

# 2010 ANNUAL SURVEY: RECENT DEVELOPMENTS IN SPORTS LAW

## INTRODUCTION

This survey focuses on sports-related cases that were adjudicated between January 1, 2010 and December 31, 2010. This survey does not include every sports-related case that was decided in 2010. Instead, the purpose of this survey is to provide summaries of the more interesting cases: those with the most compelling facts, issues, and rulings. As a whole, this survey aims to provide the reader with a solid understanding of the complex development of the sports-related legal issues that continue to arise from year-to-year. To assist the reader, this survey is divided into sections, which are listed in alphabetical order, based on the particular area of law implicated by the primary issue in each case.

## ADMINISTRATIVE LAW

Administrative law governs the actions, such as rulemaking and regulatory enforcement, of the administrative agencies of local, state, and federal governments. Although sports law rarely invokes issues of administrative law, the cases below show that these two distinct areas of law can and have had an impact on one another.

*Lincoln Hockey, LLC v. District of Columbia Dep't of Employment Servs.*<sup>1</sup>

In *Lincoln Hockey*, the District of Columbia Court of Appeals held that the Columbia Department of Employment Services' (DOES) properly granted James Huscroft's workers' compensation benefits because his employment was localized in the District of Columbia, even though he was injured while playing for the Washington Capitals' minor-league affiliate at the time of his injury.

James Huscroft, a former player for the National Hockey League's (NHL) Washington Capitals, was injured while playing in a regular-season game in Canada for the Capitals minor-league affiliate. Huscroft filed a claim for workers' compensation benefits under the District of Columbia Workers' Compensation Act (WCA), and DOES granted Huscroft temporary partial disability benefits. The Capitals appealed, arguing that DOES erred in both

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1. 997 A.2d 713 (D.C. 2010).

finding that Huscroft's claim came within the jurisdiction of the WCA and in not limiting Huscroft's award according to the work life expectancy of a NHL player.

The court first explained that the WCA only covers a claim if, at the time of the injury, the employment was "localized principally in the District of Columbia." Even though he mostly played for the Capitals' minor-league affiliate in Portland, the court found that under the *Hughes* test, Huscroft's employment was localized principally in the District of Columbia because he was hired to help achieve the business objective of winning games for the Capitals who are principally located in the District. The court's finding that the Capitals, and not the minor league team, controlled all aspects of Huscroft's employment also led to their decision that the WCA had jurisdiction over his claim. Lastly, the court ruled that DOES did not have to limit Huscroft's award according to the work life expectancy of a NHL player because Huscroft had been awarded temporary partial disability benefits and the work life expectancy limitation only applies to professional athletes who are awarded permanent partial disability benefits.

#### ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution (ADR) is a method used to resolve disputes between parties in an effort to avoid judicial actions. The most typical forms of ADR used are arbitration and mediation. In fact, most professional sports leagues require arbitration for certain types of disputes. Additionally, organizations such as the American Arbitration Association (AAA) and the Court of Arbitration for Sport (CAS), which is discussed in a separate section in the Survey, are specifically designed to address the issues associated with ADR. The following decisions display some of those issues.

#### *Beckom v. United States Bobsled & Skeleton Fed'n, Inc.*<sup>2</sup>

Beckom and three other athletes brought this claim alleging that United States Bobsled and Skeleton Federation (USBSF) violated fundamental rules of fairness and due process when deciding which athletes would participate in the Vancouver games.

In June of 2009, USBSF promulgated a new process by which it would select its push bobsled team members for the 2010 Olympics. The procedure outlined twelve criteria, some qualitative, some quantitative, to be used for selecting team members. The criteria were published and were available to all members trying out for the team. One of the criteria involved testing how

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2. AAA 77 190 E 00105 10 (Feb. 10, 2010) (Mitten, Matthew J., Arb.).

quickly the individual could push the bobsled to top speed from a standing start. This “ice push testing” is best done with a real bobsled on ice, but due to a scheduling conflict, USBSF was forced to administer the tests on dry ground with a wheeled bobsled. None of the athletes were forced to undergo the test at this time, and all four of the claimants finished in the top six of this particular test. All athletes were given subsequent opportunities to take the ice push test at the America’s Cup in October of 2009. None of the four claimants were selected to the nine-man push bobsled team for the 2010 Olympics.

The arbitrator ruled that the USBSF had enacted fair and reasonable criteria for selection of athletes. There was no evidence of bad faith or conflicts of interest. The claimants failed to show that if their ice push tests had been done on ice instead of dry ground that they would have been selected to the Olympic team. In fact, testimony from two members of the team selection committee stated that there was no substantial difference in the minds of the selection committee between the on-ice and dry ground push tests. Additionally, they stated the ice push test was only one of twelve criteria used in selecting team members and even a substantial gain in that area would not have increased the likelihood of any of the claimants being chosen for the team.

The arbitrator ruled in favor of USBSF stating that it is not the position of an arbitrator to determine the best procedure for selecting the team but, rather, to simply ensure that the USBSF had properly and fairly applied the established procedure using the twelve criteria.

*Franklin County Bd. of Educ. v. Crabtree*<sup>3</sup>

In *Crabtree*, the Court of Appeals of Tennessee held that a high school basketball coach relieved of her coaching duties did not have a right to an arbitration hearing regarding the school’s decision not to rehire her because the arbitration right did not extend to public school coaches in Tennessee.

Lisa Crabtree was a teacher and a coach of the girls’ basketball team from 2001 through the end of the 2004-05 basketball season. After the season, Crabtree was relieved of her coaching duties and her duties as a physical education teacher by the Director of School; however, she remained an English teacher. Next, Crabtree filed a grievance request with the Franklin County Board of Education (the Board), arguing that her coaching duties should be reinstated pursuant to the Collective Bargaining Agreement (CBA). Crabtree was then notified by the Director of School that coaching assignments were expressly excluded from the terms of the CBA, and he did

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3. 2010 Tenn. App. LEXIS 423 (Tenn. Ct. App. July 1, 2010).

not forward Ms. Crabtree's grievance to the Board. Crabtree contacted the Tennessee Education Association (TEA) and the Franklin County Education Association (FCEA) regarding her situation, and FCEA informed the Director of School that, if he did not forward Crabtree's grievance to the Board, FCEA would pursue an arbitration hearing.

Before the arbitration hearing, the Board filed a declaratory judgment action in the Circuit Court of Franklin County, seeking a declaration that "the decision not to rehire Ms. Crabtree as the coach of the girls' basketball team was not a matter subject to arbitration under the CBA . . . ." The Circuit Court held that the decision not to rehire Crabtree was not subject to arbitration under the CBA and ordered judgment in favor of the Board. Crabtree appealed to the Court of Appeals of Tennessee. Relying on precedent, the court ruled that the coaching assignments of teachers in Tennessee public schools are not subject to the collective bargaining procedures provided by the Education Professional Negotiations Act (EPNA) and, therefore, Crabtree did not have a right to an arbitration hearing.

#### *Gunther v. United States Speedskating*<sup>4</sup>

Gunther brought this claim against U.S. Speedskating after she failed to be selected to the Vancouver Olympic team despite winning the U.S. Championship. The arbitrator ruled that the proper procedure had been followed when deciding the members of the team.

U.S. Speedskating announced the composition of the 2010 Olympic team following the December 2009 U.S. Speedskating Championships (Championship). Despite winning the gold medal in the 1000 meter race at the Championship, Gunther was not selected to the team. Instead, Rebekah Bradford was selected for the final spot on the team based on her re-skate time. Although not official for the competition, these re-skate times are official for purposes of determining which athletes will be on the Olympic team. Gunther immediately filed a grievance with the USOC and filed a Demand for Arbitration with the AAA.

Official U.S. Speedskating rules state that the athlete who has the best time in the 1000 meter race or the winner of the competition shall be selected to the Olympic team. Therefore, although Bradford's re-skate time did not make her the winner of the competition, it did make her the athlete with the best time. In addition, there was no question as to the validity of Bradford's re-skate procedure. She requested the re-skate and did so immediately

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4. AAA 77 190 0007 10 (Jan. 15, 2010) (Rivkin, David W., Arb.).

following the race, just as the rules required. Because the re-skate was properly executed and Bradford was selected to the team in compliance with the rules, the arbitrator had no choice but to rule in favor of U.S. Speedskating.

*McDermott v. Newble*<sup>5</sup>

In *McDermott*, the Court of Appeals of Michigan held that a National Basketball Association Standard Player Agent Contract's (SPAC) arbitration clause necessitated that a dispute regarding the effect the SPAC's integration clause had on a previous oral agreement be resolved by an arbitration hearing.

Ira Newble was a NBA player who hired Richard McDermott to be his agent. In 1997, Newble allegedly promised in an oral agreement that, in exchange for the services that McDermott would provide as his agent, Newble would pay McDermott 4% of all of his NBA basketball earnings over the course of his NBA career, 20% of all future endorsement income, and 10% of all income earned from playing overseas. Newble also allegedly promised to always use McDermott as his NBA agent. Newble denied that he entered the alleged oral agreement with McDermott. In 1998, Newble and McDermott entered into a SPAC, an agreement that governed McDermott's representation of Newble. The SPAC contained an arbitration clause that stated an arbitration hearing would be used to resolve any disputes regarding the meaning, interpretation, application, or enforcement of the SPAC. The SPAC also included an integration clause that stated the SPAC replaced and superseded any previous agreement between the parties. In 2000, Newble was drafted into the NBA, and initially, McDermott received a percentage of Newble's earnings consistent with the SPAC. However in 2001, Newble hired a new agent and no longer paid McDermott any fees. In 2007, McDermott filed a complaint alleging that Newble breached the 1997 oral agreement. The trial court granted summary disposition in Newble's favor, holding that SPAC was the only agreement between the parties and the SPAC arbitration clause barred the dispute. McDermott appealed, and the Court of Appeals affirmed the trial court's decision and added that, if there were a dispute regarding the integration clause of the SPAC, an arbitration hearing would be needed to resolve it.

*Octagon, Inc. v. Richards*<sup>6</sup>

Octagon, Inc. (Octagon) and track star Sanya Richards entered into a representation agreement during the spring of 2004 in which Octagon would

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5. 2010 WL 2836352 (Mich. Ct. App. July 20, 2010).

6. 2010 U.S. Dist. LEXIS 106767 (E.D. Va. Oct. 5, 2010).

serve as Richards's exclusive representative in merchandising activities. The agreement provided that Richards would pay Octagon 15% of all compensation that she received from agreements that Octagon procured from merchandising companies. Octagon obtained Richards a deal with Nike in 2004 that ran through 2008, but in 2006, Richards informed Octagon that she would not honor her representation agreement with Octagon and would not pay Octagon its 15% cut from the Nike deal. Although Richards decided not to resign with Octagon, she did eventually pay Octagon its 15% compensation rate related to the 2004 Nike agreement. In 2007, Richards entered into another agreement with Nike. However, the original representation agreement with Octagon provided that Richards owed Octagon fees related to any renewal, extension, or modification of any endorsement agreement entered into during the term of the Octagon agreement. Octagon argued that the 2007 Nike deal was a renewal of the 2004 Nike deal that it had procured and asked Richards for their fees relating to the new Nike deal. Richards never paid Octagon any fees, and in 2007, Octagon filed its demand for arbitration. The arbitrator issued a total award, in favor of Octagon, for \$279,836.50. Octagon then filed a Motion for Confirmation of an Arbitration Award, and Richards filed a Cross-Motion to Vacate the Arbitration Award, arguing that the award must be vacated because "(1) there was no enforceable agreement to arbitrate, meaning that the arbitrator exceeded her power [and] (2) the award violates the public policy of Texas and Florida."

First, in analyzing the representation agreement between Richards and Octagon, the court found that the agreement contained a valid arbitration clause and the current dispute was one that the parties agreed to submit to arbitration; therefore, the arbitrator did not exceed her power in making her ruling. Second, the court ruled that the award did not violate the public policy of Texas and Florida because the dispute was fully litigated in the arbitration proceeding. The court also noted that public policy favors the enforcement of arbitral decisions and that awards can only be vacated on public policy grounds in only the rarest of occurrences under 9 U.S.C. § 2. Consequently, the court confirmed the arbitration award.

*USADA v. Clinger*<sup>7</sup>

When an athlete has a legitimate medical need for one of the substances that is on the banned list, the athlete may apply for a therapeutic use exemption (TUE). If approved, the athlete will not be liable for positive doping tests where the exempted substance appears. In general, the athlete

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7. AAA No. 77 E 00389 09 JENF.

should not benefit athletically from the substance, and there must not be other reasonable medical alternatives available to deal with the condition or problem.

David Clinger is a professional cyclist who tested positive for synthetic testosterone during a July 2009 race. The United States Anti-Doping Agency (USADA) suspended him for the maximum two years due to the violation. Clinger had met with a physician in July 2008, and this doctor had prescribed synthetic testosterone based on the results of a single blood test. Clinger did not file for a TUE because he believed the process would be taken care of by his physician and that he would not have to be personally involved in the application. The validity of the prescription was in question as well. An expert witness at the arbitration hearing, a doctor, testified that it was his opinion that the test results were inconclusive and that he would not have prescribed testosterone under the same circumstances.

Clinger attempted to argue that he was not taking the testosterone to cheat but, rather, under medical supervision and that his only mistake was a failure to apply for a TUE. USADA argued that Clinger's complete failure to exercise caution when taking a substance that he admittedly knew was on the banned substance list showed his significant negligence. CAS agreed with USADA and denied Clinger's attempt to gain a retroactive TUE, suspended the athlete for two years, and removed all of his racing results from the July to September of 2009.

#### *USADA v. Cosby*<sup>8</sup>

Cosby, a professional track and field athlete, was suspended for two years after a doping test showed diuretics and other masking agents in her bloodstream. This was Cosby's first doping offense—she had been tested more than twenty times before, each test coming back negative. She claimed the violation may have occurred because of a personal situation, which developed some medical side effects. USADA asked the arbitrator to uphold a full two-year suspension for Cosby based on the strict liability of doping offenses and the obligation of athletes to ensure that any pills they take do not contain banned substances.

During the hearing, Cosby testified that she had major personal problems in her life during the period surrounding the positive test because she learned her fiancé was leaving her for another athlete and she had lost her job. Her stress led to high blood pressure and increased difficulty in urinating. During a trip to her mother's house she took one of her mother's "water pills" to help

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8. AAA No. 77 190 00543 09.

her urinate. When this pill relieved her pain, Cosby used her mother's pills on a few other occasions. Cosby claims these "water pills" were the source of her positive test.

A sympathetic panel reduced Cosby's suspension to four months. The panel noted that Cosby's judgment was likely clouded due to her depression and that she took the water pills to reduce her blood pressure and corresponding pain, not to mask the use of a performance enhancing drug.

*USADA v. Merritt*<sup>9</sup>

LaShawn Merritt, United States Olympic team track and field athlete, tested positive for a banned substance and was cited for his first anti-doping violation by USADA. Although Merritt did not deny the positive test for a banned substance, he argued that he ingested the banned substance on accident and tested positive "as a result of ingesting a product, ExtenZe, he purchased at a 7 Eleven store and he did not purchase this product to enhance his sports performance." Under the World Anti-Doping Code (Code), the maximum penalty Merritt could suffer from his positive test is a two-year period of ineligibility. However, the penalty could have been eliminated if the Arbitration Panel found that Merritt was not negligent when he ingested the ExtenZe.

