in one or more mutually

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39. *Id.* at \*23.

40. *Id.* at \*24.

41. *Id.* at \*25.

42. 379 F. Supp. 2d 857 (E.D. Mich. 2005).

acceptable racing series with a reasonably competitive team.”<sup>43</sup> In resolving the issue over what the provision meant, the court found that Ford and Kahne did not reach agreement on all essential terms of the personal services contract under which the driver would have “opportunities to participate in one or more *mutually acceptable* racing series with a reasonably competitive team”<sup>44</sup> and thus, the agreement was not enforceable under Michigan law because clear and unambiguous contract language demonstrated that the parties intentionally left the meanings of “series” and “team” unexpressed in the original contract.

*Yarde Metals, Inc. v. New England Patriots Ltd. Partnership*<sup>45</sup>

After twenty years as a season ticket holder for the New England Patriots, the plaintiff, Yarde Metals, received a letter from the Patriots’s front office advising that its season ticket privileged had been terminated. The Patriots stated that an individual using a ticket from the Yarde account was ejected from the football stadium after he threw bottles in the seating section. The Patriots asked that Yarde return its remaining tickets and offered to refund the value of the tickets for the current season.

The plaintiff filed a complaint, seeking to make the Patriots liable for (1) breaching its “contractual right to season tickets and the right to renew those tickets annually,”<sup>46</sup> and (2) to impose liability based on the “doctrine of equitable estoppel which prohibited the Patriots from contradicting the expectation of the plaintiff which the Patriots created.”<sup>47</sup> Yarde argued that it had a contractual right to renew its season tickets annually due to its twenty-year relationship with the Patriots. Yarde specifically argued that the Patriots’s process in terminating its season tickets was in violation of good faith and fair dealing that could be implied in any contractual right to renew. The Massachusetts Court of Appeals rejected this argument, stating that although the Patriots’s response may have been harsh, the revocation did not have the effect of diverting to the Patriots the profits and/or benefits of value of the season tickets. Yarde sought a preliminary and permanent injunction against the Patriots, which would have enjoined the Patriots from refusing to sell Yarde season tickets. The lower court denied Yarde’s motion for injunction and granted the Patriots’s motion to dismiss.

In order to prevail on its estoppel claim, the court held that Yarde would

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43. *Id.* at 861.

44. *Id.* at 869.

45. 834 N.E.2d 1233 (Mass. Ct. App. 2005).

46. *Id.* at 1235.

47. *Id.*

have had to prove that its reliance on any alleged representation by the defendant was reasonable. Seeing as how the back of the Patriots's ticket said "this ticket and all season tickets are revocable licenses,"<sup>48</sup> the court determined that the Patriots had not made any false representations. The court concluded that Yarde failed to plead a justifiable cause of action under either count and affirmed the lower court's decision.

*Lincoln Hockey, LLC v. Semin*<sup>49</sup>

Alexander Semin, a professional hockey player, was drafted by the Washington Capitals in the 2002 draft. Semin signed a three-year contract to play hockey for the Capitals beginning the next year. The contract stated a specific time and place to which Semin must report to play hockey only for the Capitals, unless he was released from the terms of the deal. Because Semin's skills were exceptional and thus a loss stemming from a failure to perform the contract would be met with uncertain results and could not have been justly compensated by damages, the plaintiff agreed to a term in the contract that an injunction was the proper remedy to prevent him from playing for another team.

When the National Hockey League season was cancelled for the 2004-05 season due to a labor dispute, Semin was assigned to a minor league affiliate team. He left the country and played in Russia instead, and the Capitals fined him \$1,000 per day for his absence. Semin claims that he was required to serve in the Russian military and could not perform under the terms of his original contract with the Capitals. He made arrangements with the Russian military that allowed him to play hockey in lieu of formal military service. When the lockout ended, the team asked that Semin report to training camp on September 11. Semin claimed that he had worked out another agreement with the military and he would be allowed to return to the country to play hockey. After hiring new agents, Semin was suddenly no longer allowed relief from his military obligations.

The Capitals initiated this lawsuit and asked the court for injunctive relief. The club also filed a suit for tortious interference with a contractual obligation against Semin's new agents. The court granted a temporary restraining order and held a hearing discussing the injunction on December 1, 2005. The court may issue a preliminary injunction if the moving party shows "(1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the is not granted; (3) that an injunction would not

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48. *Id.* at 1236 n.4.

49. No. 05-02094, 2005 U.S. Dist. LEXIS 34047 (D.D.C. 2005).

substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction.”<sup>50</sup> The court found that in this instance, there was not a substantial likelihood of success by the club because arbitration was the potential forum in which to take up such a dispute, reducing the Capitals’s chances of success. Next, although there was substantial evidence showing that the military order was indeed false, should the evidence have been found true, it would increase Semin’s chances for victory. For these reasons, the court could not find a substantial likelihood of success and thus, the motion for injunction was denied.

#### DISABILITY

There is a great deal of legislation in place to protect the rights of disabled individuals, namely the Americans with Disabilities Act of 1990. Questions arise on occasion as to which illnesses may qualify for protection under such legislation. Further determining what sorts of accommodations may be required of leagues or sponsors of sporting events in order to comply with legislation may also be in question. The cases that follow discuss the requirements of the disability legislation and attempt to answer some of these questions.

*Mid-South Chapter of Paralyzed Veterans v. New Memphis Public Building Authority*<sup>51</sup>

Mid-South Paralyzed Veterans of America (PVA), an advocacy group for disabled individuals, alleged that the FedEx Forum, a sports and entertainment arena, failed to comply with federal regulations pursuant to the Americans with Disabilities Act of 1990 (ADA). The plaintiffs sought a declaratory judgment that the defendant had violated the ADA and preliminary and permanent injunctions to prevent the defendant from operating the FedEx Forum in a fashion that violated the ADA. Four individuals also joined the suit, all of whom are disabled and require wheelchairs. The defendant asserted that the plaintiffs’ claims should be dismissed for lack of subject matter jurisdiction because they lacked standing. The defendant asserted also that the plaintiffs had failed to state a claim upon which relief could be granted.

ADA regulations require that places of public accommodation, such as the FedEx Forum, be “‘readily accessible to and usable by individuals with disabilities’ at the time of their construction.”<sup>52</sup> The Department of Justice

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50. *Id.* at \*9.

51. No. 04-2353 M1/V, 2005 U.S. Dist. LEXIS 17375 (W.D. Tenn. Feb. 28, 2005).

52. *Id.* at \*15-16 (quoting 42 U.S.C. § 12183(a)(1)).

prescribes specific requirements with respect to the place, quantity, and type of wheelchair accessible seating that an arena must have.

The defendant argued that the individual plaintiffs' injuries were merely speculative and that they had not actually been injured because they had not attended any events at the Forum. The court, however, found that the plaintiffs' injuries were concrete, particularized, and imminent. The plaintiffs established a causal connection between their injury and the defendant's conduct. In addition, the plaintiffs' requested relief would satisfy their purported injuries. The individual plaintiffs had satisfied all standing requirements; therefore, the court dismissed the defendant's motion to dismiss the case.

In determining whether the PVA had standing, the court concluded that it did because the individual plaintiffs had standing to sue in their own right, that the purpose of Mid-South PVA was to prevent discrimination against its members with disabilities, and therefore, PVA had established standing to sue as an organization.

*Costello v. University of North Carolina at Greensboro*<sup>53</sup>

While enrolled at the defendant university, plaintiff was a scholarship golf player on the school's team. During his sophomore year, plaintiff was diagnosed with Obsessive-Compulsive Disorder. He notified his coach of the disorder and told the coach that he would have to see a psychologist weekly. Initially, the coach agreed to accommodate plaintiff's schedule, but eventually the coach began making statements to other players about plaintiff's performance and OCD, and ultimately the coach dismissed the plaintiff from the team for missed practices. Due to his dismissal from the team, plaintiff lost his athletic scholarship. He then brought a disability discrimination suit alleging violations of the Fourteenth Amendment, Title III of the Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the Rehabilitation Act of 1973 as well as a constitutional claim under Section 1983.

The plaintiff's ADA claim did not survive because the court found that neither the privilege to play collegiate sports nor the benefit of receiving a scholarship, rose to the level of a fundamental right and therefore, the defendants retained immunity against such claims based on the Eleventh Amendment. The plaintiff's constitutional claims were also denied because the Fourteenth Amendment created no cause of action and because the university was not a public entity, it was not subject to plaintiff's Title III claims. Plaintiff's Rehabilitation Act claim did survive because he met the

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53. 394 F. Supp. 2d 752 (M.D. N.C. 2005).

pleading requirements in federal courts by alleging that with or without reasonable accommodations he met the necessary requirements to participate in the university's golf program.

#### DRUG TESTING/PRIVACY

In the past year, drug testing and steroid use has come to the forefront as a major problem in some professional sports. However, drug testing policies have been in effect in a number of sports contexts for years, namely in high school sports. The cases that follow discuss the fragile balance between athletes' rights to privacy and the policy of protecting the integrity of the game and the health and welfare of athletes. These cases also describe some of the differences among testing policies at different levels of athletic competition.

#### *Dominic J. v. Wyoming Valley West High School*<sup>54</sup>

The swimming coach at a Pennsylvania public school kicked the plaintiff, Dominic M., off of the school swimming and water polo teams because of alleged drug abuse. Also, the coach instructed the other team members not to associate with Dominic and cut off the lock on Dominic's athletic locker. Dominic then underwent a drug evaluation, the results of which were negative. Dominic sued the school district and school officials, alleging violations of §§ 1983, 1985, 1986, the First Amendment, the Fourth Amendment, and the Fourteenth Amendment. The court granted summary judgment for the defendants on all of the claims.

The court granted summary judgment on the § 1983 claim because the plaintiff failed to provide evidence that the defendants deprived him of a constitutionally protected right. Additionally, the court granted summary judgment on the First Amendment right to association claim because social activities are not the type of activities protected by the United States Constitution. Further, the court granted summary judgment on the Fourth Amendment search and seizure claim because student-athletes have a lesser expectation of privacy, and the plaintiff's drug test was not intrusive enough to be deemed unreasonable. Lastly, the court granted summary judgment on the Fourteenth Amendment and the §§ 1985 and 1986 claims because the plaintiff failed to present evidence that he was deprived of a federally protected right.

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54. 362 F. Supp. 2d 560 (M.D. Pa. 2005).

*Gill v. Gulfstream Park Racing Ass'n*<sup>55</sup>

Gill was being investigated for suspicious activity regarding thoroughbred doping. The investigating agency was a privately run thoroughbred watchdog group, the Thoroughbred Racing Protection Bureau (TRPB). TRPB received its information from confidential tipsters. Gill sued many parties associated with the investigation for defamation and demanded disclosure of the tipsters' identities. TRPB alleged that the identities were protected by the informant's privilege. The informant's privilege can be used by governmental agencies, but it is uncertain whether it can be invoked by private organizations. The trial court ruled that the informant's privilege did not apply to this case. However, the Court of Appeals for the First Circuit ruled that the district court did not address all of the significant factors involved in the case, including the public's interest in maintaining confidentiality of tipsters to encourage people to speak out in the future. The court remanded the case for further analysis of the competing interests of Gill and the TRPB regarding maintenance of the tipsters' confidentiality.

*Exum v. U.S. Olympic Committee*<sup>56</sup>

In 2000, the plaintiff, Wade Exum, a former employee of the United States Olympic Committee ("USOC") who was hired to investigate doping in Olympic sports, filed suit in the U.S. District Court for the District of Colorado. He claimed that he had been the subject of discrimination under 42 U.S.C. § 1981 and made other state law claims against his employer, the USOC.

Prior to this appeal, the trial court granted summary judgment for the defendant on the discrimination claim and dismissed the state law claims, choosing not to use its supplemental jurisdiction to hear them. On appeal, the Tenth Circuit Court of Appeals found that the court "was well within its discretion in declining supplemental jurisdiction over the remainder of plaintiff's claims and USOC's counterclaims."<sup>57</sup>

Plaintiff then filed a state law claim in El Paso County District Court in 2005. He stated five claims in the complaint. Plaintiff stated a claim for "(1) fraud and misrepresentation, (2) breach of contract, (3) promissory estoppel, (4) wrongful termination in violation of public policy, and (5) tortious interference with prospective financial advantage."<sup>58</sup> Plaintiff's claims were

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55. 399 F.3d 391 (1st Cir. 2005).

56. No. 05-cv-870-WYD-OES, 2005 U.S. Dist. LEXIS 28094 (D. Colo. 2005).

57. *Id.* at \* 3.

58. *Id.*

based on the fact that he felt that the USOC had impeded his work in eliminating doping in amateur sports. The USOC stated that Exum's claims arose under federal law and thus should have been removed because the Ted Stevens Amateur Sports Act provided that original jurisdiction over civil actions arising under the laws of the United States properly resided in the district courts.

The court stated that removal cases are to be construed strictly, and that "doubts should be resolved against removal."<sup>59</sup> Further, it prefaced its analysis by stating that the governing standard is whether the required right or immunity is an essential element of the cause of action, and if so, there are grounds for removal.

Here, the plaintiff argued that there were two reasons to remand the case to the state court. First, he claimed that the doctrine of *res judicata* provided reason to remand. The district court judge held that the lower court judge "did not make a determination that the court lacked jurisdiction, but rather declined to exercise jurisdiction over state claims."<sup>60</sup> Therefore, as plaintiff's state law claims were not decided on their merits, *res judicata* did not apply.

The court next decided that statutory removal was appropriate in this case. The Ted Stevens Act states that removal is appropriate when an action relates "solely to the USOC's responsibilities under the Amateur Sports Act."<sup>61</sup> Since the basis for plaintiff's claims was that the USOC was not properly disciplining athletes for drug violations, the court found that the plaintiff's action related solely to the USOC's responsibility under the Amateur Sports Act and the action was removable. The motion for remand was ultimately denied.

#### EDUCATION LAW

Athletic participation is a significant part of many students' educational experiences. While athletics are clearly not mandatory, there may be situations where there is a conflict between the interest of the educational association or institution and the student-athlete. The cases that follow describe such conflicts, namely in the context of students who are home-schooled who wish to participate in athletics through their local public schools.

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59. *Id.* at \*5.

60. *Id.* at \*7.

61. *Id.*

*Polmanteer v. Bobo*<sup>62</sup>

In May 2004, the defendants, the Superintendent and Board of Education of Cato-Meridian Central School District, considered the school district's budget for the 2004-05 academic year. After cutting proposed expenditures by approximately \$787,000, the board presented a proposed budget of \$13.9 million to the district's voters. On May 18, 2004, and then again on June 15, 2004, the voters rejected the proposed budget. Pursuant to sections 2022(4)-(5) and 2023(1) of the Education Law, a district must adopt a "contingency budget" if voters of a district twice disapprove of a proposed budget. On June 24, 2004, the district adopted its contingency budget, which totaled \$13,401,321, a \$497,618 reduction from its initial \$13.9 million proposal. About \$350,000 in this savings was a result of the elimination of all funding for interschool athletics and extracurricular activities.