However, the Arbitration Panel found that Merritt was clearly negligent when he ingested the product because he did not look at the label in fine print on the back of the product to see what ingredients were included within the product. On the other hand, the panel did find that Merritt was not significantly negligent in ingesting the product because 1) the panel was "confident that enhancing his sports performance was the last thing on Mr. Merritt's mind when he purchased Extenze," so there was a complete "absence of intention to gain advantage over competitors"; 2) the Panel was unaware of any authorized warnings provided to athletes concerning the use of products that has a main function of sexual enhancement; 3) when Merritt purchased the product he was in the off season and taking his first break from competition in two years; and 4) USADA conceded that the positive test was an "accidental ingestion" case.

*USADA v. O'Bee*<sup>10</sup>

Kirk O'Bee was a member of U.S. Cycling with a history of doping violations. In 2001, O'Bee tested positive for steroids and served a one year

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9. AAA No. 77 190 00293 10 (Oct. 15, 2010).

10. AAA No. 77 190 00515 09.

suspension—the longest permissible under the rules at the time. In May 2009, O’Bee again tested positive for a doping violation when a form of EPO was found in his bloodstream following a race. USADA moved to suspend O’Bee for the rest of his life from competing in any U.S.-sponsored cycling events. O’Bee claimed an eight-year suspension was the appropriate sanction and appealed the case to CAS.

During the appeal, USADA introduced a string of non-analytical evidence linking O’Bee to performance enhancing drugs. This evidence included emails between O’Bee and other riders about buying drugs, as well as vials and photos of illegal drugs that they claimed belonged to O’Bee. Some of the emails contained explicit language about the drugs, how they were to be administered, and how much they cost.

CAS arbitrators can reduce a sentence for a doping violation if they find the athlete was not at fault or was not significantly at fault. Here, however, the form of EPO that O’Bee tested positive for is administered by injection and is only used as a performance enhancer. These facts show that O’Bee intentionally took the drugs and was therefore at fault.

Due to the overwhelming evidence against O’Bee, as well as “failure to express any remorse for his doping violations . . . ,” CAS found that a lifetime ban from cycling was the appropriate punishment. In addition, all of O’Bee’s competition results after 2005 were removed from the records.

*USADA v. Oliveira*<sup>11</sup>

Oliveira was a professional cyclist who tested positive for the banned substance oxilofrine during a June 2009 doping test. Both Oliveira and USADA agreed that the positive test was a result of the athlete’s ingestion of Hyperdrive 3.0+, a supplement designed to increase the energy of the user. Oliveira took the substance to counteract the effects of the allergy medicine for which she had obtained a TUE. Before taking the supplement, Oliveira checked the list of ingredients against the list of banned substances posted both on USADA and USA Cycling’s websites. She claimed that, because of these steps, she was not significantly at fault for the positive test.

Despite Oliveira’s precautions, the panel ruled that a full two-year suspension was appropriate because of the strict liability of doping offenses. When a banned substance is found in an athlete’s system, the athlete is responsible for taking the substance, regardless of any intent to cheat. The pills she took were listed as a “stimulant,” which should have made her extra-cautious when taking them. After her positive test, the athlete—along with

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11. AAA No. 77 190 00429 09.

USADA—was able to determine that Hyperdrive 3.0+ was the source of the positive test. Had the athlete taken these steps before the test was given, she could have avoided the violation.

*USADA v. Stewart*<sup>12</sup>

Stewart is a track and field coach and former Jamaican Olympic athlete who was living in Texas at the time of the appeal. Between his retirement from track in 2001 and 2004, Stewart was a coach for several successful athletes. Stewart claims he retired from coaching in 2004, but he maintains a website promoting his services as a track coach and several athletes identify him as their coach.

In December 2009, on the basis of a relationship he had with a known drug dealer named Angel Memo Heredia (Memo), Stewart was given a lifetime ban by USADA from coaching track athletes. Memo admitted under oath to providing performance enhancing drugs to Stewart and other U.S. track coaches. USADA claimed that Stewart had been a supplier of performance enhancing drugs to U.S. track athletes for many years.

Stewart appealed this decision to AAA arbitration. The arbitrator denied the appeal because of the volume of evidence linking Stewart to Memo. In addition to the direct testimony from Memo, the panel was shown emails with explicit language from Stewart indicating that he was ordering performance enhancing drugs from Memo and that he knew what he was doing was illegal. The arbitrator also stated that a lifetime ban was appropriate because of Stewart's unique position as a coach—a person whom athletes trust and look up to.

*Vinogradova v. United States Biathlon Ass'n*<sup>13</sup>

Vinogradova challenged the USBA's decision to remove her from qualifying events for the Vancouver Olympics because of her appearance on the Belarus national team. The arbitrator found no evidence of any unreasonableness or irrationality in the decision of the USBA.

International biathlon rules allow for athletes who are citizens for more than one country to appear on the national team for each. However, once an athlete has represented one country at the international level, she cannot represent another country for a period of two years unless she becomes a citizen of the second country or applies for and receives a waiver from the IBU.

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12. AAA No. 77 190 110 10 JENF.

13. AAA No. 77 190 00511 09 (Feb. 16, 2010) (Benz, Jeffrey G., Arb.).

Vinogradova had competed for Belarus at the IBU World Cup on March 26, 2006. On March 23, 2008—slightly less than two years later—Vinogradova appeared as a member of the U.S. Biathlon team at the North American Biathlon Championships. Because these two competitions were held less than two years apart, Vinogradova was not allowed to win a medal and was not allowed to compete with the U.S. Biathlon team at the time trials the following January. As a result, Vinogradova would not be able to compete for a spot on the 2010 Olympic team.

Vinogradova filed for arbitration of the decision to disqualify her. Vinogradova had not filed for a waiver of the two-year period between different international appearances. There was no agreement either by the Belarus or U.S. national teams to waive the time restriction. Additionally, by not filing her complaint until November of 2009, Vinogradova had allowed the six-month statute of limitations to run, and therefore, her claim was time barred. Finally, the arbitrator saw no evidence of bias or bad faith on the part of the USBA when making their decision and, therefore, ruled in favor of the USBA.

*Vogel v. United States Speedskating*<sup>14</sup>

Vogel challenged U.S. Speedskating's decision to declare him ineligible for the qualifying races for the Vancouver Olympic Games. He was attempting to overturn the NGB's interpretation of a complex qualifying rule, but the arbitrator ruled in favor of U.S. Speedskating.

In order to qualify for the U.S. Speedskating Championships (USS), a skater must appear in a sanctioned speedskating tournament and finish a race within a specified time. This race must occur between July 1 and October 11, 2009 in order to be eligible for the December 2009 USS. The USS is used as a qualifying event for the 2010 Olympic team selection process. Vogel competed in a sanctioned event in Calgary in November of 2009 and obtained a time that was fast enough to allow him to qualify for the USS. However, this race occurred in November, a month after the October 11 deadline needed to qualify for the USS.

U.S. Speedskating ruled that Vogel was ineligible to compete in the USS. Vogel filed for arbitration of that decision. The arbitrator ruled that the qualification rule was sufficiently clear to give notice to Vogel and that for him to interpret the rule in any other way was unreasonable. However, the arbitrator did suggest that U.S. Speedskating should rewrite the rule to increase its clarity as well as increase efforts to inform its athletes of the exact

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14. AAA 77 190 00553 09 (Jan. 15, 2010) (Rivkin, David W., Arb.).

dates in which a qualifying race must be run.

#### ANTITRUST LAW

Antitrust law seeks to provide a more competitive economic environment for the benefit of consumers. Throughout history, this area of the law has undoubtedly had a lasting impact on sports law. Courts have recognized that certain agreements that would otherwise violate antitrust laws are necessary for sports leagues to produce their products; thus, such agreements are legal under certain circumstances. Antitrust law continues to affect the way the business of sports is conducted. The cases that follow demonstrate some of the judicial actions concerning sports law and antitrust law that were decided in 2010.

#### *American Needle, Inc. v. NFL*<sup>15</sup>

In *American Needle*, the United States Supreme Court reversed a decision by the Seventh Circuit that granted the NFL immunity from the antitrust claims of American Needle based on the NFL's status as a single entity.

The NFL, an unincorporated association of thirty-two teams, decided to pool their rights to develop, license, and market intellectual property under National Football League Properties (NFLP). At first, NFLP offered non-exclusive licenses to manufacturers of NFL apparel; however, in 2000, NFLP granted an exclusive license to Reebok to produce and sell headwear for all thirty-two teams. American Needle, which had previously owned a non-exclusive license to produce NFL headwear, brought an antitrust claim against the NFLP's decision to sell exclusive licenses.

The only issue on appeal to the Supreme Court was whether the NFL was capable of violating Section 1 of the Sherman Act or whether the NFL was a single entity. The Court found that the single entity defense could not apply to the NFL because the NFL teams did not possess either the unitary decision-making quality or single aggregation of economic power characteristic of a single entity. The NFL teams were considered substantial, independently owned and managed businesses that compete with one another both on the field and to attract fans, players, and management personnel. More specifically, the Court found that the teams compete in the market for intellectual property because each team is a potentially competing supplier of NFL team trademarks. In response, the NFL argued that the brands are distributed through a single outlet. The Court rejected this argument, analogizing the NFL to a joint venture because, if the fact that competitors

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15. 130 S.Ct. 2201 (U.S. 2010).

aligned under a single distributor immunized them from the antitrust laws, the Sherman Act would be easily avoided. In conclusion, the Supreme Court's decision forced the NFL to defend the antitrust claims against them under the rule of reason because it was not immunized from liability under Section 1 of the Sherman Act as a single entity.

*Deutscher Tennis Bund v. ATP Tour, Inc.*<sup>16</sup>

In *Deutscher Tennis Bund*, the Third Circuit court of appeals affirmed the lower courts finding that the ATP Tour did not violate Section 1 of the Sherman Act when it relegated the plaintiff's tournament to second-tier status.

The ATP Tour is a non-profit corporation consisting of a membership of men's professional tennis players and organizers. The ATP Tour was a league without a championship season, however, because the tennis grand slam events were not regulated by the ATP Tour, but rather by the International Tennis Federation. Therefore, in order to better compete with other sports and entertainment events, the Tour reorganized its event schedule to better showcase its star players. Under its "Brave New World" plan, the Tour redesigned its format by differentiating between top-tier and second-tier tournaments in order to maximize the attendance of their best players at the Tour's largest events. The plan required qualifying players to play in all Tier I events, at least four Tier II events, and two Tier III events. Deutscher Tennis Bund was relegated to Tier II status and brought an antitrust claim against the ATP Tour's reorganization.

On appeal, Deutscher Tennis Bund first argued that the single entity defense should not apply to the ATP Tour. The ATP Tour argued that each of its tournament members is dependent on the others to produce a common product, a professional tennis tour and that the members did not compete with each other. The court analyzed the issue based on *Bulls II*, *Brown v. Pro Football*, and *American Needle* but stopped short of granting the ATP Tour a single entity defense because it was not necessary based on the fact that the court, assuming concerted action, found that no relevant market existed. In response, Deutscher Tennis Bund argued that the ATP Tour's reorganization was a horizontal restraint among competitors that justified application of a *per se* rule. The court found that the *per se* rule was inapplicable in the sports context due to the necessity for horizontal restraints on competition. Lastly, Deutscher Tennis Bund argued that it was not necessary to define a market because the case should be considered under a "quick look" analysis. The court found that the quick look was also inapplicable because the ATP Tour

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16. 610 F.3d 820 (3d Cir. 2010).

offered a legitimate precompetitive justification for their reorganization: to compete in the market for sports and entertainment events; therefore, a full market analysis was necessary to establish antitrust liability. Because no market power was found, the court affirmed the decision in favor of the ATP Tour.

*Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*<sup>17</sup>

In *Race Tires American, Inc.*, the Third Circuit Court of Appeals affirmed the grant of summary judgment to Hoosier Tire and World Racing Group for its decision to adopt a single tire rule for dirt track oval racing.

The plaintiff, Specialty Tires of America (STA), claimed Hoosier Tire, a rival tire manufacturer, entered into an exclusive agreement with World Racing Group. The Group's agreement specified that racers were required to use Hoosier-brand tires, which Hoosier agreed to pay for in sponsorship and promotional deals. STA claimed that this violated both Sections 1 and 2 of the Sherman Act. STA argued that Hoosier Tires owned 70% of the market for dirt track tires, which unlawfully restricted competition, namely STA, from competing in that market. In response, Hoosier argued that STA did not have standing to bring an antitrust claim because STA did not suffer an antitrust injury. Hoosier argued that STA's injury came as a result of lawful competition for an exclusive contract. Moreover, Hoosier argued that, as a matter of law, a sanctioning body can require participants to use a certain manufacturer's products without violating the Sherman Act. Hoosier Tire objected to STA's definition of Hoosier's market and market power but did not argue those points in its motion to dismiss.

The court agreed with Hoosier that STA suffered no antitrust injury because the competition for an exclusive supplier was pro-competitive conduct. The court also found that, in the absence of evidence of coercion by Hoosier Tire, a sanctioning body that was free to institute a single tire rule was free to choose a supplier without being subject to the antitrust laws.

*TYR Sport, Inc. v. Warnaco Swimwear, Inc.*<sup>18</sup>

TYR brought this suit against competitor Warnaco (Speedo), U.S. Swimming, and the USOC alleging disparagement and other antitrust violations because of a relationship between U.S. Swimming coaches and Speedo, as well as alleged coercive comments made by those coaches. Speedo moved for summary judgment.

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17. 614 F.3d 57 (3d Cir. 2010).

18. 2010 U.S. Dist. LEXIS 47582 (C.D. Cal. 2010).

TYR and Speedo are competitors in the high-performance swimsuit business. In addition, Speedo has an exclusive sponsorship agreement with U.S. Swimming. TYR's claim revolves around statements made by U.S. Swimming coaches to their athletes from 2007 to 2009. TYR claims that the coaches promoted Speedo as the best swimwear available and told their athletes that Speedo swimwear would make them faster. Courts have recognized a Sherman Act violation when there is a conspiracy to disparage a competitor. However, a plaintiff seeking to prove a disparagement violation of the Sherman Act has a substantial burden of proof. Like all Sherman Act claims, the plaintiff must show existence of a "contract, combination, or conspiracy" between separate entities. In a disparagement claim, the plaintiff must also show that the defendant's acts rose to a higher level than false advertising. Therefore, TYR was required to show that coaches used their influence to coerce swimmers into buying Speedo swimwear, rather than merely suggesting that Speedo was the superior product. Finally, TYR must show "significant and more-than-temporary harmful effects on competition."

TYR made no showing of any conspiracy between Speedo and U.S. Swimming. The preference for Speedo seemed to simply be the position of U.S. Swimming coaches, independent of any input from Speedo. TYR also failed to make any showing that the statements had more than temporary effects on competition. The facts presented by the defendant during the trial showed that competition had actually significantly increased from 2007-09, with three new substantial competitors entering the marketplace. During this period, Speedo's total market share of U.S. swimmers had fallen considerably. The court granted the defendant's motion for summary judgment as TYR had failed to show a genuine issue as to any material fact and defendants were entitled to judgment by matter of law.

*Warrior Sports, Inc. v. NCAA*<sup>19</sup>

In *Warrior Sports, Inc.*, the Sixth Circuit Court of Appeals affirmed the District Court's judgment in favor of the NCAA regarding alleged antitrust violations against Warrior Sports.

Warrior, a lacrosse stick manufacturer, brought an antitrust claim against the NCAA's rule change in 2008, which changed the allowable size for lacrosse stick heads. The NCAA rule on the size of lacrosse stick heads went unchanged until 2006 when the NCAA attempted to change the rule due to safety concerns that the base of lacrosse stick heads had become too narrow, requiring greater force by defenders during play. Warrior sued the NCAA

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19. 2010 U.S. App. LEXIS 17650 (6th Cir. 2010).

following their attempt to change the rule in 2006, and the NCAA agreed to reconsider its rule change. In 2007, the NCAA consulted Warrior on the size and shape of a new stick head, and Warrior suggested a flare design. The NCAA adopted the change but, upon realizing that Warrior held the patent to the flared design, did not enforce the rule. In 2008, the NCAA officially changed the rules for the size of lacrosse stick heads by making both flared and straight heads legal. The rule change rendered Warrior's existing heads ineligible but allowed Warrior to utilize its patent on flared lacrosse stick heads.

The court assumed the rule change was commercial in nature and focused its analysis on the rule's effect on competition. The court found that the rule did not harm competition and, therefore, did not unreasonably restrain trade in violation of Section 1 of the Sherman Act. Warrior failed to identify any anticompetitive effect on the market based on the rule change because the change affected all manufacturers equally. Warrior also brought a claim for tortious interference, arguing that the NCAA acted improperly based on the influence of Warrior's competitors. The court also rejected this claim because it lacked specificity and because the NCAA's rule change did not inherently suggest that the NCAA meant to cause Warrior any harm.

#### BANKRUPTCY LAW

##### *In re Texas Rangers Baseball Partners*<sup>20</sup>

In *In re Texas Rangers Baseball Partners*, the United States Bankruptcy Court for the Northern District of Texas granted, in part, the lender's motion to reconsider a court order imposing a bankruptcy auction of the Texas Rangers baseball team and their assets.

Prior to the commencement of their Chapter 11 bankruptcy, the debtor, Texas Rangers Baseball Partners, entered into an asset purchase agreement with Rangers Baseball Express, LLC (Express) to sell its assets, including the Texas Rangers. A receiver was then appointed to oversee the sale of the assets. The receiver, Snyder, determined that there were several potential bidders interested in acquiring the Rangers and concluded that an auction would be the best proof of the adequacy of the price to be paid by Express for the Rangers' assets. Snyder and the debtor's lenders brought two issues with the Approved Procedures adopted by the bankruptcy court for the purchase of the Rangers assets. First, they argued that the lack of time before the bankruptcy auction was inadequate for the completion of due diligence and to

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20. 2010 Bankr. LEXIS 2644 (Bankr. N.D. Tex. 2010).

obtain financing. They also contended that the “stalking horse provisions” afforded Express were unnecessary and overly generous.

The court found that the potential bidders had adequate time to prepare for the auction because they had notice that bids for the Rangers would eventually be entertained at the commencement of the Rangers’ Chapter 11 bankruptcy. The court found that the time period afforded bidders enough time for due diligence because none of the potential bidders expressed a problem with the time period. The time period also did not restrict financing because the prospective bidders were required to have immense wealth in order to purchase the team and because payment was spread out over time following the auction. Next, the court determined that the requirement that the “stalking horse bid” by Express be compensated with a breakup fee in the greater of \$10,000,000 or 125% of Express’s actual costs and damages should be modified to force Express to decide between either the \$10,000,000 or the 125% before the commencement of the auction, to avoid a potential windfall for Express. In response the Snyder’s motion for reconsidering the time period of the auction, the court allowed the auction to proceed but retained jurisdiction to resolve a dispute if the highest bid was considered inadequate.

*National Jockey Club v. Ganassi*<sup>21</sup>

In *National Jockey Club v. Ganassi*, the United States District Court for the Northern District of Illinois denied both parties’ post-trial motions.

The case involved the post-trial motions arising from a dispute between the plaintiff National Jockey Club (Club) and defendant Chip Ganassi Group, LLC, which leased the Club’s property in an unsuccessful attempt to convert the Club into Chicago Motor Speedway for horse and auto racing. The property was purchased by Chicago Motor Speedway, LLC (CMS), but its loans were personally guaranteed up to an amount of \$10.5 million by Chip Ganassi. Chicago Motor Speedway was ultimately unsuccessful, and CMS filed for Chapter 11 bankruptcy. As a result of the bankruptcy, Ganassi refused to pay the promised \$10.5 million, and the Club brought an action to recover for his breach of contract. The court found that Ganassi owed \$8.85 million to the Club.

In its post-trial motion, Ganassi argued that guaranty was not recoverable because (1) the Club terminated the lease and, therefore, terminated the guaranty, (2) the Club should not benefit from breaching its contract with Ganassi, (3) the Club failed to show that CMS owed any rent and was in default, and (4) Mr. Ganassi satisfied his guaranty by paying more than he

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21. 2010 WL 3713679 (N.D. Ill. 2010).

was required to pay. The Club brought a motion for a judgment as a matter of law as to CMS's counter claims and, alternatively, for a new trial. The court dismissed Ganassi's claims that the guaranty was no longer applicable after the termination of the lease because Ganassi had agreed that the termination of the lease would not relieve him of the liability for his personal guaranty. The court also denied Ganassi's claim that CMS was current on its rent payments because CMS was not current on the payments of its construction loan, which was enough to consider CMS in default. In conclusion, Ganassi's motions were denied, and the order requiring payment of the guaranty was enforced.

#### CONSTITUTIONAL LAW

Constitutional law provides individuals with certain types of protection from governmental infringement of their constitutionally guaranteed rights. Constitutional issues in sports typically arise from disputes involving federal or state governmental entities, educational institutions, athletic associations, and student-athletes. Our judicial system has long established that participation in high school or collegiate sports is not a constitutionally protected right and that, when student-athletes choose to participate in high school or collegiate athletics, they give up certain rights that would otherwise be constitutionally protected. The cases below provide examples of how our legal system tackles state and federal constitutional issues that arise in the area of sports law.

#### *Anderson v. Baseball Club of Seattle*<sup>22</sup>

In *Anderson*, the United States District Court for the Western District of Washington granted in part and denied in part the defendant's motion for summary judgment on the plaintiff's claim that the Seattle Mariners violated his constitutional rights. The plaintiff brought action under 42 U.S.C. § 1983 to seek a remedy for the violation of his rights protected under constitutional and federal law by defendants acting under the color of state law.

The plaintiff was a MLB ticket re-seller and attempted to obtain a license to re-sell tickets from a fixed location in front of a store across the street from Safeco Field prior to Mariners games, but his application was denied. Thereafter, the plaintiff was relegated to re-selling tickets on foot and was subjected to six encounters with undercover members of the Seattle police department who were being employed by the Baseball Club of Seattle. These undercover officers detained, searched, and seized the plaintiff's property. Plaintiff further argued that the city acted arbitrarily and capriciously in

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22. 2010 U.S. Dist. LEXIS 138544 (W.D. Wash. 2010).

refusing to issue a ticket re-selling permit.

Pursuant to Seattle Municipal Code section 15.17.010, the plaintiff was authorized to re-sell Mariners tickets on foot. Therefore, the plaintiff brought claims that his due process rights were violated because he was searched and arrested without proper authority. The court determined that the Mariners' policy was not arbitrary because it was conducted consistently and that the plaintiff's equal protection claims also failed because he offered no evidence in support of those claims. In conclusion, the court granted summary judgment in favor of the Mariners on all claims except the plaintiff's claim that the searches violated his constitutional right to due process.

*Besler v. Bd. of Educ. of West-Windsor-Plainsboro Reg'l Sch. Dist.*<sup>23</sup>

In *Besler*, the Supreme Court of New Jersey affirmed a decision granting relief to the father of a student-athlete whose rights to free speech under the First Amendment were violated when a school board denied him the opportunity to complete a statement alleging that a high school coach verbally abused students.

The plaintiff was the father of a student-athlete who had been the victim of constant verbal abuse from the coach of her high school basketball team. The father attended a School Board meeting and attempted to express his concerns during the public comment period of the meeting. Each speaker was given a maximum of five minutes in front of the Board, but Besler was stopped after thirty seconds by the Board's President, Dr. Lester Bynum. Besler then sued the School District for violating his rights to free speech.

On appeal, the School Board argued that, as a public entity, it could not be held liable for the acts of one of its members, that Besler did not produce sufficient evidence to prove his First Amendment claim, and that the evidence did not support a jury award of \$100,000. The court held that Dr. Bynum, as Board President, would be considered the final policymaker for the board, which gave him the authority to bind the public entity for constitutional infringement. In determining whether there was sufficient evidence that Besler's First Amendment rights were violated, the court found that Dr. Bynum's reasoning for stopping Besler's speech was content-based and not content-neutral based on increasing efficiency at the meeting. Therefore, the School Board could not identify a compelling reason for restricting Besler's speech, and his First Amendment claim was affirmed. However, the court reversed and remanded the award of \$100,000 in damages because Besler had not produced evidence of the damages he suffered with sufficient specificity.

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23. 993 A.2d 805 (N.J. 2010).

The court found that compensatory damages could not be awarded in such a large amount for de minimis mental anguish or embarrassment. Therefore, the case was affirmed and remanded to reassess the damages award.

*Doe v. Banos*<sup>24</sup>

In *Doe*, the United States District Court for New Jersey denied a plaintiff's motion for preliminary injunction based on a student's claim that her constitutional rights were violated by the school's policy that conditioned participation on a school-sponsored sports team on their parent's consent to a school policy precluding the student's use of drugs and alcohol.

The defendant school established a "24/7" policy prohibiting students from consuming, possessing, or distributing drugs or alcohol or attending any gathering where drugs and alcohol might be present. If the policy was violated, a student could face suspension from extracurricular activities, counseling, or community service. A student's participation in school athletics was contingent on her parents signing the policy. The plaintiffs submitted the form with a cover letter reserving their right to challenge the rule and noting that they were signing the form "under duress." The school refused the amended letter, and the plaintiff sued, arguing that the school board violated his First Amendment right to free speech by not accepting the cover letter.

In order to state a constitutional claim against the school, the plaintiff was required to show that (1) the conduct challenged was committed by a person acting under the color of state law and (2) that the conduct deprived him of his rights, privileges, or immunities under the Constitution. The court found that the second requirement was not satisfied because the school's refusal to accept his cover letter did not limit his right to free speech. The court found that the school gave the defendant every opportunity to voice his opinion on the rule. Therefore, the court held that the school was justified in imposing the rule for the safety of its students. The court concluded that public policy also favored its decision because ruling otherwise might undermine the community's collective judgment on the standard of conduct for its student athletes.

*Evans v. Ky. High Sch. Athletic Ass'n*<sup>25</sup>

In *Evans*, the District Court for the Western District of Kentucky rejected a plaintiff's claim that a Kentucky High School Athletic Association's (KHSAA) rule was religiously discriminatory.

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24. 2010 U.S. Dist. LEXIS 51666 (D.N.J. 2010).

25. 2010 U.S. Dist. LEXIS 39063 (W.D. Ky. 2010).

The plaintiffs brought a consolidated constitutional challenge against KHSAA's Bylaw 13, which limited the athletic eligibility of student athletes who accept financial aid to offset the costs of private education. Bylaw 13 differentiated between need-based financial aid and merit-based financial aid. A student accepting need-based aid was eligible to receive up to 100% of their tuition and remain eligible to participate in school-sponsored sports. However, merit-based aid was restricted to 5% of a school's student body, and players that received more than 25% of their tuition from merit-based aid were not eligible to participate in KHSAA-sponsored sports. The plaintiffs also challenged the rule that a student who accepted financial aid from any source other than the school was not eligible for athletics unless the donor submitted itself to review by KHSAA.

The plaintiffs, four parents whose children were ruled ineligible by Bylaw 13, argued that a strict scrutiny standard should be applied to the court's analysis because KHSAA was discriminating against Roman-Catholic schools on the basis of religion. The court disagreed, using a rational basis standard because the Bylaw applied to all non-public schools equally. The court held that Bylaw 13 was rationally related to the legitimate interest of preventing third-parties from recruiting student-athletes. It also held that the 25% limit on merit-based financial aid was rationally related to the goal of preventing recruitment.

*Fischer v. City of Colo. Springs*<sup>26</sup>

Fischer, a Colorado Springs resident, challenged the constitutionality of an agreement between the city and the USOC to develop facilities for use by the USOC. The city of Colorado Springs secured financing to renovate a downtown building for use by the USOC. The financing was obtained through a Public Facilities Authority (PFA) set up by the city. The PFA purchased the city's police and fire stations and then leased them back to the city. The PFA then sold interests in the lease it had with the city to investors. The resulting money was used to fund the USOC's building. The USOC was to be charged nominal rent for use of the building, and it was to be conveyed to the USOC after a period of thirty years. Fischer claimed that this was a violation of article eleven of the Colorado Constitution, which requires legislation or an election before the state can acquire debt. Fischer also challenged the donation of the building to the USOC as an unconstitutional donation to a private corporation.

The Court of Appeals agreed with a lower court ruling to dismiss the

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26. 2010 Colo. App. LEXIS 1348 (Sept. 16, 2010).

constitutionality claim. Because there was no absolute provision requiring the city to make future payments on the lease for the police and fire stations, it was not the type of debt covered by the constitution. The Circuit Court remanded the case to the lower court to determine if the provision that conveyed the building to the USOC after thirty years was unconstitutional.

*Moberly v. Univ. of Cincinnati Clermont College*<sup>27</sup>

In *Moberly*, the United States District Court for the Southern District of Ohio granted the defendants motion for summary judgment regarding the plaintiff's claims that the college violated his First Amendment right to freedom of speech.

The plaintiff, an assistant basketball coach for the University of Cincinnati-Clermont College, alleged a violation of his freedom of speech when the college rejected his application for reappointment as assistant coach based on his protest against perceived discriminatory treatment by the school. In his deposition, the plaintiff allegedly informed the college's vice-provost of the discriminatory treatment of his players by saying that "kids weren't treated very well." He further elaborated in his affidavit that the discrimination was a result of a comment calling his African-American players "black trash." The plaintiff alleged that the school violated his Title VI rights and that the defendant school administrator's individual conduct was racially discriminatory, which amounted to a discriminatory retaliation under Section 1981 and was retaliation based on his freedom of speech under Section 1983.

The court held that, to succeed in his Title VI claims against the school and school administrators, Moberly needed to show that he engaged in the protected activity by opposing a unlawful practice under Title VI. Title VI protects people from being excluded from any program receiving federal assistance on the basis of race, color, or national origin. The court found that Moberly did not establish his participation in a protected activity because his complaint that "kids weren't treated well" was impermissibly vague, and the court was prohibited from considering other quotes from his affidavit that were not included in the plaintiff's deposition. The court found that the plaintiff's Section 1981 claim also failed because Moberly could not satisfy his burden of proving that (1) he engaged in activity protected by the discrimination statutes, (2) the exercise of his civil rights was known to the defendants, (3) the defendant's took an employment action adverse to plaintiff, and (4) there was a causal connection between the protected activity and the adverse employment action. The court concluded that the college's refusal to

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27. 2010 U.S. Dist. LEXIS 89974 (S.D. Ohio 2010).

fire Moberly was not materially adverse; therefore, Section 1981 was inapplicable. Lastly, the court rejected Moberly's First Amendment retaliation claim based on his inability to establish that (1) he engaged in a constitutionally protected activity, (2) that Defendant's adverse action caused him to suffer injury that would be likely to chill speech, and (3) that the adverse action was motivated in response to the plaintiff's exercise of his constitutional rights. The court concluded that Moberly did not face an adverse action tending to chill speech; therefore, his complaint was dismissed.

*Natke v. North Branch Area Sch. Dist.*<sup>28</sup>

In *Natke*, the United States District Court for the Eastern District of Michigan granted the defendant school district's motion to dismiss based the plaintiff's challenge that the school violated his constitutional rights.