The plaintiffs, taxpayers in the district whose children were enrolled in the district's middle or high schools and who participated or wished to participate in interschool athletics, brought this suit challenging the legality of the contingency budget. The plaintiffs alleged that under Education Law section 2023(1) it was unlawful to eliminate interschool athletics, field trips, and other extracurricular activities.<sup>63</sup>

The New York Supreme Court enjoined the defendants from implementing the contingency budget because it made no provision for interschool athletics and extracurricular activities. The court then mandated the defendants to adopt a new contingency budget that allocated an amount "pro rata" to those activities that would be in compliance with the Education Law. In response, the district asserted that it could not simply add funding for interschool athletics and extracurricular activities to its budget while reducing all other spending pro rata. The district further noted that it could not fund interschool athletics and extracurricular activities without imperiling its basic educational mission due to the fact that budget reductions had already been made in staffing and personnel costs.

The Appellate Division of the New York Supreme Court agreed with the defendant and concluded that the statutory mandate did not require the board to fund interschool athletics, field trips, and other extracurricular activities as part of its contingency budget. The court noted that the legislative intent of the statute was to classify "expenses incurred for interschool athletics, field trips, and other extracurricular activities as ordinary contingent expenses that a district is authorized but not required to incur as part of its contingency

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62. 794 N.Y.S.2d 171 (N.Y. App. Div. 2005).

63. *Id.* at 174.

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## ANNUAL SURVEY

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budget.”<sup>64</sup>*Jones v. West Virginia State Board of Education*<sup>65</sup>

The Joneses home schooled their children, including their son, Aaron. In 2002, Aaron indicated his desire to participate on the Mannington Middle School wrestling team. In order for Aaron to participate on the team, the Joneses were told that they would have to get approval from the West Virginia Secondary School Activities Commission (“WVSSAC”). The Joneses were also advised that Aaron would only be allowed to participate if he was enrolled full-time in a WVSSAC participating school. The Joneses filed a complaint against the school officials seeking declaratory, equitable and injunctive relief. The Joneses also filed a motion seeking a temporary restraining order and preliminary injunction. The circuit court entered a preliminary injunction permitting Aaron to immediately participate on the Mannington Middle School wrestling team based on its findings that (1) the school officials had breached a statutory duty; (2) they violated the home-schooled student’s right to equal protection and (3) they had breached the duty to promulgate reasonable rules and regulations.

On the first claim the appellate court found the circuit court erred in concluding that the school officials breached their duty because the lower court’s decision was not supported by the language contained in the statute. On the equal protection claim, the court held that prohibiting home-schooled children from participating in interscholastic athletics does not violate equal protection under West Virginia’s state constitution. Lastly, the court noted that the legislature empowered the WVSSAC “to exercise . . . control, supervision and regulation of interscholastic athletic events.”<sup>66</sup> Part of this authority over “athletic events” is determining who is eligible to participate in such events, as the WVSSAC did in the legislative rule at issue in this case. Therefore, the court found that the WVSSAC did not exceed its statutory authority in promulgating a rule pertaining to the eligibility requirements for participating in interscholastic athletics.

## GENDER EQUITY

Although Title IX came into play over thirty years ago, the application of this and other gender related policies are still being challenged today. While female athletes are gaining more exposure and opportunities every year, there

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64. *Id.* at 179.

65. 622 S.E.2d 289 (W. Va. 2005).

66. *Id.* at 299.

is still room for improvement. The cases that follow describe some of the attempts to bring further equity to athletics, mainly at the collegiate level.

*College Sports Council v. Department of Education*<sup>67</sup>

Plaintiff, the College Sports Council, a member of a coalition of associations that represents male intercollegiate and scholastic athletes, coaches, and alumni, brought suit against the Department of Education, challenging the rules and policies implementing Title IX of the Education Amendments of 1972<sup>68</sup> on the grounds that they violate the United States Constitution, Title IX, and the Administrative Procedure Act. Specifically, plaintiffs alleged that the 1979 Policy Interpretation (Three-Part Test) and its 1996 and 2003 Policy Clarifications encourage and give educational institutions the authority to cap or cut men's athletic programs.

The plaintiff asked the district court to grant it declaratory and injunctive relief in order to vacate the allegedly unlawful rules and policies and require the Department of Education to issue new rules consistent with Title IX and the Constitution. In a previous suit filed by the plaintiff, the court dismissed the plaintiff's claims on standing grounds, concluding that the plaintiff had not met its burden of persuasion on the question of whether it was a proper party to bring its suit.

As the court laid out, constitutional standing required that the plaintiff satisfy three elements. First, the plaintiff must show an "injury in fact," and an injury that was "concrete" and "actual," not "conjectural" or "hypothetical."<sup>69</sup> Second, the plaintiff must show that the defendant's conduct caused the injury suffered. Third, the plaintiff must show that there was a likelihood that the requested relief would redress the alleged injury.

In the end, the district court held that the plaintiff failed to establish Article III standing and dismissed the case. The court noted that it was not enough to confer standing because the plaintiff claimed to be an "interested party" within the meaning of the statute. The plaintiff offered nothing to prove that the loss of men's wrestling opportunities was due to the rules and policies complained of, nor did it offer anything to substantiate its claim that a favorable decision would redress its injuries. In fact, the court held that the educational institutions that choose to eliminate or reduce the size of men's wrestling teams do so independently and not as a result of the rules and policies associated with Title IX.

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67. 357 F. Supp. 2d 311 (D. D.C. 2005).

68. 20 U.S.C. §§ 1681-88 (1997).

69. *Coll. Sports Council*, 357 F. Supp. 2d at 312 n.1.

*Mercer v. Duke University*<sup>70</sup>

Mercer tried out for Duke's football team during her freshman year at the university. Although she did not make the team, she was allowed to serve as a team manager, work out with the kickers, and participate in the conditioning programs. In 1995, Mercer was asked to participate in a scrimmage game where she kicked the game-winning field goal; she was then made a member of the team. The instant media attention attracted by the story caused the head coach, Coach Goldsmith, to question his decision to allow Mercer to play for the team, and the coach began to treat Mercer unfairly. Coach Goldsmith eventually cut Mercer from the team, and she brought a Title IX action against the university.

The district court dismissed Mercer's claim because Title IX does not require that women be given the opportunity to play on the men's football team. The district court found that Duke could change its mind and remove Mercer from the team. Mercer appealed, and the Court of Appeals for the Fourth Circuit held that Title IX's contact sports exemption ceases once a university allows the female student to join the men's team. Mercer won at trial and was awarded one dollar in compensatory damages, \$2 million in punitive damages, and \$380,000 in attorneys' fees. Duke appealed. The punitive damages award was vacated, and the court held that the district court should determine whether the attorneys' fees were still appropriate. The district court determined that Mercer was still entitled to attorneys' fees and awarded her \$349,243.96; Duke again appealed.

On appeal, the Fourth Circuit considered three factors to determine whether Mercer was entitled to attorneys' fees: (1) the relief obtained, (2) the significance of the legal issue, and (3) the public interest served by the litigation. First, the court agreed with Duke's argument that Mercer's relief was very limited. Second, since Mercer's case was the first of its kind and others would have to follow its decision, the court held that it a significant legal issue. Third, the court held that Mercer's case was a major development in Title IX law, so it served an important public interest. After balancing the factors, the court held that the fees awarded were reasonable. The court ruled that the district court did not abuse its discretion in awarding or calculating the attorneys' fees and affirmed its award.

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70. 401 F.3d 199 (4th Cir. 2005).

*Jackson v. Birmingham Board of Education*<sup>71</sup>

This case is an appeal to the United States Supreme Court from the federal trial court and appellate court decisions ruling that Title IX does not create a private right of action for retaliation. Jackson brought this case because he believed that the Birmingham Public School District was retaliating against him based on the complaint he filed about discrimination in the high school athletic programs. Jackson was a teacher in the district and formerly a high school girls' basketball coach, who alleged that he was terminated from his coaching duties as a result of his complaints to the school board about inadequate funding for the girls' programs.

The Court looked at the provisions of Title IX that state that any entity that receives federal funding must not intentionally discriminate on the basis of gender. Then, the Court further defined the scope of Title IX by declaring that intentional discrimination exists if an individual complains about discrimination and then is retaliated against as a result of the complaint. The Court rejected the Board of Education's argument that even if Title IX encompassed a private right of action, Jackson was not being discriminated against because he was only an "indirect victim" of the Title IX violation. The Court rejected this argument because the plaintiff was actually the individual retaliated against. Therefore, the plaintiff could not be properly characterized as an "indirect victim" because he was directly affected as a result of his complaint. The Court posited a public policy justification for its ruling, stating that if individuals were not afforded a private right of action for others being discriminated against, Title IX would be ineffective because people who witness discrimination would be less likely to bring lawsuits and those who are discriminated against may not be able to sue themselves.

## INTELLECTUAL PROPERTY

Intellectual property is a growing area of law both inside and outside the arena of sports. However with the growth of endorsements and merchandising, there is a significant role for intellectual property law in the sports context. The following cases explain the application of trademark and copyright protections in the area of sports. The impact of these cases will have an effect both on the sports market and the development of intellectual property law.

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71. 544 U.S. 167 (2005).

*ACI International, Inc. v. Adidas-Salomon AG*<sup>72</sup>

More than fifty years ago, Adidas placed its now famous “Three-Stripe Mark” on the side of its athletic shoes. The mark has become famous because of its use in connection with sponsorship of professional and amateur sports tournaments, organizations, and athletes. Adidas owns multiple federal trademark registrations for the “Three-Stripe Mark” for athletic footwear.

In its counterclaim suit, Adidas alleged that the plaintiff, ACI, offered for sale and sold shoes that bear features that are confusingly similar imitations of Adidas’s “Three-Stripe Mark.” ACI’s athletic shoes bear a two-stripe mark, which Adidas claimed was used to intentionally mislead and deceive consumers into believing the shoes were manufactured by Adidas and, therefore, ACI is guilty of trademark infringement and dilution.

The court held that Adidas had sufficiently alleged that ACI’s two-stripe design was likely to be confused with the “Three-Stripe Mark” produced by Adidas. The court concluded that Adidas had shown that there could also be a likelihood of initial-interest, point-of-sale, and post-sale confusion among consumers, so much so that the court did not determine likelihood of confusion as a matter of law. It was held also that Adidas adequately pled its dilution claim by showing that its mark was famous, that ACI was making commercial use of a mark in commerce, that ACI’s use began after the “Three-Stripe Mark” became famous, and that ACI’s use erodes the distinctiveness of the “Three-Stripe Mark” by its capacity to identify and distinguish goods and services.

*Open Source Yoga Unity v. Choudhury*<sup>73</sup>

This case deals with a motion for summary judgment on the issue of copyright and trademark infringement. The defendant, Choudhury, invented a series of twenty-six yoga exercises and two breathing techniques, called asanas, in the late 1960s and 1970s. The defendant taught his techniques to people in Southern California. Along with his classes, he sought various copyrights to protect his techniques and books that he published throughout the 1970s. The defendant requires all yoga instructors using his techniques to be certified. This dispute arose when the plaintiff began teaching yoga techniques similar to defendant’s without permission or certification. The plaintiff alleged that yoga techniques are not copyrightable.

First, the court addressed whether a series of yoga techniques could be

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72. 359 F. Supp. 2d 918 (C.D. Cal. 2005).

73. No. C03-3182, 2005 U.S. Dist. LEXIS 10440 (N.D. Cal. Apr. 1, 2005).

copyrighted, concluding that the defendant's techniques did not meet the creativity requirement necessary for a valid copyright to attach. Then, the court addressed the issue of whether the techniques were in the public domain, concluding that the defendant's presentation of the techniques to a private audience in his classes was not enough to release the techniques into the public domain.

Ultimately, the court denied the plaintiff's motion for summary judgment while granting one of the defendant's motions. Also, the court denied the defendant's motion for trademark invalidity.

*Lawlor v. Nike, Inc.*<sup>74</sup>

In this case, Lawlor sued Nike, Inc., alleging patent infringement. Lawlor claimed that a select line of Nike's shoes infringed upon two of his patents. The court stated that "patent infringement analysis is a two step process: the first step—claim construction—is to determine the meaning and scope of the patent claims asserted to be infringed; and the second step—determination of infringement—is to compare the properly constructed claims to the product accused of infringement."<sup>75</sup> Lawlor's infringement claim centered on the design of the sole of the shoes. The court found that the disposition of Lawlor's claim hinged upon the construction of "bottom sole" as used in Lawlor's patent.

Nike argued that the term "'bottom sole' should be construed to mean '*the outsole, which is the part of the shoe that contacts the ground and is also the lowest part of the sole.*'"<sup>76</sup> In contrast, Lawlor argued that "the term 'bottom sole' is properly construed to mean '*a part of the shoe sole attached to the bottom of the upper sole.*'"<sup>77</sup> Lawlor's interpretation of "bottom sole" likely would impute an infringing use by Nike's shoes.

The court concluded that "bottom sole" should be interpreted in accordance with Nike's definition. The court based its decision on Lawlor's interchanging use of "bottom sole" and "outer/outsole" throughout his patent specification. Further, the court considered whether Nike's shoes infringed on Lawlor's patent. It stated that "[a]n accused device may infringe a patent either literally or under the doctrine of equivalents."<sup>78</sup> Literal infringement occurs "when every limitation recited in the claim is found in the accused

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74. No. 02-CV-12262, 2005 U.S. Dist. LEXIS 12001 (D. Mass. June 20, 2005).

75. *Id.* at \*6-7.

76. *Id.* at \*8.

77. *Id.*

78. *Id.* at \*17.

device.”<sup>79</sup> A device infringes “under the doctrine of equivalents if every element in the claim is literally or equivalently present in the accused device.”<sup>80</sup> The court held that Nike’s shoes did not literally infringe because none of Nike’s accused shoes have the same “bottom sole” as described in Lawlor’s patent claims. Also, the court held that Lawlor’s doctrine of equivalents theory failed because of prosecution history estoppel. Accordingly, the court granted Nike’s motion for summary judgment regarding the infringement claims.

#### PROPERTY

Property law is one of the oldest areas of law, dating back to medieval British law. However, disputes continue to occur relating to both possession and use of public and private property. In the sports arena, many property disputes are related to the building and/or funding of stadiums for use by professional sports teams. The case that follows discusses some of the issues related to sports stadium development, including constitutional takings and zoning.

#### *Detroit/Wayne County Stadium Authority v. Drinkwater, Inc.*<sup>81</sup>

This case is a consolidation of many cases related to just compensation for the taking of several properties to construct two stadiums in Detroit (for the Tigers and the Lions). The property owners are the defendants. They rejected the plaintiff’s purchase offer for their properties, but their properties were taken by eminent domain. The just compensation issue was decided in court. The defendants did not believe that they received just compensation for their properties because the court did not properly consider the potential to sell their properties for casino development. The defendants argued that the court erred in giving its jury instruction “by providing a jury instruction premised upon the *probability* of assemblage for casino development rather than the *possibility* of assemblage for casino development.”<sup>82</sup> The appellate court concluded that the trial court did not give an erroneous instruction, basing its decision on precedent that “probability” was the standard in cases of private assemblage. The “possibility” standard is applicable for rezoning cases, which are unique and different from private assemblage cases.

The plaintiff appealed also the award that the defendants received for the

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79. *Id.* (quoting *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 532 (Fed. Cir. 1996)).

80. *Id.* at \*20.