The father of a minor student initiated a challenge on his son's behalf that the school violated his constitutional rights when it suspended him from his high school baseball team after he was charged with stealing a case of beer from a local store. The plaintiff also alleged a state law breach of contract claim. The school district administered the suspension based on the guidelines in its athletic handbook that deem athletic programs to be a privilege, not a right, that can be suspended if a student is found to have committed "gross misconduct." Gross misconduct included "theft, extortion, vandalism . . ."

The plaintiff made two constitutional law arguments: (1) that the school violated his equal protection rights under the "class of one" theory and (2) that the defendant violated his rights to due process. The court found that the plaintiff was unable to establish a claim of one by (1) refuting every conceivable basis that might support the government action or (2) that the decision was driven by animus or ill will. The court agreed with the school district's argument that the plaintiff was not treated any differently than similarly situated students. The court also found that plaintiff's due process claim should be dismissed because he failed to state a valid property right that was hindered. The court held that participation in athletics was not a valid property right; therefore, the plaintiff did not have valid due process claim. Lastly, the court concluded that the plaintiff's state law breach of contract claim also failed because plaintiff offered no case law in support of his contention that a student could bring a breach of contract action against a public school.

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28. 2010 U.S. Dist. LEXIS 10480 (E.D. Mich. 2010).

*Octaviano v. Kings Park Central Sch. Dist.*<sup>29</sup>

In *Octaviano*, the U.S. District Court for the Eastern District of New York denied a high school student's request for a temporary restraining order and a preliminary injunction based on a school's violation of her Fourteenth Amendment equal protection rights and rights under Title IX of the Education Amendments of 1972.

The case arose out of a school's decision to suspend a high school student from extracurricular activities for one year following her admission to providing another student with alcohol. The student brought alcohol onto a bus in a hairspray container. The school's policy denoted three categories of alcohol offenses: (1) Caught in Possession, which is punished by an automatic one year suspension; (2) Caught Intoxicated at School, which is grounds for suspension according to team rules; and (3) Intoxication Outside of School, which the school generally does not involved itself in. Following the one-year suspension, the plaintiff appealed the suspension with the district school board, but her appeal was denied. The plaintiff then brought suit to request that the court impose a temporary restraining order to allow her to participate in extracurricular activities, particularly varsity basketball.

The court considered whether to award a preliminary injunction based on the plaintiff's ability to demonstrate (1) irreparable harm absent injunctive relief and (2) either a likelihood of success on the merits, or a serious question going to the merits, "with a balance of hardships tipping decidedly in the plaintiff's favor." Despite conflicting precedent, the court found that the suspension's effect on the plaintiff's ability to earn a college scholarship based on her senior-year participation in extracurricular activities constituted irreparable harm. However, the court ruled that the plaintiff did not have sufficient likelihood of success based on her underlying equal protection and Title IX claims. For a "class-of-one" equal protection claim, plaintiff was required to provide evidence of similarly-situated individuals that received significantly different treatment than her, and she failed to identify an appropriate comparison. Moreover, the court ruled she did not offer enough evidence to demonstrate a disparate treatment between the male and female athletes; therefore, her Title IX claim was also barred. Therefore, the suspension was upheld.

*Sisson v. Virginia High School League, Inc.*<sup>30</sup>

In *Sisson*, the plaintiff sought an order from the United States District

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29. 2010 U.S. Dist. LEXIS 136055 (E.D.N.Y. 2010).

30. 2010 U.S. Dist. LEXIS 132264 (W.D. Va. 2010).

Court for the Western District of Virginia granting a temporary restraining order and preliminary injunction enjoining defendant Virginia High School League (VHSL) from prohibiting his participation in varsity athletics. The court denied the order and affirmed the VHSL's administrative decision.

The plaintiff was one day too old under the VHSL's participation rules and, after a failed appeal to the school, filed this action under 42 U.S.C. section 1983, alleging violations of his right to due process and equal protection. The plaintiff's appeal was based on his specific learning disability in reading and writing that caused an auditory processing deficit. VHSL has the power to grant a waiver based on its rules, which allow for an exception "for the student who experienced a delayed start or interruption in his/her educational progression due to a significant disability." The plaintiff's first appeal was successful but was ultimately declined, and his waiver was denied. The plaintiff then appealed again, and following an in-person hearing, his waiver request was denied.

The court based its ruling on the plaintiff's ability to establish the necessary elements for a preliminary injunction: (1) irreparable harm and (2) a likelihood of success on the merits. The plaintiff failed to establish a likelihood of success on the merits because he was unable to establish that his Fourteenth Amendment right to life, liberty, or property had been infringed upon. The court considered the fact that the plaintiff was not forced to be held back; rather, his parents elected to hold him back. Therefore, the court denied the plaintiff's requests for a preliminary injunction and temporary restraining order based on his failure to establish a likelihood of success on the merits.

*University Interscholastic League v. Sw. Officials Ass'n*<sup>31</sup>

In *University Interscholastic League*, the Court of Appeals of Texas reversed the lower court's ruling finding that the University Interscholastic League (UIL) was a governmental unit subject to sovereign immunity, which barred the plaintiff's suit.

The plaintiff, Texas Association of Sports Officials (TASO), was a trade association made up of 12,000 Texas sports officials. The UIL had previously had a rule, Section 1204, which required the use of TASO officials for UIL-sponsored sporting events. However, the UIL amended Section 1204 in 2009 by allowing UIL events to only be officiated by sports officials who register and pay dues to the UIL. In response, the TASO argued that the UIL (1) attempted to exercise an unauthorized delegation of power, (2) improperly imposed an occupation tax, and (3) tortuously interfered with the contractual

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31. 2010 WL 3370782 (Tex. App. 2010).

relationships between TASO and its members. The UIL argued that it had sovereign immunity, which they did not waive, that prohibited TASO's claims against the League. Alternatively, the UIL argued that TASO did not have standing. TASO argued that the UIL was a private association, not protected by sovereign immunity, because no statutory or constitutional provision specifically created the UIL.

The court found that the UIL was a part of the University of Texas at Austin, which was afforded sovereign immunity because it was established by the Texas Constitution and because it has been well settled that state universities are governmental entities subject to sovereign immunity. Beyond its affiliation with the University of Texas, the court found support for the UIL's sovereign immunity based on the fact that it participated in rule making and the carrying out of educational policies based on Texas state law. Because the UIL was protected by sovereign immunity, the plaintiff's claims were dismissed for lack of jurisdiction.

*Wisconsin Interscholastic Ath. Ass'n v. Gannett Co.*<sup>32</sup>

In *Wisconsin Interscholastic Athletic Association*, the United States District Court for the Western District of Wisconsin granted a declaratory judgment in favor of the plaintiff Wisconsin Interscholastic Athletic Association (WIAA) against the defendant's claim that the grant of an exclusive license to American Hi-Fi to stream WIAA-sponsored tournaments online violated the defendant's First and Fourteenth Amendment rights.

The WIAA initiated this action to seek a declaratory judgment that they had the right to control the live streaming and play-by-play of WIAA-sponsored tournaments, to grant licenses, and receive payment for the granting of a license. The defendant newspaper argued that the WIAA's grant of an exclusive license violated their First Amendment rights. Their basic argument was that, when the WIAA makes a decision to allow the media into an event, it must let the media members do anything they want in furtherance of their "journalistic function." However, the court held that the fact that the media was welcome to WIAA-sponsored sporting event was not enough to designate the WIAA-sponsored athletic events as a "public forum." Therefore, the court analyzed the claims based on the reasonableness of the exclusive rights agreement. The court rejected Gannett's First Amendment argument because the exclusive contract to broadcast tournament games online did not discriminate against a specific viewpoint and was not directed at restricting a certain idea from entering the marketplace.

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32. 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. 2010).

The court also rejected plaintiffs' claim that granting an exclusive license violated their equal protection rights. To determine whether the defendant's equal protection rights had been violated, the court needed to determine whether the exclusive license rationally furthered a legitimate state purpose. The court held that WIAA had a legitimate interest in raising revenue to support its programs; therefore, Gannett's Fourteenth Amendment claim also failed, and WIAA's motion for summary judgment was granted.

#### CONTRACT LAW

As is the case in any business, contracts are essential to numerous aspects of the sports industry. Contracts in sports involve athletes' contracts, coaches' contracts, television deals, sponsorship deals, spectator waivers, and much more. The following cases discuss various contractual issues faced by judicial decision makers in 2010.

#### *Duffy v. Ticketreserve, Inc.*<sup>33</sup>

In *Duffy*, the United States Court for the Northern District of Illinois, Eastern Division ruled that the users of an online marketplace brought a valid breach of contract claim under a User Agreement entered into between the users and the operator of the online marketplace when the operator of the online marketplace refused to dispense of the users' online banking funds upon the users' request.

Ticketreserve, Inc. (Ticketreserve) operates an "online marketplace," where customers buy, sell, and trade options to purchase tickets for sporting events. The plaintiffs in this matter were users of Ticketreserve's online market place and brought fraud and breach of contract claims against Ticketreserve as a result of the alleged defrauding of the users when they attempted to secure tickets for the 2009 Super Bowl from other Ticketreserve users. The users' contractual claims arose out of the User Agreement that all users of Ticketreserve's online marketplace must agree to before using Ticketreserve's services. Ticketreserve moved to dismiss all of the claims, arguing that the users failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). The court first found that the User Agreement stated that Illinois law would govern the contract and that, under Illinois law for a valid breach of contract claim, the users had to allege four elements: (1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages. After finding that the User Agreement created a valid and enforceable contract

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33. 2010 U.S. Dist. LEXIS 66603 (N.D. Ill. July 6, 2010).

between the user and Ticketreserve, the court found that the release provisions in the User Agreement, which stated that Ticketreserve was released from all claims arising out of disputes between buyers and sellers in the online marketplace, prevented the users from bringing a breach of contract claim against Ticketreserve for failure to prevent the fraudulent transactions between users. However, the User Agreement also provided that Ticketreserve would process and mail out user funds from their online accounts within fourteen business days after a user made a withdrawal request. Because Ticketreserve refused to release the users' funds back to the users from their online accounts upon request, the court ruled that the users' breach of contract claim relating to the improper withholding of funds should not be dismissed.

*Giuliani v. Duke Univ.*<sup>34</sup>

As a junior in high school, Andrew Giuliani was recruited to play varsity golf at Duke University by then-head varsity golf coach Rod Myers. During the recruitment, Myers told Giuliani that, if he came to Duke, he would have lifetime access to Duke's facilities and have the opportunity to earn spots in the most competitive NCAA tournaments. Giuliani alleged that these inducements influenced his decision to enroll at Duke. However, in the spring of 2007, Coach Myers passed away, and Coach O.D. Vincent took over the Duke golf program. Coach Vincent decided to cut the size of the golf squad in half and cancelled Giuliani's eligibility to participate in Duke's athletics program. However, Coach Vincent told Giuliani that he could maintain his status on the team if he agreed to certain "parameters." Giuliani refused to agree to these conditions. In July 2008, Giuliani brought a breach of contract claim against Duke and Coach Vincent. Duke and Coach Vincent filed an answer and moved for judgment on the pleadings in September 2008. The United States Magistrate Judge for the United States District Court for the Middle District of North Carolina addressed the motions by recommending that Defendants' motion be granted on the ground that Giuliani failed to establish elements of a breach of contract claim. Giuliani filed objections to the recommendations. Duke and Coach Vincent then filed a motion to dismiss Giuliani's claim.

First, the court stated that a valid contract is formed when two parties manifest an intent to be bound and the terms of the contract are "definite and certain or capable of being made so" such that the parties "assent to the same things, in the same sense." The court found that Giuliani's claim for breach of contract based on Coach Myers' oral statements made during recruiting did

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34. 2010 U.S. Dist. LEXIS 32691 (M.D.N.C. Mar. 30, 2010).

not constitute a valid contract because the statements did not show a meeting of the minds or establish definite and certain terms. The statements instead described the potential benefits available to Giuliani and the opportunities he would have if he enrolled at Duke, earned a spot on the golf team, and maintained that spot.

*Gutkowski v. Steinbrenner*<sup>35</sup>

Robert Gutkowski is a “distinguished professional in the field of sports television, marketing, and management,” and George Steinbrenner was the owner of the New York Yankees. In a meeting in December 1996, Gutkowski alleged that he presented to Steinbrenner the idea of starting a Yankees owned and operated television network. Steinbrenner was interested in the idea and asked Gutkowski to work with the Yankees on figuring out if starting a network was a viable option. In February 1997, Gutkowski met with general counsel of the Yankees about the idea as well. In February 1998, Steinbrenner had Gutkowski prepare a memo that would explain all of the viable local television broadcast and cable options available to the Yankees after their current television deal expired. Gutkowski prepared the memo and then later made a presentation to the Yankees on how to build a Yankees television network. Gutkowski alleged that, throughout their dealings, Steinbrenner told Gutkowski that if he decided to start a Yankees network that he would have Gutkowski build it, be significantly involved with it, and be compensated for his idea and efforts. In May 1998, Gutkowski received a consulting agreement from the Yankees that provided for him to consult the Yankees regarding all matters related to the Yankees’ future television rights for six months.

Steinbrenner ultimately started the YES Network and in October 2003 retained Gutkowski to act as a consultant in a lawsuit. Gutkowski alleged that Steinbrenner gave him assurances that Gutkowski was going to be the next CEO of the YES Network. However, someone else was chosen to be the next CEO. Gutkowski signed another two-year consulting agreement with the YES Network in 2004 and, in 2007, asked the Yankees to properly compensate him for being the architect of the YES network. After the Yankees failed to act, Gutkowski filed his complaint on August 28, 2009, alleging that Steinbrenner and the Yankees failed to abide by the terms of an oral agreement under which Gutkowski would be compensated for his efforts and contributions in the creation of the YES Network. Steinbrenner filed a motion to dismiss, arguing that Gutkowski’s breach of contract claim was inadequately pleaded. The court agreed with Steinbrenner and found that Gutkowski’s breach of contract

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35. 680 F. Supp. 2d 602 (S.D.N.Y. 2010).

claim was inadequately pleaded because the purported oral agreement between Gutkowski and Steinbrenner lacked a price or compensation term. The court also found that the purported oral agreement was unenforceable under New York's statute of frauds. Therefore, the court dismissed Gutkowski's breach of contract claim.

*Haag v. Castro*<sup>36</sup>

In 2004, team member of the Carmel Commotion Soccer Team, an Indiana Youth Soccer Association (IYSA) team, played in a youth soccer tournament in Colorado. Before playing in the tournament, the team received a permit by the IYSA to play in an out-of-state tournament. Upon arriving in Colorado the team's head coach, Mark Castro, rented a passenger van for the team's use during the tournament. On June 12, 2004, after completing all soccer games and tournament-related events for the day and en route to a whitewater rafting trip, the passenger van collided with another vehicle and team members were injured as a result of the collision. On June 7, 2006, team members filed a Complaint for Declaratory Relief seeking a declaration that Virginia Surety's insurance policy, which was secured through the IYSA, provided coverage for the team members while Castro drove them to the team-building whitewater rafting activity. On motions for summary judgment, the trial court found that the policy did not provide coverage to the team members. The team members appealed.

On appeal, the court focused their decision on the language in the Virginia Surety policy issued to the IYSA. The relevant language of the policy stated that the policy only provided coverage "while the automobile is being used in the business of the [IYSA]" and that coverage was not provided "in the transportation of youth or adult participations to or from athletic games or athletic events, including but not limited to practices, exhibitions, post-season and scheduled events." The team members argued that the automobile was being used in the business of the IYSA because the IYSA's business is the promotion of youth soccer and the team members were promoting youth soccer while in Colorado. However, the court found that the automobile was not being used in the business of the IYSA when the rented van was in an accident because the IYSA did not have the right to control the soccer team's activities while it was attending the out-of-state soccer tournament, as the only control IYSA had was allowing or disallowing the soccer team to attend the tournament. The court also dismissed the team members' argument because it found that the team members were not promoting youth soccer while on route

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36. 934 N.E.2d 189 (Ind. Ct. App. 2010).

to a whitewater rafting trip. The court affirmed the trial court's summary judgment in favor of Virginia Surety.