81. No. 251799, 2005 Mich. App. LEXIS 1856 (Mich. Ct. App. Aug. 9, 2005).

82. *Id.* at \*6.

business interruption related to relocation. The court stated that “[d]amages resulting from business interruption are compensable . . . provided the damages can be proven with a reasonable degree of certainty. But damages related to lost profits are not recoverable in a business interruption case.”<sup>83</sup> The court determined that the defendants’ business interruption award resulted from testimony relating to labor costs and other operational expenses, which related to lost profits. Therefore, the court remanded on this issue for a more appropriate determination.

#### TAXATION

Taxation is a concern for all Americans. However, sports organizations also face taxation issues. The following case describes the sales tax computation and some of the practical concerns facing professional sports teams when determining the appropriate payment of such taxes.

*Boston Professional Hockey Ass’n v. Commissioner of Revenue*<sup>84</sup>

The plaintiff, Boston Professional Hockey Association, Inc. (BPHA), owns and operates the Boston Bruins hockey team. During the years 1991-94, BPHA received the gate receipts from its home games and earned income from broadcast licensing agreements and revenue from the use of the Bruins logo and trademarks. From 1991-94 BPHA filed its tax returns in Massachusetts. However, in those returns, BPHA did not treat all of its income as Massachusetts income. As a result, the Commissioner notified BPHA that he was going to assess additional corporate excise taxes against it for those years, including interest. After paying the adjusted assessments, BPHA filed applications for abatement. BPHA’s applications were denied based on the fact that it failed to meet its burden of proving entitlement. In this appeal, BPHA challenged the Commissioner’s method of computing BPHA’s sales and property figures and sought to reduce the percentage of net income subject to the excise tax. BPHA asserted also that the Commissioner’s interpretation and application of the apportionment formula violated the commerce clause.

The court concluded that the board’s decision to affirm the commissioner’s findings that “when viewed as a single ‘income-producing activity,’ the costs of fielding and managing the Bruins through the games in a tax year were borne largely in Massachusetts and, at a minimum, in greater

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83. *Id.* at \*48 (citations omitted).

84. 820 N.E.2d 792 (Mass. 2005).

proportion here than in any other State”<sup>85</sup> were accurate. Also, the court upheld the Commissioner’s application of the apportionment of BPHA’s gate receipt and local listing revenue. With regard to the apportionment of revenue that BPHA received from its interest in the use of the Bruins logo and trademarks, the court vacated the board’s decision and remanded the matter back to the board for a recalculation of the proper taxes and abatement due to BPHA for the years 1991-94.

#### TORTS

Torts is continually the most litigated area in the context of sports law. Because of the constant contact among athletes and between athletes and spectators, there are constantly injuries and liability questions with regard to the costs of such injuries. This inherent physical contact often makes it difficult to decide tort cases. The cases that follow discuss the allocation of liability in tort cases as well as the assumption of risk doctrine that often comes into play to preclude tort liability in the sports context.

#### *Coblentz v. Peters*<sup>86</sup>

Both the plaintiff and the defendant were playing golf when the plaintiff was struck by a golf cart that was being operated by the defendant. The trial court granted summary judgment to the defendant because it reasoned that the plaintiff had assumed the risk that comes with playing golf by choosing to participate in the activity.

The Ohio court of appeals disagreed. The court held that the trial court had erred in granting the defendant summary judgment. The court noted that while a golfer may assume the ordinary risk of playing golf, such as being struck by a golf ball, being struck and injured by a golf cart is not an ordinary risk of the game. Because being struck by a golf cart was not a foreseeable consequence of participating in the activity, the court concluded that a negligence standard should have been applied to the initial case. The court reversed the decision of the trial court and remanded the case for further proceedings applying the negligence standard.

#### *Crews v. Seven Springs Mountain Resort*<sup>87</sup>

In January 2002, the plaintiff was skiing at the defendant’s ski resort when

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85. *Id.* at 800-01.

86. No. 2004-T-0017, 2005 Ohio App. LEXIS 1073 (Ohio Ct. App. Mar. 11, 2005).

87. 874 A.2d 100 (Pa. Super. Ct. 2005).

he was seriously injured after a snowboarder collided with him on one of the slopes. According to the plaintiff and other witnesses, the snowboarder was a high school student who was intoxicated at the time of the collision. The plaintiff brought this negligence action against the ski resort. In response, the ski resort answered that it was not responsible because the plaintiff had assumed the risk of collision and also had released the resort from any liability for injuries that occurred while skiing through his purchase of a lift ticket that contained an exculpatory clause on the back.

In order to determine if the ski resort was responsible for the plaintiff's injuries, the court had to decide if the plaintiff had assumed the risk of being struck by an intoxicated underage snowboarder. The plaintiff contended that being struck by another skier while he or she is under the influence is not an inherent risk in skiing. The court agreed, stating that a collision with an underage drinker on a snowboard cannot be considered an inherent risk of downhill skiing.

*Cass v. American Home Assurance Co.*<sup>88</sup>

On November 15, 2003, the plaintiff, Cass, was snowboarding downhill at Granite Peak when he collided with a snowmobile, driven uphill by a Granite Peak employee. Cass suffered serious injuries from the collision and, as a result, brought suit against Granite Peak and its insurer. Before the collision occurred, Cass had purchased a season pass for Granite Peak. The application for the pass included, among other things, a release of liability. Cass argued that the release was void because it was contrary to public policy. Granite Peak contended that it was not liable for negligence, that Cass released it from liability when he signed the application for the season pass, and that the release expressly covered its employee's actions in the case.

After examining the release, the court held that colliding with a snowmobile driven against the downhill flow was not one of the "inherent risks" included in the release. Granite Peak attempted to argue that the employee's actions were covered by the release because he was inspecting conditions on Granite Peak premises at the time of the collision. However, as the employee testified, he was on his way to investigate the users of the hill, not to inspect the conditions of the hill. Thus, the court found the release to be ambiguous as to whether the employee's actions were considered part of an "inspection" and found the release to be inapplicable in the case.

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88. 699 N.W.2d 254 (Wis. Ct. App. 2005).

*Tank v. Barney*<sup>89</sup>

Eric Barney was pulling Leslie Tank in tube behind his ski boat, when Tank was thrown up on the shore and injured. Tank sued Barney, claiming that he was negligent in operating the boat. Barney moved for summary judgment, claiming that Tank's claim was barred by the doctrine of assumption of risk. The trial court granted Barney's motion for summary judgment, finding that Barney was merely negligent. Tank appealed and argued that there were triable issues of fact that Barney's conduct was reckless and outside the ordinary activity of tubing.

The Court relied on the *Knight*<sup>90</sup> rule, whereby a person has a duty of care to the co-participant of an activity not to increase the risks beyond those common in the sport or activity. The court held that Barney's conduct was not reckless and affirmed the grant of summary judgment.

*Taylor v. Mathys*<sup>91</sup>

Elizabeth Taylor, Jeremy Mathys, and Bobby Vanover were alternating driving an ATV with a homemade sled attached. During one ride, Mathys was driving the ATV, Taylor was riding on the back of the ATV, and Vanover was being pulled on the sled. While going over a snow drift, Taylor's leg was caught in the ATV's tire and was broken. Taylor sued Mathys, alleging that he was negligent and reckless in operating the ATV. Mathys moved for summary judgment under the state recreational immunity statute<sup>92</sup> and the doctrine of assumption of risk. The trial court granted Mathys's motion, and Taylor appealed.

Taylor argued on appeal that the recreational immunity statute and doctrine of assumption of risk did not apply because Mathys was negligent in his operation of the ATV and the injuries were caused by a negligent act that could not have been anticipated. The court held that whether the injury could have been anticipated was irrelevant. The court relied on previous Ohio supreme court cases in holding that when a person is engaged in a recreational activity, he or she assumes the ordinary risks associated with that activity and cannot recover for injuries arising out of that participation without showing that the other participants either recklessly or intentionally caused the resulting injuries. The court determined that Mathys did not intentionally injure Taylor and Mathys's conduct was within the custom of the activity; therefore, Mathys

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89. No. A107155, 2005 Cal. App. Unpub. LEXIS 3214 (Cal. Ct. App. Apr. 7, 2005).