*Hambric Sports Mgmt., LLC v. Team AK, Inc.*<sup>37</sup>

In *Hambric Sports Management LLC*, the United States District Court for the Northern District of Texas, Dallas Division granted a defendant athlete representation agency's motion to dismiss for failure to state a claim because the court found that the plaintiff failed to prove all four elements necessary to bring a valid tortious interference with existing contract claim.

Plaintiff Hambric Sports Management, LLC (Hambric) and Defendants IMG Worldwide, Inc., (IMG) and Gaylord Sports Management (Gaylord) represent professional athletes. Defendant Team AK, Inc. (Team AK) assists in the managing of professional golfer Anthony Kim and Defendant Sterling C. Ball serves as President of Team AK. In 2006, Hambric entered into a Management and Representation Agreement with professional golfer Anthony Kim. The agreement provided that Hambric would represent Kim as his agent from August 24, 2006 to December 31, 2008 and that Hambric would be entitled to receive commissions for the endorsement, promotional, and marketing deals that Hambric secured for Kim. On May 6, 2008, Kim terminated the agreement with Hambric, and on June 10 2008, Kim signed a new agency agreement with IMG. Because Kim terminated the agreement before December 31, 2008, Hambric alleged that Kim wrongfully violated the agreement. Hambric also alleged that IMG, Gaylord, and Ball tortiously interfered with the agreement between Hambric and Kim because from mid-2007 through May 6, 2008 Ball attempted to control all aspects of Kim's relationship with Hambric through his position with Team AK and he delivered copies of the Agreement and Kim's endorsement contract with Nike to Gaylord for review. Furthermore, Hambric alleged that, before Kim had terminated his agreement with Hambric, Ball and Gaylord discussed the topic of representing Kim and went as far as allegedly speaking with many endorsement companies concerning a prospective business relationship with Kim. Hambric argued that these actions hindered his ability to market and secure endorsement deals for Kim.

Hambric brought claims of tortious interference with contract against the Defendants. The Defendants filed motions to dismiss the action. After the court found that it had jurisdiction over the matter, the court analyzed Gaylord's motion to dismiss for failure to state a valid tortious interference with contract claim. To bring a tortious interference with existing contract

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37. 2010 U.S. Dist. LEXIS 65491 (N.D. Tex. June 29, 2010).

claim in Texas, Hambric had to show that “(1) a contract subject to interference exists; (2) the alleged act of interference was willful and intentional; (3) the willful and intentional act proximately caused damage; and (4) actual damage or loss occurred.” Gaylord argued that Hambric did not fulfill the second or third elements. The court agreed and found that, although Gaylord’s conduct was intentional and willful, it was not the proximate cause of Kim terminating the agreement with Hambric. Instead, the court found that Ball was the driving force behind Kim’s decision to terminate the agreement with Hambric and that Gaylord never made a new agreement offer to Kim before he terminated his contract with Hambric. Therefore, the court granted Gaylor’s motion to dismiss.

*HBCU Pro Football, LLC v. New Vision Sports Props., LLC*<sup>38</sup>

HBCU Pro Football, LLC (HBCU) produces televised broadcasts of football games involving historically black colleges and universities, and CSTV Networks (CSTV) broadcasts college sporting events. New Vision Sports Properties (NVSP) is owned by Victor Pelt and brokers broadcast deals between producers and broadcasters. HBCU alleged that Pelt and NVSP, while acting as agents for CSTV, entered into a contract with HBCU for the broadcast of three college football games. As part of the agreement, HBCU promised to pay NVSP and CSTV a \$50,000 broadcast fee, and NVSP promised to give HBCU 80% of the gross advertising revenues. HBCU brought a breach of contract claim in the Circuit Court for Baltimore City against NVSP and CSTV, alleging that HBCU had fulfilled its obligations under the agreement and that CSTV and NVSP had not. However, before NVSP and Pelt had been served, CSTV had removed the case to the United States District Court for the District of Maryland. HBCU moved to remand on the ground that CSTV’s removal violated the “rule of unanimity” by first not obtaining the consent of the other defendants before removing the case. The court denied HBCU’s motion to remand because it found that CSTV’s co-defendants had not yet been served at the time of the removal; therefore, the “rule of unanimity” did not apply.

*Mayer v. Belichick*<sup>39</sup>

In *Mayer*, the United States Court of Appeals for the Third Circuit held that an NFL ticket-holder failed to allege any actionable injury arising out of the New England Patriots’ “Spygate” scandal because, as a season ticket-

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38. 2010 U.S. Dist. LEXIS 71383 (D. Md. July 14, 2010).

39. 605 F.3d 223 (3d Cir. N.J. 2010).

holder, he had nothing more than a contractual right to a seat from which to watch an NFL game between the Jets and the Patriots.

Carl Mayer was a New York Jets season ticket-holder and attended the Jets September 9, 2007 game against the New England Patriots. After the game, multiple media outlets reported that the NFL was investigating accusations that an employee of the Patriots was videotaping the signals given by Jets' coaches during the game. Such videotaping is prohibited under NFL rules. On September 13, 2007, the NFL found that the Patriots had engaged in prohibited videotaping and imposed various sanctions against the team. Believing that he acquired certain contractual rights as a season-ticket holder for an NFL team, Mayer brought a breach of contract claim against the NFL for destroying the videos that the Patriots had recorded. He also brought a third-party beneficiary claim and breach of implied contract or quasi-contract claim against the Patriots and Belichick. The District Court dismissed Mayer's claims as a matter of law because he failed to allege any actionable injury arising out of the Patriots' videotaping scandal. On appeal, the Court of Appeals for the Third Circuit first found that Mayer's ticket stated only that "[t]his ticket only grants entry into the stadium and a spectator seat for the specified NFL game." From this, the court found that Mayer's ticket did not create a contractual right for him to see a game played in compliance with all NFL rules. Because Mayer was allowed entry into the stadium and witnessed the game, he suffered no injury to his only legally protected contractual right arising from his season ticket. Therefore, the court dismissed all of Mayer's claims against the Belichick, the Patriots, and the NFL.

*Mayfield v. NASCAR*<sup>40</sup>

In *Mayfield*, the United States District Court for the Western District of North Carolina, Charlotte Division held the plaintiff race car driver could not bring a breach of contract claim against the defendant because the agreements and applications that the plaintiff signed with the defendant included a release provision that waived the driver's right to sue the defendant under a breach of contract theory.

Jeremy Mayfield is a professional race car driver for NASCAR, and to compete in NASCAR-sponsored races, he had to sign the NASCAR Sprint Cup Series 2009 Driver and Car Owner Agreement (the Agreement), the NASCAR Competition Membership and License Application NASCAR Sprint Cup Series *Drivers* (Drivers Application), and the NASCAR Competition Membership and License Application NASCAR Sprint Cup

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40. 2010 U.S. Dist. LEXIS 51270 (W.D.N.C. May 18, 2010).

Series *Car Owners* (Owners Application). The Agreement required Mayfield to abide by NASCAR's Substance Abuse Policy (the Policy). The Agreement provided for the random drug testing of drivers and outlined the drug testing procedures that had to be followed by Mayfield and NASCAR. One such procedure was that the testing was to be done at a facility that had been certified by the Substance Abuse and Mental Health Services Administration (SAMHSA) of the United States Department of Health and Human Services. On May 1, 2009, Mayfield submitted to a random drug test. The test was performed by Aegis, a SAMHSA certified laboratory. Mayfield tested positive for a prohibited substance. In bringing his breach of contract claim, Mayfield claimed that Aegis failed to follow the SAMSHA Guidelines (the Guidelines) for testing procedures by failing to label, transport, and secure his specimen "in such a manner as to ensure that the specimen [was] not misplaced, tampered with, or relabeled." Mayfield argued that three instruments required Aegies to follow the Guidelines: (1) the Guidelines themselves; (2) the Policy; and (3) the NASCAR/Aegis service contract. However, the court found that the Drivers Application and Owners Application that Mayfield signed contained a release provision that waived his right to sue NASCAR for breach of contract and therefore dismissed his claim.

*Morris v. Olympiakos*<sup>41</sup>

In *Morris*, the United States District Court for the Southern District of Texas, Houston Division held that a foreign professional basketball team's motion to vacate a default judgment against them should be granted because the court who ordered the default judgment did not have personal jurisdiction over the foreign professional basketball team.

Christopher Morris, a former NBA player, signed an agreement to play basketball in Greece for Olympiakos, a Greek national basketball club. On August 29, 2003, Morris sued Olympiakos for breach of contract as a result of Olympiakos' alleged failure to pay Morris for his services as a professional basketball player. On April 21, 2004, Olympiakos was served with a summons and a copy of Morris' complaint. On August 31, 2004, Morris filed a request for default judgment because Olympiakos failed to file a responsive pleading or otherwise defend the suit, and on September 1, 2004, the court granted Morris' request for default judgment and ordered that Morris "recover from defendant . . . Olympiakos SFP, the sum of \$910,000 together with post-judgment interest thereon at the rate of 2.03% per annum." Morris then filed an Acknowledgement of Assignment of Judgment to Gary W. Ebert,

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41. 2010 U.S. Dist. LEXIS 65014 (S.D. Tex. June 30, 2010).

who, in October of 2009, filed an Application and Memorandum for an Order for Issuance of Writ of Garnishment against Olympiakos, which the court granted. On November 13, 2009, Olympiakos filed a Federal Rule of Civil Procedure 60(b)(4) motion to vacate default judgment, arguing that the default judgment was void because the court did not have personal jurisdiction over Olympiakos as a foreign professional team. The court first found that a judgment may be set aside under Rule 60(b)(4) if (1) the court lacked subject matter or personal jurisdiction over the matter or (2) the court acted in a manner inconsistent with due process of law. Olympiakos argued that the court lacked personal jurisdiction over the matter because it is a corporate entity formed under Greek law, its principal place of business is in Greece, and it does not maintain a presence in Texas. Olympiakos also argued that the contract was entered into by the parties in Greece and the services to be performed per the contract were to be completed in Greece. However, Morris argued that the court had personal jurisdiction over the matter because Olympiakos solicited Morris, a Texas resident, to play for Olympiakos. Eventually, the court held that it did not have personal jurisdiction over the matter because (1) Olympiakos did not have the minimum contacts within the state of Texas to be subject to a Texas court's personal jurisdiction and (2) there was no evidence showing that, in recruiting Morris, Olympiakos knew or had reason to know that he was a Texas resident and, therefore, did not purposefully avail itself of the privilege of doing business in Texas and could not reasonably have anticipated being hauled into court there.

*Turner Broad. Sys. v. McDavid*<sup>42</sup>

This dispute arose out of an alleged breach of an oral agreement between Turner Broadcasting System Inc. (Turner), the owner of the Atlanta Hawks and Atlanta Thrashers sports teams and the operating rights to Philips Arena, and David McDavid to sell the teams and the operating rights. After a jury trial, McDavid was awarded a \$281 million verdict on his breach of contract claim. Turner appealed, arguing that “(1) the evidence failed to show (a) that the parties intended to be bound in the absence of an executed written agreement or (b) that the parties reached agreement on all material terms of the sale . . . .”

In November 2002, McDavid expressed an interest in buying the assets of the Hawks, Thrashers, and Philips Arena, and the parties entered into negotiations. On April 30, 2003, the parties executed a Letter of Intent that outlined the proposed sale terms, but the Letter of Intent expired with no

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42. 303 Ga. App. 593 (Ga. Ct. App. 2010).

agreement. McDavid attempted to extend the Letter of Intent, but Turner's principal negotiator told McDavid that there was no need, because "[w]e're very, very close to a deal. You're our guy." The parties continued negotiations, and during a conference call on July 30, 2003, Turner's CEO agreed to terms set by McDavid and announced to the parties, "we have a deal." Negotiations continued regarding the drafting process of the agreement, and on August 19, 2003, the corporate board of directors of Time Warner, Turner's parent company, approved the sale of the assets to McDavid. However, two of the board members, Ted Turner and Steve Case, opposed the deal. The next day, Turner began negotiations with Atlanta Spirit, LLC about purchasing the rights to the Hawks, Thrashers, and Philips Arena. On September 12, 2003, McDavid and Turner verbally reached a final agreement on the terms of the written agreement, and Turner's principal negotiator announced, "the deal is done. Let's get documents we can sign and we'll meet in Atlanta for a press conference and a closing [early next week]." However, on September 15, 2003, McDavid received a phone call from Turner that it had sold the assets to Atlanta Spirit instead.

In analyzing the breach of contract claim, the court first recognized that Georgia law allows oral contracts to be binding and enforceable if there is "consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." The court found that, from the conduct of the parties and statements made during the negotiations, a jury could have found that Turner had manifested an intent to be bound to the sale of the teams and the operating rights of the arena to McDavid and that McDavid had manifested an intent to buy the teams and the operating rights from Turner. Therefore, the court affirmed the jury's decision.

*Urlacher v. Dreams, Inc.*<sup>43</sup>

Brain Urlacher is a professional football player and Dreams, Inc. (Dreams) is a sports memorabilia firm. On October 10, 2007, Urlacher allegedly entered into an agreement with Dreams in which Urlacher agreed to make public appearances and to autograph items exclusively for Dreams until the agreement terminated on August 31, 2011. On September 13, 2009, Urlacher injured his wrist in a football game against the Green Bay Packers, and on September 15, 2009, Dreams allegedly notified Urlacher that it was terminating the agreement for cause. Urlacher brought action against Dreams, alleging a breach of a contract claim and that the September 15, 2009 letter

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43. 2010 U.S. Dist. LEXIS 15259 (N.D. Ill. Feb. 22, 2010).

was an anticipatory breach of contract. Dreams removed the action to federal court and filed an answer to the complaint and a counterclaim against Urlacher alleging a breach of contract and unjust enrichment claim because Urlacher failed to repay Dreams for services Urlacher had been compensated for but did not perform. Urlacher moved to dismiss Dreams' counterclaims, arguing that the court should dismiss Dreams' breach of contract counterclaim because it did not point to any specific provision in the agreement that stated Urlacher had to repay Dreams the pre-paid monies for services that Urlacher did not ultimately perform. The court refused to grant Urlacher's motion to dismiss because it found that at the pleading stage Dreams was not required to identify the exact provision of the agreement that Urlacher violated.

#### COURT OF ARBITRATION FOR SPORT

The Court of Arbitration for Sport (CAS) is an independent international arbitration body that was established in 1984 to resolve disputes arising from sports. Headquartered in Switzerland, CAS decisions have developed a body of law known as *lex sportiva*. In order for a dispute to be submitted to arbitration by the CAS, there must be an agreement that requires the parties to arbitrate the dispute. The CAS may hear disputes of commercial or disciplinary nature. Below are examples of issues resolved by the CAS in 2010.

#### *Anderson v. IOC*<sup>44</sup>

Anderson and six other women had competed in and won Olympic relay events with Marion Jones. Because of Jones' subsequent doping violations and admittance of past use, she was stripped of her medals. The decision was left to the IOC Disciplinary Commission (Disciplinary Commission) to determine if the members of Jones' relay teams should be stripped of their medals. The other sprinters pointed to a CAS decision from 2005 in which members of a medal winning relay team were allowed to keep their medals even after one member of the team—Jerome Young—had been suspended for a doping violation. The Disciplinary Commission found a distinction between the two cases, however. In the previous case, the guilty sprinter had not admitted to past use like Jones, and the dirty sprinter in the previous case had not participated in the finals. The Disciplinary Commission ruled that all medals were to be returned.

The USOC and the seven clean sprinters appealed to CAS to have their medals reinstated. The WADA Code addresses how teams should be punished

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44. CAS 2008/A/1545.

when an individual member is found guilty of a doping violation. If one or two members of the team are found to be dirty, the team should not be punished. If, however, more than two individuals on the team are guilty of offenses, the team should be stripped of any awards or prize money earned while the dirty players were on the team. The IOC argued that relay events are different from the organized team sports that the Code referred to in that section. CAS found this argument unpersuasive and determined the Code was applicable. Furthermore, CAS disagreed with the IOC that the 2005 Jerome Young decision was not controlling. Whether Young admitted to past drug use was legally irrelevant because he was stripped of all his previous medals regardless of the existence of a confession. Additionally, the fact that he did not run in the finals also bears no legal relevance because even from the sidelines he was an active member of the team. The CAS arbitrator overturned the IOC's decision to strip the female sprinters of their medals and ordered the IOC to pay all costs associated with the arbitration.

*Australian Olympic Comm. v. Fédération Internationale de Bobsleigh et de Tobogganing*  
*Confederação Brasileira de Desporto no Gelo v. Fédération Internationale de Bobsleigh et de Tobogganing*<sup>45</sup>

These two cases were combined and decided by the ad hoc division of CAS at the Vancouver Olympic Games. The Australian Olympic Committee (AOC) challenged the Fédération Internationale de Bobsleigh et de Tobogganing's (FIBT's) decision not to include their women's two-person Bobsled teams in the Vancouver Olympics. FIBT chose the Brazilian women's team to participate in the Games, despite the Australian team being ranked higher in the world ranking. When determining which bobsled teams will advance to the Olympic Games, the IOC uses a quota formula based upon world rankings and continental representation. In order to qualify for the Games from a continent that does not already have a representative, a bobsled team must have participated in five international competitions on three different tracks and be ranked among the top fifty for men or top forty for women. If no team from a continent can meet these qualifications, the continent will not have a representative. The IOC determined that, because Australia already had two men's teams competing, their continental representation had been met.

The two parties were divided about the meaning of one clause in the continental representation rule. The clause allows for one men's and one

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45. CAS arbitration N° OG 10/01; CAS arbitration N° OG 10/02.

women's team to be allowed to represent their continent, assuming they have met the other qualifications. The IOC argued that the rule was intended to provide a spot to either a men's bobsled team or a women's. The AOC argued that the wording of the rule required the continent to be represented by a team from both genders. CAS agreed with the AOC and ruled that the plain language of the rule required both a men's and women's team to represent each continent. There are several distinctions in the rules between the men's and women's events. This led CAS to determine that the two events were separate and, therefore, required a continental representative for each.

*Berger v. World Anti-Doping Auth.*<sup>46</sup>

Both the WADA and International Paralympic Committee (IPC) Anti-Doping Codes provide for a therapeutic use exemption (TUE) to prohibited substances. Decisions to allow or deny a TUE are made by a panel of experts from the IPC. In order to be granted a TUE, an applicant must show that the drug is needed to treat a legitimate medical condition and show that the drug will not have significant performance enhancing aspects. Berger, a fifty-two-year-old paraplegic shooter, challenged the IPC's decision to deny him a therapeutic use exemption for his heart medication Metoprolol.

The IPC in a decision supported by WADA found that, although Metoprolol is a legitimate drug for treating the heart conditions faced by Berger, its subsequent performance enhancing aspects could not justify the granting of a TUE. The panel found that the performance enhancing aspects were especially evident in the sport of shooting because of the drug's ability to decrease heart rate and heart rate variability, thus increasing accuracy. CAS confirmed the IPC panel's decision and dismissed the appeal.

*Devyatovskiy v. IOC; Tsikhan v. IOC*<sup>47</sup>

In August 2008 Devyatovskiy and Tsikhan competed in and medaled in the hammer throw competition at the 2008 Beijing Olympics. Following the competition, the athletes were subjected a drug test. Both tests showed excess testosterone in their blood streams in violation of anti-doping regulations, and their medals were stripped. Both men requested the lab test their B samples to ensure there had not been a false positive result. The B samples for each athlete produced a different ratio of testosterone than the A sample results. Both men challenged the validity of the tests, and each claimed that they had never used illegal supplemental testosterone. Each athlete had passed

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46. CAS 2009/A/1948.

47. CAS 2009/A/1752; CAS 2009/A/1753.

numerous drug tests in the past.

CAS upheld the appeals of both men and ruled that their medals should be returned to them. This ruling stemmed from the inability of the Beijing laboratory to replicate their results. The laboratory violated established custodial and sample analysis procedures. CAS stated that, if doping violations are to be considered a strict liability offense, then the labs that are carrying out the testing must be held to the same high standards. “[T]he rule-makers and the rule appliers must begin by being strict with themselves.”

CAS was quick to point out that this decision did not exonerate the athletes or prove that they did not commit a doping offense. Rather, this decision set forth the standards by which drug testers are to be held if there is to be any validity to the strict penalties set forth for doping violations.

*FC Sion v. FIFA*<sup>48</sup>

El-Hadary cancelled his contract with the African soccer team Al-Ahly SC. He claimed the team had promised to release him from his contract after the 2008 African Cup so that he could return to Europe to finish his career.

In January 2007, El-Hadary signed a contract with Al-Ahly SC, which extended through the 2009-10 season. According to El-Hadary, the team promised to release or transfer him to a European team so that he could finish his career in Europe. The team only requested that El-Hadary remain on their team until after the African Cup in January of 2008. After the African Cup El-Hadary and the Swiss team FC Sion made several attempts to get Al-Ahly SC to release the player or transfer him. Al-Ahly SC steadfastly refused release their rights to El-Hadary.

In February of 2008, El-Hadary gave notice to Al-Ahly SC that he was terminating his contract with the team. El-Hadary justified the termination on the basis that the team had broken its promise to allow him to return to Europe to finish his career. In March of 2008, FC Scion and the Swiss Football Association filed for a transfer that would allow El-Hadary to play for the Swiss team. In April, El-Hadary was granted a temporary transfer, but in June, Al-Ahly SC filed a formal complaint with FIFA against FC Sion alleging breach of contract and inducement of a player to break his contract.

The FIFA Dispute Resolution Chamber (DRC) found in favor of Al-Ahly SC and ordered FC Sion to pay a penalty of 900,000 Euros to Al-Ahly SC and suspended El-Hadary from play for four months. Both FC Sion and El-Hadary appealed this FIFA decision to CAS. CAS ruled against both FC Sion and the player. FC Sion had no legal position to appeal the decision of FIFA’s DRC.

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48. CAS 2009/A/1880.

FC Sion was a party to the FIFA decision and had no basis to appeal that decision to CAS. El-Hadary's four-month suspension was also upheld.

*FK Pobeda v. UEFA*<sup>49</sup>

FK Pobeda, a Macedonian soccer team, competed against FC Pyunik from Armenia in both a home and away leg in qualifying rounds for the UEFA Champions League tournament. Pobeda was defeated by Pyunik and eliminated from the tournament. Following up on various reports and rumors after the game, UEFA investigated the betting patterns involving the two games between Pobeda and Pyunik. The investigation uncovered substantial irregularities in the betting lines leading up to the match, as well as the timing and number of bets placed.

Upon conclusion of UEFA's investigation, its disciplinary committee found Pobeda guilty of gambling conspiracy and suspended the club from participation in any UEFA events for eight years. UEFA also banned the team's president and captain permanently. Pobeda filed an appeal to UEFA and was granted an appellate hearing. However, the counsel for Pobeda left in the middle of the hearing because they claimed they had not been given sufficient time to review recently submitted evidence. The hearing continued without them, and the appellate board confirmed the original UEFA ruling and charged Pobeda with the costs.

Pobeda appealed to CAS seeking to have both the disciplinary and financial penalties overturned. Calling gambling conspiracy "one of the worst possible infringements of the integrity of sports," CAS upheld both the decision to suspend the team for eight years and the president for life. However, CAS set aside the decision to permanently ban the team's captain because the team's president had been in control of the plot from the beginning and the captain feared he would lose his job if he challenged the president's decision.

*Irish Football Ass'n v. Football Ass'n of Ireland*<sup>50</sup>

The controversy in this case centered around the attempt of Daniel Kearns to switch his national team designation from Northern Ireland (IFA) to the Republic of Ireland (FAI). Kearns was born in Northern Ireland but was a dual citizen of both Ireland and Britain. Kearns had appeared on international teams for Northern Ireland before but only as a teenager and never at the "A" international level. In August 2009, Kearns filed an application to FIFA to

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49. CAS 2009/A/1920.

50. CAS 2010/A/2071.

change association from the IFA to FAI. This decision was irreversible.

The IFA appealed this transfer to FIFA's Players' Status Committee (PSC). The PSC judge found that, because Kearns had dual nationality and had not played at the "A" international level for the IFA, the transfer should be allowed. The IFA then appealed the PSC decision to CAS.

Prior to 1950, there was much confusion and controversy regarding the IFA and FAI as both claimed to be the governing body of football in Ireland, fielded teams with the name "Ireland," and selected players from anywhere in Ireland. In 1950, FIFA enacted a new policy that forbade the two associations from selecting a player that had no connection to its respective territory. The IFA claims that under this policy Kearns was not eligible to play for FAI because he was not born in the Republic of Ireland nor were his parents or grandparents. The FAI disagreed as to the extent of the 1950 FIFA policy and claimed that it is not an absolute bar to selecting a player from the opposing side of the island. FIFA agreed with the FAI and petitioned CAS to reject the appeal.

CAS found that the 1950 FIFA policy was no more than an attempted agreement between two contentious sides with contentious political underpinnings. In short, the policy did not have the full rule of law. Because of this finding and the facts submitted by the PSC judge, CAS dismissed the appeal.

*Jones v. Commonwealth Games Fed'n*<sup>51</sup>

This case was decided by the ad hoc division of CAS at the 2010 Commonwealth Games in New Delhi. Jones was ranked seventeenth in the world in the sport of lawn bowling and was told in February 2010 that he would be representing Norfolk in the singles bowling event at the Commonwealth Games. Jones had lived on Norfolk Island since 2001. Jones held a General Entry Permit obtained in 2006 under a 1980 Norfolk immigration law. Prior to that, he lived in Norfolk under a Temporary Entry Permit. Generally, when a country participating in the Commonwealth Games does not have specific rules regarding citizenship, five consecutive years of permanent residence in the country shall suffice. However, Norfolk does have laws concerning how a foreigner can become a citizen. These laws require the person to have held a General Entry Permit for at least five years.

After filing his eligibility form for the Games, Jones was told that he was ineligible to participate in the Games because he was not a "citizen or subject" of Norfolk. Because he had only held a General Entry Permit for four years,

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51. N° CG2010/01.

he was not considered a citizen of Norfolk and therefore could not compete in the Games. Jones appealed before the Norfolk Supreme Court, asking the Court declare him a citizen, but the Court refused to hear the case, ruling that CAS held exclusive jurisdiction over the disagreement.

Jones then appealed to CAS the day before the Commonwealth Games began. Although noting “considerable sympathy” for Jones, CAS decided that, under the technical rules of the Games, he was not eligible to compete.

*Kenya Football Fed’n v. FIFA*<sup>52</sup>

The Kenyan Football Federation (KFF) was suspended in 2006 for interference in government soccer operations. FIFA conditionally lifted the ban in 2007 on the provision that the KFF follow certain FIFA guidelines for normalizing soccer operations in the country. During the suspension period, two separate groups claimed to be the governing body for the nation’s football team. A few weeks after the suspension was conditionally lifted, each group began conducting business as the country’s governing body. Each group enacted rules and hired coaches and players. One group, in a formal hearing before FIFA, elected its board members and dissolved the KFF. The new group that was formed—Kenya Football Limited (KFL)—was recognized both by FIFA and the Kenyan government as the bona fide governing body of Kenyan football.

The now dissolved KFF brought this dispute before CAS to determine which party was controlling. Article 10 of the FIFA statutes expressly provide that only one governing body may be recognized by FIFA in each country but does not outline the process by which FIFA should select that governing body. The KFF claimed that FIFA did not validly expel them and, therefore, the succession of KFL was not legally valid. FIFA argued that it was not expelling the KFF as a member and, therefore, did not have to follow the expulsion guidelines. Rather, they were simply following their own procedure by following the rule in Article 10 and determining which governing body would be internationally recognized. CAS agreed with FIFA on this issue, which made the KFF’s second claim of illegal succession void. CAS dismissed this and all further appeals and upheld FIFA’s decision to recognize KFL as the bona fide governing body of Kenyan football.

*Oliveira v. USADA*<sup>53</sup>

Oliveira was born in Brazil and moved to the United States in 1997. She

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52. CAS 2009/O/1808.

53. CAS 2010/A/2107.

began competitive cycling in 2006 and joined her first professional team in 2008. Oliveira battled severe allergies her entire life, and the medication that she took for her allergies left her drowsy. To combat this fatigue side effect, Oliveira began taking a supplement called Hyperdrive, which she purchased online.

In June 2009, Oliveira competed in a professional event in Italy and was selected for random doping controls after the race. This was the first time in her professional career that Oliveira had to submit to a doping test. In early July, Oliveira competed in two events and was selected for a doping test each time. She testified that she was not taking Hyperdrive during the second set of tests, due to her supply of the pills running out. In late July it was revealed that Oliveira had tested positive for the banned substance Oxilofrine after her June race. The doping tests conducted in early July did not show any banned substances.

In September, Oliveira rejected USADA's two year suspension and appealed before the American Arbitration Association. The arbitrator in that case agreed with USADA and upheld the maximum two-year suspension. Unhappy with this result, Oliveira appealed the decision before the CAS in April 2010.

Oliveira's argument in the case centered around the fact that she had no intent to commit a doping violation. The prohibited substance was not listed on the packaging of Hyperdrive as one of the ingredients. Oliveira argued that, because of her limited experience in competitive cycling, she was not exposed to a wide range of doping education and did not know of the techniques required to keep banned substances from entering the body, such as thoroughly examining the manufacturer's website. She claimed that a two-year suspension was too harsh because of her lack of experience and education.

USADA countered by pointing out that the anti-doping rules explicitly state that it is the sole responsibility of each athlete to ensure that no prohibited substances enter her body. If an athlete is unsure of the ingredients in a supplement, she should refrain from taking it.

The CAS sympathized with Oliveira's position, set aside the decision of the AAA arbitration, and reduced her sentence from two years down to eighteen months. The arbitrators found that Oliveira did not have the intent to take a banned substance for the purpose of improving on-track performance. In addition, she had taken reasonable steps to check the ingredients listed on the label against the list of banned substances produced by USADA.

*Pechstein v. Deutscher Olympischer Sportbund*<sup>54</sup>

Claudia Pechstein challenged the German Olympic Committee's (DOS's) decision not to include her in the Vancouver Olympic Games because of a doping violation in 2009. Pechstein was found guilty of illegal blood doping, had medals and event times rescinded, and was declared ineligible for a period of two years by WADA. CAS dismissed her appeal of this decision. Pechstein claimed that she had new medical evidence that would exonerate her, but a hearing was not scheduled in time for the Olympics. Calling it a "desperate attempt" by Pechstein to subvert the anti-doping rules, CAS dismissed the case, claiming it did not have jurisdiction to hear the issue in its ad hoc division because this was not a controversy regarding a decision made by an Olympic committee regarding the Olympic Games. CAS went on further to say that, even if it did have the jurisdiction to hear this case, it still did not have the power to overturn a suspension levied by WADA for a doping violation.