90. See *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992).

91. No. 14-04-32, 2005 Ohio App. LEXIS 143 (Ohio Ct. App. Jan. 18, 2005).

92. OHIO REV. CODE ANN. § 1533.181 (2001).

was granted summary judgment.

*Green v. Konawa Independent School District*<sup>93</sup>

Green, a fourth-grader, participated in an elementary school track and field competition at the Konawa track and football field facilities. After Green had finished his individual competition, a teacher instructed him to go outside of the facility and sit on one of the “stands” to wait for the other students to finish competing. Green and three other students went to the stands and climbed to the top level. One of the students, who was large (weighing over 200 pounds), leaned over the top rear edge of the stands and caused the stands to topple over. Green was injured in the fall, and his father sued the school district.

Green’s father alleged that the school was negligent in failing to secure the stands and/or failing to properly supervise the children. The school tried to claim governmental immunity, stating that the injury occurred on school grounds during participation in an athletic event. However, the court held that governmental immunity does not apply to the school in this situation because Green was not participating in the athletic competition when the injury occurred. The court held that Green was injured by an instrumentality that played no part in the athletic contest. Also, the court stated that the instrumentality was dangerous because a 200 pound person could cause it to topple, and it should have been secured to the ground. Furthermore, the court stated that governmental immunity was intended to bar suits against schools for known risks of athletic competition and, in this case, the risk of the stands toppling was not incidental to the contest.

*Gonzalez v. Univiversity System of New Hampshire*<sup>94</sup>

This case was brought by the plaintiff, who was a student-cheerleader at a state university. While performing a stunt, the plaintiff fell and suffered serious injuries that ultimately rendered her a quadriplegic. The plaintiff brought this suit, alleging that the school was negligent, breached its fiduciary duty, and was reckless. In response to her lawsuit, the defendant raised various affirmative defenses, including the student’s signature on a liability release form, an expired statute of limitations, assumption of risk, and sovereign immunity.

First, the court addressed the waiver the plaintiff signed to join the cheerleading team. It concluded that the release did not bar the plaintiff’s

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93. 105 P.3d 840 (Okla. Civ. App. 2005).

94. No. 451217, 2005 Conn. Super. LEXIS 288 (Conn. Super. Ct. Jan. 28, 2005).

claim because the defendant was in a position of power and there was no dispute of fact as to whether a special relationship existed between the parties at the time the release was executed. Then, the court looked at the defendant's argument that the doctrine of sovereign immunity prevented the plaintiff from bringing the suit. The court determined that sovereign immunity did not apply because the discretionary act, which resulted in injury in this case, did not fall into the category of government planning or policy formulation.

With regard to the statute of limitations defense, the court ruled in the plaintiff's favor because the amended complaint, although filed after the two-year statute of limitations had expired, was still permitted because the amended complaint significantly related to the original complaint, which had been filed prior to the statute of limitation's expiration. Then, the court considered whether recklessness was shown by the defendant. It looked at the cheerleading coach's actions and training and determined that no matter what action the coach may have taken, the injury still would have occurred. Therefore, the defendant could not be said to have acted recklessly. Finally, the court determined that the defendant's motion for summary judgment on the issue of assumption of risk could not be granted because there was a genuine issue of material fact as to the coach's negligence.

*Locke v. Ozark City Board of Educ.*<sup>95</sup>

This case is an appeal of a summary judgment motion granted for the defendant at the trial court level. The plaintiff is a physical education teacher who served also as a high school baseball umpire. In 1999, Locke was the head umpire in a game, and after the game, a parent of a player attacked him, punching him in the face and causing damage to his eye and face. Locke alleged that the school and school district were liable for his injuries because, according to the Alabama High School Athletic Association (AHSAA) rules, the school sponsoring the event had a duty to supply security. The school district countered by arguing it could not be held responsible for the criminal actions of a third party.

The first issue addressed by the court was whether Locke was a third party beneficiary of the contract between the high school and the AHSAA, thereby giving him standing to bring the action against the school. The court listed several factors that must be present to recover under this theory of law: (1) the contracting parties intended to bestow a benefit upon the third party, (2) the plaintiff was the intended beneficiary of the contract, and (3) the contract was breached. The court ultimately concluded that because there was a genuine

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95. 910 So. 2d 1247 (Ala. 2005).

issue as to whether a valid third party beneficiary contract existed, the prior decision to grant summary judgment was improper.

The second argument the court took up was whether Locke's argument was based on tort or contract law. The court eventually concluded that Locke had produced enough evidence to show a breach of contract and not a tortious injury; therefore, the court rejected the school district's argument. In conclusion, the court reversed the original trial court decision because a genuine issue of material fact did exist and needed to be addressed by the lower court.

*Price v. Time, Inc.*<sup>96</sup>

In this case, the United States Court of Appeals for the Eleventh Circuit held that the term "newspaper" in Alabama's shield law did not include magazine publications. The court held further that a college football coach had not exhausted all other reasonable efforts to discover the identity of the magazine's confidential source for an article before attempting to force the magazine to reveal the source.

In a *Sports Illustrated* article, Don Yaeger, a reporter, recounted several incidents of sexual misdeeds committed by Mike Price, then head football coach at the University of Alabama. One of the major incidents included allegations that Price had patronized a strip club called "Artey's Angels" on two different occasions while he was in Pensacola, Florida. The article alleged that Price had behaved in a lewd manner while at the club and had even propositioned two women for sex. Additionally, it recounted an incident where Price allegedly made sexual advances toward a female university student. The article relied on confidential sources for most of its content.

Five days before the article was published, Yaeger called Price to get a response to the allegations in the article. Price flatly denied the allegations. Two days before the article was to go on sale at newsstands, Yaeger appeared on a radio talk show and recounted the allegations made in the article. As a result of the comments and the article, Price sued Yaeger, the author, as well as Time, the publisher of *Sports Illustrated*, for libel and slander. Price asked the magazine to reveal the confidential sources behind the stories in interrogatories, but the magazine refused relying on the Alabama shield statute and the First Amendment. Price then sought to compel disclosure of the sources.

The district court concluded that the Alabama shield statute did not apply to magazines and that Price had overcome the First Amendment qualified

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96. 416 F.3d 1327 (11th Cir. 2005).

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reporter privilege. The court granted Price's motion to compel disclosure of the confidential sources. Later, the district court stayed its original order and certified the case to the state supreme court. The Supreme Court of Alabama declined the certification, and the district court renewed its original order. The district court granted Time's motion to certify the privilege issues for interlocutory appeal.

The court of appeals relied on the text of the state statute to conclude that the term "newspaper," as it was used in the statute, did not include magazines; therefore, the Alabama shield law did not protect *Sports Illustrated*. In addressing the First Amendment qualified reporter privilege, the court of appeals held that the privilege was not absolute. The privilege may be defeated if the party seeking the identity of the confidential source proves

[1] that the challenged statement was published and is both factually untrue and defamatory; [2] that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and [3] that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.<sup>97</sup>

The court held that Price had met the first and third requirements by presenting evidence that the allegations in the article were false and that the identity of the informant was necessary to prepare his case. The court held that Price did not meet the second requirement because he failed to interview all possible witnesses that may have revealed the identity of the confidential source; therefore, the order requiring *Sports Illustrated* to reveal its confidential source was vacated.