*Virgin Island Olympic Comm. v. Int'l Olympic Comm.*<sup>55</sup>

The qualification rules for Olympic skeleton set out the guidelines for determining which athletes will compete in the Olympic Games. These rules are in place to determine the top thirty men and the top twenty women. Only twenty-eight men worldwide could fulfill the qualification requirements—leaving two empty positions for the Games. Alexa Putnam was the highest ranked woman who failed to make the top twenty and qualify for the Games. She petitioned CAS after the IOC would not allow herself and the next highest ranked woman to fill the two vacant men's positions.

The IOC has procedures in place for allocating unused quota positions but only those that are the same gender. The IOC argued that men's and women's skeleton are separate events and that a team from one gender cannot fill an unused quota spot from another gender. CAS agreed with the IOC and did not allow the additional women. Men's and women's skeleton have slightly different rules and qualifying procedures; they are separate races with separate winners. CAS ruled that the qualifying procedures were in place to determine the top thirty men and top twenty women, not the top fifty overall skeleton athletes.

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54. CAS arbitration N° OG 10/04.

55. CAS arbitration N° OG 10/03.

*WADA v. Cyprus Football Ass'n; FIFA v. Cyprus Football Ass'n*<sup>56</sup>

The two appeals in this case were joined by CAS and examined together but decided separately. Marques, Medieros, and several other members of the Cypress football team APOP Kinyras were found guilty of a doping violation when the substance Oxymesterone was found in their systems during a doping test conducted after a match. The players claimed they had never taken any steroids or banned substances and their positive test was a result of pills they took before the game that were given to them by their coach. It was common practice for Coach Eranosian to hand out two white round pills to starters about an hour before games. The players were told the pills contained caffeine and vitamins. The pills were distributed from a container that had no markings on it or description of what was contained in the “vitamins.” The players were free to refuse to take the pills, and several players did refuse. Before a big game in November 2008, the coach handed out slightly different pills—this time they were brown and cylindrical. Trusting their coach, the players took the pills assuming they were the same vitamin pills they had taken before, which had not triggered a positive doping test. The players claimed their positive tests were a result of the ingestion of this new pill through no fault of their own.

Coach Eranosian was forthcoming and cooperative during the investigation and revealed he had given the players a banned substance. As a result of his cooperation, he was banned for only two years from involvement in professional soccer. The cases against Marques and Medieros’ teammates were dropped, but Marques and Medieros were still suspended because their positive tests had occurred before the coach switched the pills. However, FIFA’s Judicial Committee decided that, because of the extraordinary cooperation of all the parties in the case, it was appropriate to reduce the players’ suspension by half to a single year.

WADA and FIFA appealed the reduction of the sentence to CAS. They argued that level of cooperation in an investigation is not grounds for reduction of a sentence. The only way an athlete may have a mandatory two-year sentence reduced is if they are found to have no fault or negligence in the ingestion of the banned substance. Because the players made no attempt to find out what was in the pills they were taking, they were significantly at fault for the positive doping test. They petitioned CAS to extend the players’ suspensions to two years and to suspend Coach Eranosian anywhere from two years to life.

The decision by CAS centered around the element of intent. Because the

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56. CAS 2009/A/1817; CAS 2009/A/1844.

players did not intend to take a banned substance, a reduction of their suspension was appropriate. Because Eranosian intentionally distributed banned substances to his players before games and did so through misrepresentation, his offense was considered more serious. CAS extended Eranosian's suspension to four years.

*WADA v. Hardy*<sup>57</sup>

U.S. swimmer Jessica Hardy was suspended in 2008 for a doping violation. During Olympic trials in the summer of 2008, Hardy was given an on-site doping test. The test returned a positive result for the banned substance Clenbuterol. Hardy's B sample confirmed the result. The United States Anti Doping Association (USADA) ruled that a doping violation had occurred and submitted the case to the AAA per USADA procedure. Under USADA rules, an athlete shall be suspended for two years following a doping violation if the violation was intentional or the result of significant negligence. Hardy claimed that the prohibited substance was an ingredient in an AdvoCare supplement that she was taking and was not an intentional effort to gain performance enhancing qualities. The AAA panel agreed that Hardy's negligence was not significant in this case and reduced her suspension to one year.

WADA appealed the reduced sentence to CAS, claiming Hardy should be suspended the full two years. WADA argued that Hardy's negligence had in fact been significant and there was nothing "truly exceptional" about her case to warrant a reduced suspension. Top level athletes are expected to be especially vigilant when taking any type of substance and trusting a coach or a sponsor is not a valid excuse for a positive doping test. CAS upheld the decision of the AAA panel to reduce the suspension. Hardy had personal conversations with AdvoCare about the ingredients in their supplements but was assured that their supplements were tested by an independent company and would not trigger a positive doping test. In addition, Hardy consulted with her coach, the team nutritionist, and a USOC official. CAS ruled that Hardy had taken reasonable steps to ensure that she was not taking a banned substance and that she was not significantly at fault for the positive test.

CRIMINAL LAW

Members of the sports industry are not immune from criminal liability, and the media often highlights such criminal activity. Although few criminal laws directly implicate sports, the crimes committed by athletes, coaches, and

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57. CAS 2009/A/1870.

anyone else in the sports world are treated the same as the crimes committed by any other member of society and do have an effect on sports. The following cases demonstrate some of the criminal prosecutions related to sports or of someone within the sports industry.

*Heike v. Guevara*<sup>58</sup>

In *Heike v. Guevara*, the United States District Court for the Eastern District of Michigan granted a coach's motion to dismiss a former player's defamation claim based on her dismissal from Central Michigan University's (CMU) women's basketball program.

The player, Brooke Heike, was awarded a renewable athletic scholarship to play women's basketball for CMU beginning with the 2006-07 academic year. Prior to her second season, the defendant, Sue Guevara, was hired to coach the CMU women's basketball team. Heike alleged that the Coach subjected her to unwelcome harassment and discipline throughout the season. By March of the 2008 season, Coach Guevara told the plaintiff that she was not her "type" of player and that Heike would be losing her athletic scholarship. Heike appealed the school's decision to not renew her scholarship, and Coach Guevara prepared a statement explaining her decision to remove Heike from the team. She stated that the plaintiff failed to understand basketball concepts, never appeared to strike for success, and appeared to be very satisfied with her deficiencies. Heike argued that Guevara's statements were defamatory and caused her the economic loss of her scholarship and that she suffered reputational damage because she was unable to obtain an athletic scholarship from any other school.

Coach Guevara moved to have the plaintiff's defamation claim dismissed for failure to state a claim. She also argued that Michigan law provides a complete defense to a claim for defamation when the statements are published at the invitation or with consent of the plaintiff. The court held that Heike gave her coach implied consent to evaluate her performance by accepting her one-year renewable scholarship. The court also found that Heike's appeal was effectively a request for Coach Guevara to explain the reasons for not renewing plaintiff's scholarship. Therefore, the defamation claims against the coach were dismissed with prejudice.

*United States v. Bonds*<sup>59</sup>

In *Bonds*, the Ninth Circuit affirmed the District Court's evidentiary ruling

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58. 2010 U.S. Dist. LEXIS 103435 (E.D. Mich. 2010).

59. 608 F.3d 495 (9th Cir. 2010).

that excluded key evidence in the government's prosecution of Barry Bonds for perjury.

The plaintiff, Barry Bonds, was accused of perjury for swearing under oath that he had not taken performance enhancing drugs. In order to prove its claim against Bonds, the government was required to prove that the test samples it seized from BALCO actually came from Bonds. The government attempted to verify the samples with the testimony of Greg Anderson, the trainer who administered the test. However, Anderson refused to testify and was jailed for contempt of court. As a result, the government attempted to submit the testimony of another BALCO employee, James Valente, to testify that Anderson had brought the samples to the lab and said they were from Barry Bonds. The District Court held that this was inadmissible hearsay. The government then attempted to submit BALCO's log sheets, which recorded the result of the tests under Bonds' name, but this was also found to be hearsay.

On appeal, the government argued that the statements were admissible as statements by an agent, statements authorized by a party, or under the residual exception. The government also argued that the log sheets were also admissible under the same exceptions. The court held that (1) the district court properly excluded the testimony of Greg Anderson based on his record of untrustworthiness, (2) the government failed to show that Anderson's statements were authorized by Bonds, (3) there was sufficient evidence to establish that Anderson was an independent contractor of BALCO rather than an employee, and (4) the district court did not abuse its discretion in refusing to admit the BALCO log sheets.

*United States v. Broxmeyer*<sup>60</sup>

In *Broxmeyer*, the Second Circuit reversed the lower court's finding that a field hockey coach's relationship with a seventeen-year-old player supported a conviction for production of child pornography. The court also reversed the coach's conviction for transportation of a minor across state lines with intent to engage in sexual activity.

The two counts against Broxmeyer, a thirty-seven-year-old field hockey coach, for child pornography arose from two photos that the girl took of herself and "sexted" to the defendant. In order to support a conviction, the government was required to prove that (1) the victim was less than eighteen-years old, (2) the defendant induced the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction, and (3) the visual

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60. 2010 U.S. App. LEXIS 16032 (2d Cir. 2010).

depiction had been transported in interstate or foreign commerce. Broxmeyer did not challenge the first or third elements because the victim was seventeen and because the phone used to take the pictures was produced in South Korea. The Second Circuit agreed with Broxmeyer and reversed the conviction because it could not be proven beyond a reasonable doubt that the two pictures in question were a result of Broxmeyer's inducement.

He was also convicted of transporting a minor across state lines with intent to engage in sexual activity when he drove a fifteen-year-old player home from New York to Pennsylvania. Before leaving New York, Broxmeyer induced the girl into performing oral sex. To support their claim, the government was required to prove that the defendant (1) knowingly transported a minor across state lines, (2) with intent to engage in sexual activity with the minor, and (3) the minor was under the age of eighteen. The Second Circuit reversed the lower court's conviction of Broxmeyer because the unlawful sexual act occurred in New York, before crossing into Pennsylvania, and there was no intent to commit a sexual act when the state line was crossed. Therefore, the Second Circuit reversed Broxmeyer's convictions for production of child pornography and transportation of a minor across state lines, affirmed his convictions for attempted production of child pornography and possession of child pornography, and remanded the case for re-sentencing.

*United States v. Johnson*<sup>61</sup>

In *United States v. Johnson*, the district court reversed the conviction of a weight lifting coach for eight counts of sexual exploitation of a minor in violation of federal statute.

Scott Johnson was a weightlifting coach at St. John's Healthtracks, a specialized facility for young athletes. He was charged with persuading a minor to engage in sexually explicit conduct for the purpose of visual depiction by telling female athletes to go into an examination room, disrobe, and weigh themselves, unaware that Johnson had set up a hidden video camera in the room. In order to prove a violation under section 2251(a), the government was required to prove that Johnson actually induced the women to engage in "sexually explicit conduct." The district court considered a number of factors to determine if Johnson's visual depictions met the category of "lascivious exhibition of the genitals or pubic area." Based on the substance of the video images obtained from Johnson, which were not sexually graphic, the court found that the federal statute could not apply to Johnson's conduct

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61. 2010 U.S. Dist. LEXIS 57925 (E.D. Mo. 2010).

because the statute was intended to punish more aggressive conduct. However, the court noted that Johnson's conduct would likely be found to violate state invasion of privacy laws and federal laws prohibiting video voyeurism.

*United States. v. Thomas*<sup>62</sup>

Tammy Thomas, a former professional cyclist, was found guilty of three charges of perjury and one charge of obstruction of justice stemming from statements she made to a grand jury in 2003. During USADA's BALCO investigation of 2003, Thomas was called before the grand jury and given immunity in exchange for her testimony linking a Greek track coach, Patrick Arnold, with the BALCO conspiracy. Thomas' immunity stated that her testimony would not be used against her in future proceedings as long as it was truthful. Thomas denied ever receiving or taking any supplements or steroids from Arnold. Partially because of Thomas' testimony, Arnold was not indicted by the grand jury.

In 2005, another grand jury investigated Arnold, and this time handed down three separate indictments. As part of his plea deal, Arnold testified against Thomas to a third grand jury in 2006. Arnold testified that he had given anabolic steroids to Thomas personally and knew that she had used them for competitions. Thomas was sentenced to five years probation and six months monitored home confinement. Thomas appealed the obstruction of justice verdict to the circuit court.

The Ninth Circuit confirmed the lower court's ruling, finding that Thomas had indeed made statements that delayed the proper administration of justice and the statements were made with that intent.

DISABILITY LAW

*Brown v. County of Nassau*<sup>63</sup>

This is a suit under Section II of the Americans with Disabilities Act (ADA), where Christopher Brown alleged the home of the New York Islanders, Nassau Coliseum (the Coliseum), is not readily accessible to disabled people.

To allege an ADA violation, the plaintiff must show he is a qualified disabled individual; the venue is a public entity; and the plaintiff was denied the opportunity to benefit from the venue's services. Here, Brown suffered

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62. 612 F.3d 1107 (9th Cir. July 22, 2010).

63. No. 07-CV-4811 (JFB)(ETB), 2010 WL 3487256 (E.D.N.Y. Sept. 3, 2010).

from arthrogyposis, which causes him to be confined to a wheelchair, and the Coliseum is owned by Nassau County, New York; therefore, the only issue is whether Brown was denied the benefit of the Coliseum due to his disability. Both parties moved for summary judgment. Brown's motion alleges several reasons why he could not benefit from the venue. First, he alleges he could not find a handicap parking spot. Second, he had trouble accessing the arena. Third, he could not use the bathrooms outside the area, and the indoor stalls are too narrow. Fourth, he had trouble accessing the ticket window. Fifth, he had trouble accessing the elevator. Moreover, Brown brought forth an expert report that said the Coliseum deviated from ADA guidelines. Nassau County's motion alleged that Brown's complaints are not sufficient for an ADA violation.

Ultimately, the court denied both motions for summary judgment because issues of fact exist. For Brown's motion, the court said that a reasonable person may view his evidence differently and conclude that an individual in a wheelchair can access the stadium and its utilities without difficulty. For Nassau County's motion, the court said that Brown brought forth enough showing that the Coliseum is not readily accessible to disabled individuals to create an issue of fact for a jury.

*Greer v. Richardson Independent Sch. Dist.*<sup>64</sup>

In *Greer*, the United States District Court of the Northern District of Texas granted, in part, defendant's motion for summary judgment, finding that defendant's football stadium did not violate the ADA, nor the Rehabilitation Act. Concurrently, the court granted, in part, plaintiff's motion for summary judgment, finding that alterations made to the surrounding facility did violate the ADA and the Rehabilitation Act.

Plaintiff Leslie Greer, who uses a wheelchair, attended her son's junior varsity football game at Berkner High School. The stadium in which the game was held had no accessible handicapped seating in its bleachers, so Greer watched the game from a concrete walkway in front of the bleachers. Greer filed a discrimination claim under Title II of the ADA and Section 794 of the Rehabilitation Act. The court applied the same standard to both claims.

Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the service, programs, or activities of a public entity, or be subjected to discrimination by any such entity." However, a less stringent requirement exists for facilities that were in existence at the time of the ADA's

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64. 3:08-CV-160-M, 2010 WL 3025530 (N.D. Tex. 2010).

enactment in 1992. Under this less stringent requirement, public entities must “operate each service program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” Because the facility at issue was comprised of pre-ADA elements, as well as post-ADA elements, the court conducted two analyses. Under the first, the court found that the football stadium, built in 1968, survived ADA scrutiny, even though it did not meet ADA Accessibility Guidelines (“ADAAG”). As a result, Greer failed to present a prima facie case. Under the second, the court found that a ramp, recently built outside the stadium, failed to meet ADAAG and thus violated Title II of the ADA.