*Knafel v. Chicago Sun-Times, Inc.*<sup>98</sup>

In this case, the United States Court of Appeals for the Seventh Circuit held that a newspaper had not defamed the female plaintiff by reporting her affair with a sports celebrity. Karla Knafel had an affair with Michael Jordan; she alleged that Jordan wanted to keep the affair secret and agreed to pay her \$5 million to keep the secret. Richard Roeper wrote a very unflattering article in the *Chicago Sun-Times* describing the affair. Knafel sued the newspaper for defamation, claiming that the article falsely implied that she was engaged in the crime of prostitution. The district court dismissed the lawsuit, and Knafel appealed.

The court began by setting forth the elements of a defamation claim.

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97. *Id.* at 1343 (quoting *Miller v. Transamerican Press, Inc.*, 628 F.2d 932, 932 (5th Cir. 1980)).

98. 413 F.3d 637 (7th Cir. 2005).

Knafel had to show that the newspaper made a false statement about her, that the paper caused an unprivileged publication of the statement to third parties, and that the publication of the statement caused her harm. The court held that the words of the article were subject to an innocent construction and were not defamatory. The court affirmed the district court's dismissal of the case.

*Stringer v. Minnesota Vikings Football Club, LLC*<sup>99</sup>

Korey Stringer, a member of the Minnesota Vikings football team, died of heat stroke following the second day of practice at the Vikings' training camp in 2001. Prior to his death, Stringer participated in two days of practice during which he vomited numerous times and exhibited some strange behavior, such as collapsing to his knees on several occasions. Due to these episodes, Fre Zamberletti, coordinator of medical services for the Vikings, and Paul Osterman, an assistant trainer, both tended to Stringer, giving him fluids for hydration. After the morning practice on the second day of training camp, Stringer became ill again and was taken to a trailer to cool off. While in the trailer, Osterman claimed that Stringer began moving his head back and forth for about ten minutes. Osterman eventually called the training room to get a golf cart to pick up Stringer, but when the cart arrived, Stringer was unresponsive. At no time did Osterman or Zamberletti take Stringer's temperature or monitor his heart beat. Zamberletti finally instructed someone to call an ambulance after Stringer's condition seemed to worsen. On admission to the hospital, Stringer was unconscious, his pulse was 148 beats per minute and his blood pressure was undeterminable. It was also found that Stringer had a body temperature of 108.8 degrees. After many failed attempts to better his condition, Stringer died at the hospital.

Kelci Stringer, Korey's wife, brought a wrongful death action asserting that both Osterman and Zamberletti had a personal duty to protect and care for Korey's health and they were grossly negligent in carrying out this duty. The district held that Osterman and Zamberletti did not owe Stringer a personal duty to care for or protect him and determined they were not grossly negligent, thereby granting summary judgment to both defendants. The court of appeals affirmed, holding that both men did owe Stringer a personal duty, but their actions were not grossly negligent as a matter of law. The Minnesota Supreme Court applied the personal duty test, which states that in order for a co-employee defendant to owe a personal duty to an injured employee, the defendant must have (1) taken or directed another to take direct action toward the injured employee and (2) acted outside the course and scope of

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99. 705 N.W.2d 746 (Minn. 2005).

employment. As a result of applying the personal duty test, the court determined that the defendants did not owe Stringer a personal duty and affirmed the decision of the prior two courts.

#### WORKERS' COMPENSATION

Workers' compensation plays a significant role in the lives of professional athletes. While student-athletes and amateur athletes are not considered "employees" for purposes of collective workers' compensation, professional athletes are employees of their league or professional sports organizations, and therefore, are eligible to receive workers' compensation in the event they are injured on the job. The following cases discuss some of the problems in determining whether workers' compensation is appropriate for an athlete as well as some of the issues related to calculating the appropriate amount of workers' compensation.

#### *Jani v. Bell*<sup>100</sup>

Michael Webster played the center position in the NFL for sixteen seasons from 1974 until 1991. In 1998, he was diagnosed with brain damage from head injuries sustained during his playing career. Webster applied for disability benefits under the NFL Player Retirement Plan (the Plan). In 1999, Webster was informed that he would be eligible to receive total and permanent disability benefits, but Webster appealed the decision seeking active football disability benefits, which provide greater income. Webster's appeal was denied with the explanation that he did not become totally disabled within a short period after his disability occurred, which was one of the Plan's requirements. Webster again appealed and provided medical and financial documentation to support his appeal. Webster died while the appeal was pending, and the administrator of his estate was informed that Webster correctly received degenerative benefits. Webster's estate appealed the decision for the third time, but the appeal was denied again because Webster's supporting medical documentation was speculative in nature.

The court granted Webster's estate's motion for summary judgment, holding that the classification of Webster's injuries as degenerative was not supported by the evidence and that the Plan had abused its discretion when it declared Webster's injuries to be degenerative rather than active.

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100. No. WDQ-04-1606, 2005 U.S. Dist. LEXIS 10150 (D. Md. Apr. 26, 2005).

*Swift v. Richardson Sports, Ltd.*<sup>101</sup>

Swift was injured in an unusual play while playing professional football for the Carolina Panthers. Swift broke his fibula and suffered damages to his ankle tendons. He underwent surgery, but was unable to regain full speed and mobility. The Carolina Panthers released Swift from the team the next season. He tried out and made the Jacksonville Jaguars team the next season, however, he was unable to perform up to the highest standards due to his still ailing injury, so Swift was release by the Jaguars after participating in one regular season game. The injury had effectively ended Swift's professional football career. Consequently, Swift recovered workers' compensation payments from the Panthers. The Panthers appealed this award, specifically (1) the finding that Swift suffered a compensable injury, (2) Swift's testimony regarding why the Panthers released him, (3) the duration of Swift's benefits, (4) the credit that the Panthers received for Swift's one paycheck from the Jaguars and (5) attorney's fees award to Swift.

The court held that Swift did suffer a compensable injury because the injury was the result of an accident that occurred while playing for the Carolina Panthers. The injury was unusual and unexpected. Furthermore, Swift took reasonable measures to protect himself from such injuries. Next, the court held that Swift's testimony relating his personal knowledge regarding why the Panthers had released him was allowable because it was not hearsay. Next, the court ruled that the duration of Swift's benefits was appropriate because Swift's injury occurred while he was employed with the Panthers. The Panthers argued that Swift should not be entitled to the full benefit duration because he played after the injury for the Jaguars, but the court ruled for Swift. Next, the court ruled that the Panthers were entitled to a dollar-for-dollar credit for the amount they paid Swift after his injury. The lower court held that the Panthers were not entitled to such a credit, but the court held that based upon precedent the team was entitled to dollar-for-dollar credit. Finally, the court remanded the lower court's award of attorney's fees because the lower court did not offer legal support for its decision.

*Renfro v. Richardson Sports, Ltd.*<sup>102</sup>

In this case, the defendants, the Carolina Panthers and the plaintiff, Dusty Renfro, appealed the workers' compensation award rendered by the North Carolina Industrial Commission. Renfro injured his wrist during a Panthers'

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101. 620 S.E.2d 533 (N.C. Ct. App. 2005).

102. 616 S.E.2d 317 (N.C. Ct. App. 2005).

preseason practice. Renfro continued to practice for a few more weeks when he was released by the team for unsatisfactory performance. Renfro believed that his poor performance was due to his wrist injury and subsequently filed an injury grievance and workers' compensation claim. The injury grievance was settled for \$35,294.00.

The Commission awarded Renfro partial disability compensation at the maximum rate of \$620.00 per week for a period of 300 weeks beginning from the date of his injury by accident. [The Panthers] were awarded a dollar-for-dollar credit for the injury grievance settlement amount of \$35,294.00 to be deducted from the end of the 300-week period.<sup>103</sup>

The Panthers claimed that Renfro did not suffer a compensable injury, the Commission erroneously determined Renfro's average wage rate, and the length of the 300-week compensation period was too long. Renfro claimed that the Panthers were not entitled to a dollar-for-dollar credit for the injury grievance settlement.

First, the Panthers claimed that Renfro did not suffer a compensable injury because he "was engaged in his normal work routine when he was injured."<sup>104</sup> The court held that Renfro's injury was compensable because it was an accident; Renfro "was forced by another player into utilizing an unusual and awkward blocking or work technique that was not normally used in plaintiff's normal work routine."<sup>105</sup> Second, the Panthers claimed that the Commission made an error in determining Renfro's average weekly wage rate. The Panthers argued that the Commission should not have based its determination on Renfro's potential future NFL earnings because Renfro was a marginal player and had never been on an NFL roster for a full year. The Court of Appeals of North Carolina deferred to the Commission's findings that exceptional reasons existed to base its determination on Renfro's future earnings under his NFL contract because Renfro had previously worked only sixteen of fifty-two weeks prior to the injury. Third, the Panthers claimed that the 300-week compensation period was too long because the injury was not permanent and Renfro could look for employment with other NFL teams prior to the cessation of the period. The court stated that the burden was on the Panthers to demonstrate that Renfro was capable of earning his pre-injury wages post-injury. The court held that the Panthers may file a motion with the Commission to modify Renfro's award.

Renfro contended that the Commission erroneously awarded the Panthers a dollar-for-dollar credit for the injury grievance settlement. The court upheld

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103. *Id.* at 322.

104. *Id.*

105. *Id.* at 324.

the Commission's decision because the NFL Standard Player Contract explicitly stated that an NFL team will receive credit for the settlement payment amount.

#### MISCELLANEOUS

The following cases are relevant to the area of sports law but do not necessarily fit securely into one of the previously discussed categories. These cases involve a variety of topics, including non-profit organization, homosexual rights and the development of a recreational hockey league.

#### *Hispanic College Fund, Inc. v. NCAA*<sup>106</sup>

The Hispanic College Fund (HCF) is a private nonprofit organization that gives scholarships to qualified Hispanic students. The HCF is also a member of the NCAA, which regulates intercollegiate athletics. In 1999, the NCAA voted to eliminate preseason football games by 2002. Around the same time that the proposal was adopted, HCF was accepted as a member of the NCAA and authorized to sponsor preseason football games. In 2001, HCF sought an exception that would allow it to hold an exempted game in 2002, but the NCAA denied its request. HCF then sought a waiver of the rule, and the NCAA granted the waiver for 2002. HCF was denied a waiver in 2003 and 2004. HCF sued the NCAA, but the trial court granted the NCAA's motion for judgment on the pleadings. HCF appealed the decision.

The court held that in the absence of fraud or other illegality, it would not interfere with the internal affairs of an association with private membership. The court rejected HCF's claim that as an affiliated member it had no voice in the governance of the NCAA, which made its membership involuntary if the organization wanted to sponsor preseason games, because HCF was not an educational institution and could raise money in other ways. The court declined to rule on HCF's lack of voting power argument because it was not alleged in the complaint. The court affirmed the decision of the lower court, holding that when HCF joined the NCAA, it did so with knowledge of the membership conditions.

#### *Koebke v. Bernardo Heights Country Club*<sup>107</sup>

This case involves a lesbian couple who appealed a summary judgment award granted by a California appellate court. One member of the couple was

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106. 826 N.E.2d 652 (Ind. Ct. App. 2005).

107. 115 P.3d 1212 (Cal. 2005).

a member of the defendant country club. The two had executed a written “Statement of Domestic Partnership” and sued the club, alleging a violation of the Unruh Civil Rights Act because the club refused to extend certain marital membership benefits to the plaintiff’s partner because the club determined that the plaintiff’s partner did not meet the marriage requirement.

The California supreme court first addressed whether, under the Unruh Civil Rights Act, the country club must treat registered domestic partners as spouses, and it concluded that it must. In support of its finding, the court looked at various California statutes, including The Domestic Partner Act, and concluded that full marital benefits should be extended to registered domestic partners. The court went through a lengthy analysis of factors set forth in *Harris v. Capital Growth Investors XIV*.<sup>108</sup> The factors include: (1) whether the discrimination is related to a personal characteristic; (2) whether there is a justification for the discrimination based on a legitimate business interest; and (3) whether the consequences of allowing the discriminatory policy were significant. The court addressed each of the factors and concluded that the plaintiff’s arguments were stronger for each prong of the *Harris* test than the arguments of the country club in favor of the disallowance of extension of benefits. The court concluded that the initial summary judgment in favor of the defendants was incorrect because the club’s policies were discriminatory against registered partners under California law.

*Dominion Sports Services, Inc. v. Bredehoft*<sup>109</sup>

Hockey North America (“HNA”) started an adult men’s novice hockey league. HNA’s central office was in Virginia but it conducted leagues across the United States and Canada, including the venue of this case, Minnesota. Bradford Bredehoft provided services for HNA in Minnesota. Initially he was not under an employment contract, but later Bredehoft signed an employment contract with HNA. This contract had a restrictive covenant that prohibited Bredehoft from working for or starting a competing league within twenty-five miles of HNA’s operations for one year after termination of employment. Steve Swanson assisted Bredehoft in his duties with HNA, but was not an HNA employee and did not receive compensation.

HNA encountered financial difficulties and owed money to many creditors, including the IRS, local ice rinks and referees. Dominion Sports Services purchased HNA’s assets. In this asset purchase agreement, Dominion Sports Services did not assume the obligation of HNA’s

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108. 805 P.2d 873 (Cal. 1991).

109. No. A04-2343, 2005 Minn. App. Unpub. LEXIS 594 (Minn. Ct. App. Dec. 20, 2005).

employment contracts and specifically did not assume Bredehoft's contract. As a result of this agreement, Dominion Sports Services adopted HNA as a league name.

As this asset purchase agreement was taking place, Bredehoft and Swanson met with the players of the league and informed the players of HNA's financial difficulties. During this meeting, the parties discussed many alternatives and ultimately decided on creating their own league to be run locally by Minnesotans. However, HNA contacted the players and discussed the possibility of players still playing the HNA. Initially, the players viewed this option favorably, but ultimately decided to form their own league. Consequently, HNA sued Bredehoft, Swanson and many of the other players and parties involved for multiple causes of action, including breach of contract, breach of fiduciary duty, interference with contractual relationships, interference with prospective contractual relationships, unfair competition and civil conspiracy. The court ruled against HNA on all claims.

The court found that HNA did not have a valid breach of contract claim against Bredehoft because Bredehoft did not have a contract with the new management of HNA. A contract did not exist because the asset purchase agreement explicitly stated that the new management did not assume the employment contracts of the former management's employees. Additionally, the court determined that the new management did not reaffirm a contract with Bredehoft because the new management was never a party to Bredehoft's employment contract. Furthermore, the court held that there was not novation because novation requires mutual agreement of all parties involved to substitute the new management as a party to the contract and that did not exist in this case.

Moreover, the court held that HNA did not have a valid breach of fiduciary duty claim against Bredehoft because Bredehoft was never an agent of HNA. Also, HNA's tortious interference with contract claim failed because a contract did not exist between HNA and Bredehoft. HNA's tortious interference with prospective contractual relations claim failed because the court determined that Bredehoft and Swanson and the players' actions in forming a competing league did not constitute a wrongful act. The court stated that Bredehoft, Swanson and the players had no obligation to HNA. Finally, the court concluded that HNA's unfair competition and civil conspiracy claims had no merit because there was no tortious interference in this case.

#### CONCLUSION

The sports law field is constantly growing and changing. It is a unique

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field as it encompasses the law of a number of different areas of practice. The preceding cases only present an overview of some of the changes that have occurred in the sports law field in the past year. However, it is clear that sports will continue to provide advancement and development to the law, both in the context of sports law and in each general field of practice.

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