#### DRUG TESTING ISSUES

##### *Bourgeois v. La. State Racing Comm’n.*<sup>65</sup>

Two horse trainers appealed a judgment by the Louisiana State Racing Commission that punished them for giving their horses Fluphenazine, a horse tranquilizer. On appeal, the court laid out the standard for reversal of an agency decision. The court said that a decision will be reversed if the appellant has been prejudiced because the findings are (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error or of law; (5) arbitrary or capricious; or (6) not supported by a preponderance of the evidence.

The appellate court said the facts were not disputed and the preponderance of the evidence supporting the Commission’s decision was unequivocal. Therefore, the court concluded that the record showed that the post-race test results were positive for Fluphenazine, the trainers knew of the administration of the tranquilizer, and, as a matter of law, the trainers are the absolute ensures of the condition of the horses. Based on those undisputed facts, the court affirmed the Commission’s ruling.

##### *United States v. Comprehensive Drug Testing, Inc.*<sup>66</sup>

In 2002, the federal government began an investigation into the Bay Area Lab Cooperative (BALCO). The same year, Major League Baseball (MLB) and the Players Association entered into a collective bargaining agreement that provided for suspicionless drug testing for all players. During the

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65. No. 2010-CA-0573, 2010 La. App. LEXIS 1571 (La. Ct. App. Nov. 12, 2010).

66. Nos. 05-10067, 05-15006, 05-55354, 2010 WL 3529247 (9th Cir. Sept. 13, 2010).

investigation, federal authorities discovered that ten MLB players tested positive during the drug testing. The government secured a subpoena seeking all drug testing records, specimens, and urine samples. The drug testing company and Players Association brought an action to have the seized property returned. The district court ordered the property returned, and the federal government appealed.

The court concluded that the district court did not abuse its discretion by ordering the property returned. The district court correctly balanced that the risk to the players by disclosing the results outweighed the benefit of keeping the records. Moreover, the court affirmed the return of the records because the United States had obtained the evidence by circumventing the search warrant. Therefore, when it is determined that the government has obtained evidence through intentional wrongdoing, it should return the property.

#### DISCRIMINATION LAW

##### *Hayes v. Delaware State University*<sup>67</sup>

In *Hayes v. Delaware State University*, the United States District Court for the District of Delaware granted Defendant's motion to dismiss in part and denied it in part, finding that, although some of Plaintiff's claims were time-barred, most were not.

On July 1, 2001, Plaintiff, an African-American woman, began employment with Delaware State University as Head Women's Track Coach and Senior Woman Administrator (SWA) in the Athletics Department pursuant to a one-year contract. At the end of the one-year contract, Plaintiff and the institutional defendant entered into a three-year contract. In 2005, Defendant announced that Plaintiff was promoted to Associate Athletics Director; however, a new contract was not provided. Subsequent to that announcement, the University hired a male Senior Associate Athletics Director and a male Associate Athletics Director. These new hires removed and demoted other senior female staff members, eliminated the SWA assistant position, and removed job responsibilities from Plaintiff. As the year progressed, Plaintiff noticed that the new hires treated women differently than men, and her own relationship with them became increasingly abusive. On April 24, 2006, Plaintiff took four days of medical leave from work due to stress and high blood pressure. On April 27, 2006, Plaintiff was placed on administrative leave due to an allegation that she had coerced a student athlete to transfer to another university. On May 8, 2006, Plaintiff was fired for

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67. 2010 WL 2990165 (D. Del. July 29, 2010).

“nothing in particular.” Plaintiff filed suit, accusing Defendant of sex discrimination, gender harassment, maintaining a hostile work environment, and retaliation, all under Title VII.

At issue was whether Plaintiff’s allegations were time-barred and whether the complained-of acts were part of an ongoing violation or constituted discrete discriminatory acts. Under Title VII, a plaintiff must file a charge within 180 days of the complained-of-conduct. Here, Plaintiff’s complaint was filed January 17, 2007, making claims based on events before March 23, 2006 invalid.

Defendants contended that many of Plaintiff’s allegations involved “discrete” acts that occurred before March 23, 2006 and should have been dismissed. Plaintiff alleged that the discrete acts were components of her hostile work environment claim. In a hostile work environment claim, so long as one act making up the hostile environment occurred within the applicable statutory period, the claim is timely. However, this does not apply to discriminatory or retaliatory acts.

The Supreme Court has enunciated several discrete acts: termination; failure to promote; denial of transfer; and refusal to hire. Here, Plaintiff’s termination was a discrete act, which was subject to the time bar. In contrast, the reduction in Plaintiff’s duties, the elimination of her assistant, and the removal from travel activities were not discrete acts but make up part of the hostile work environment claim.

To determine whether a hostile work environment exists, the Third Circuit has enunciated a two-part test. First, a plaintiff must demonstrate that at least one act occurred within the filing period. Second, it must be determined whether the harassment is something more than an isolated occurrence or sporadic acts of intentional discrimination. Here, Plaintiff had successfully shown that at least one part of her claim fell within the statute of limitations period, thus fulfilling the first step of the Third Circuit’s test. As for step two of the test, Plaintiff sufficiently painted a picture of a pervasive atmosphere of discriminatory intimidation towards women and thus presented a valid claim for hostile work environment.

Under Title VII, it is unlawful for employers to discriminate against any of its employees because that employee has opposed any unlawful practice under 42 U.S.C. § 2000e-3(a). Here, Plaintiff alleged six acts by Defendants that were retaliatory in nature. Two were at issue here—Plaintiff’s false accusations claim and unlawful termination claim.

False accusation is a discrete act and is thus subject to the statute of limitations. Therefore, Plaintiff’s allegations involving conduct prior to March 23, 2006 were time-barred, while those occurring after are not. Termination is

also a discrete act subject to the statute of limitations. However, because Plaintiff's firing occurred after March 23, 2006, it was not time-barred.

*Lanier v. Clovis Unified School District*<sup>68</sup>

In *Lanier*, the United States District Court for the Eastern District of California granted Defendants' motion to dismiss Plaintiff's federal claims for failure to state a claim. It also dismissed Plaintiff's state claims, denying supplemental jurisdiction over them.

Plaintiff was an African-American male who owned and operated a sports officiating service. Since 2004, he had been attempting, without success, to obtain an officiating contract with defendant Clovis Unified School District (CUSD). In 2005, he received accreditation from the California Interscholastic Federation, allowing him to submit business proposals to CUSD. Despite this, CUSD continually denied Plaintiff's proposals. Plaintiff alleged that, in 2008, Dennis Lindsey, a CUSD employee with the authority to approve contracts, used a racial slur after a review of Plaintiff's proposal. Further, CUSD began awarding their officiating contracts to a white "insider." Plaintiff filed suit, alleging four claims for relief based on federal civil rights law: Section 1981; Section 1983; Section 1985; and Section 1986. Plaintiff's fifth claim was a collection of pendant state claims alleged against Defendants school board members. Defendant responded by filing a motion to dismiss.

To withstand a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must set forth factual allegations sufficient "to raise a right to relief above the speculative level." Plaintiff's first claim for relief alleges discriminatory treatment in contracting in violation of Section 1981. To establish a *prima facie* case for discrimination in commercial contracting, a plaintiff must show that (1) he was a member of a protected class; (2) the plaintiff attempted to contract for certain services; and (3) the plaintiff was denied the right to contract for those services. Here, due to a time bar, discriminatory actions occurring prior to October 8, 2007 were not actionable. Because Plaintiff did not submit a proposal after that date, he was never denied the right to contract. Thus, his Section 1981 claim was dismissed.

Because of the time bar, Plaintiff's Section 1983 only pertained to racially based discrimination that occurred after October 8, 2007. Because Plaintiff had not offered any evidence showing racially biased conduct during that time period, his Section 1983 claim was dismissed as well.

To state a conspiracy claim under Section 1985, a plaintiff must show (1)

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68. 2010 WL 3733953 (E.D. Cal. Sept. 20, 2010).

an agreement or meeting of the minds by the defendants to deprive him of his constitutional rights; (2) a causal relationship between the alleged acts done in furtherance of the conspiracy and his resulting injury; (3) a deprivation of rights under Section 1983 on which the conspiracy claim is predicated; and (4) some racial or class-based invidious discrimination. Here, Plaintiff's allegations supporting his Section 1985 claim were the same as his Section 1983 claim. Because his Section 1983 claim was denied, he was precluded from bringing a Section 1985 claim.

A federal court may decline to exercise supplemental jurisdiction over state claims for several reasons. Here, the court found that the values of judicial economy, convenience, fairness, and comity would be served if all state claims were litigated in state court. Thus, Plaintiff's state claims were dismissed. Plaintiff's Section 1986 claim was time-barred.

*Robinson v. Hicks*<sup>69</sup>

In *Robinson*, the United States District Court for the Middle District of Pennsylvania recommended that Defendant's motion for summary judgment be granted, finding that Plaintiffs were unable to demonstrate facts showing that Defendants had an ingrained propensity to racially discriminate or that there was an intent to discriminate here on the basis of race.

Plaintiffs Angela Robinson and Johnny Robinson had a son, J.R., who was a member of the Harrisburg Soccer Club (HSC). Between the fall of 2006 and the summer of 2007, Angela began calling the president of HSC to report various criticisms she had of the league. As the calls became more frequent and more trivial, the president told Angela to direct calls to the league's coordinator. When the league did little to address her concerns, Angela called Tina King, a supervisor for the Department of Parks and Recreation for the City of Harrisburg. King suggested that the Robinsons could participate in another league if they wished. In August of 2007, the Robinsons were suspended from participation in HSC for one year for a series of actions, which included using profanity at staff and children. The Robinsons appealed to the Director of the Eastern Pennsylvania Youth Soccer Association (EPYSA); however, the suspension was not only upheld but increased to two years, when the Robinsons behavior at the appeals hearing turned aggressive. The Robinsons responded by filing suit, claiming racial discrimination and due process claims pursuant to Sections 1981 and 1983.

Section 1983 imposes civil liability upon any person who, under color of state law, deprives someone of the rights, privileges, or immunities secured by

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69. 2010 U.S. Dist. LEXIS 140837 (M.D. Penn, Dec. 2, 2010).

the federal Constitution or the laws of the United States. It is not itself a source of substantive rights but merely provides a method for vindicating federal rights elsewhere conferred. A public entity may be held liable for a violation of a constitutional rights under Section 1983 only when the alleged unconstitutional action executes or implements policy or a decision officially adopted by those whose acts may fairly be said to represent official policy. Here, the plaintiffs did not demonstrate a widespread racial animus in the operation or management of the soccer program. Consequently, summary judgment in favor of the defendants was appropriate on Plaintiffs' Section 1983 claim.

To state a Section 1981 claim, a plaintiff must generally demonstrate (1) that he belongs to a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in the statute, including the right to make and enforce contracts. Here, as African-Americans, plaintiffs Johnny Robinson and J.R. satisfied the first element. To meet the second prong, Plaintiffs must allege facts that establish that their suspension from the soccer program was an act of intentional racial discrimination or would support an inference to that effect. Here, Defendants were able to support their decision to suspend Plaintiffs by referencing numerous statements and actions upon which the ban was based. Further, Plaintiffs did not put forth evidence that the league had a history of banning other racial minorities or that their behavior attributed to them should not have resulted in suspension. Therefore, they are unable to satisfy the second prong and unable to establish a prima facie case under Section 1981.

#### EMPLOYMENT LAW

Employment law is a large body of law, composed of federal and state statutes, administrative regulations, and judicial decisions, that govern the employer-employee relationship. Specific issues in employment law include employment discrimination, workplace safety, and workers' compensation, among others. Athletes, coaches, and other employees of teams, leagues, or sports entities often use employment law to protect themselves. Below are some cases that demonstrate the issues associated with employment law in the sports industry.

#### *Cincinnati Bengals v. Khalid Abdullah*<sup>70</sup>

In *Cincinnati Bengals*, the United States District Court of the Southern District of Ohio vacated default judgments against Defendants and granted

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70. 2010 WL 1857270 (S.D. Ohio Apr. 28, 2010).

Defendant's motion to compel arbitration of Plaintiff's claims.

In 2008, Plaintiff filed a complaint against six of their former players, seeking an injunction barring them from them from filing for and receiving worker's compensation benefits in California. Plaintiff argued that, under the player contracts signed by Defendants, workers' compensation claims could only be sought in Ohio. The trial court agreed and granted Plaintiff a preliminary injunction. Several months later, the trial court entered default judgments against four of the six defendants. In August of 2009, Plaintiff amended complaint to add additional defendants. When this occurred, Defendants removed the case to federal court and filed three motions: (1) a motion to vacate default judgment; (2) a motion to compel arbitration; and (3) a motion to intervene by the National Football League Players Association.

Defendants argued that the default judgments should be vacated under Federal Rules of Civil Procedure 60(b)(1) and/or 60(b)(5). Under these rules, a court may set aside a judgment due to mistake, inadvertence, surprise, or excusable neglect or when applying the judgment prospectively is no longer equitable. They contend that the default judgments were made in error because they conflicted with California law, which provides that an employee's right to seek compensation benefits cannot be waived or preempted by federal labor law. They argued that the judgments were inequitable because they created an "intolerable friction" with orders entered by the California Workers' Compensation Appeals Board. Finally, they argued that the judgments should be set aside for inadvertence or excusable neglect because Defendants were ineffectually serviced. The district court, following the Sixth Circuit, agreed. According to the Sixth Circuit, when a default judgment "results from an honest mistake rather than willful misconduct, carelessness or negligence," Rule 60(b) must be applied especially liberally. To satisfy this Rule, the court must consider three equitable factors: (1) will plaintiff be prejudiced; (2) do defendants have a meritorious defense; and (3) did any culpable conduct by the defendants cause the defaults. Here, the district court found that Plaintiff's service was inadequate, that Plaintiff had not established any prejudice that would result from setting aside the judgments and that Defendants did have a meritorious defense.

As for the motion to compel arbitration, the district court found that, under the National Football League (NFL) Collective Bargaining Agreement (CBA), any contract dispute between the parties was to be submitted to final and binding arbitration. Plaintiff then cited Article IX, Section 2 of the CBA, which states that a grievance must be initiated within forty-five days from the date of the event giving rise to the grievance. However, because of Plaintiff's improper service, the district court ruled that forty-five day countdown did not begin until Defendants motioned to vacate the default judgments. Thus,

Defendant's motion was granted. As a result, Defendant's third motion was not considered.

*Grant v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*<sup>71</sup>

In *Grant*, the United States District Court of the Northern District of Georgia denied cross motions for summary judgment, finding that Defendant arbitrarily affirmed the denial of "line-of-duty" (LOD) benefits to Plaintiff. The case was then remanded for further consideration.

The Defendant Bert Bell/Pete Rozelle NFL Player Retirement Plan (Plan) is a retirement plan, governed by the Employee Retirement Income Security Act of 1974 (ERISA), which provides retirement, disability, and related benefits to eligible National Football League (NFL) players. Plaintiff Willie Grant is a former NFL player and a participant in the retirement plan. In 2008, Grant applied to receive LOD disability benefits, which are for players who have incurred "substantial disablement arising out of League football activities." A "substantial disablement" is a permanent disability as defined by the American Medical Association (AMA).

To evaluate Grant's LOD benefits claim, Defendant sent him to Dr. Terry L. Thompson. Dr. Thompson concluded that Grant did not suffer from a "substantial disablement" as defined by the AMA. The claim was thus denied. Grant then appealed to the Plan's Retirement Board. The Board is made up of six voting members. In the event of a stalemate with respect to a medical decision, the Board may submit the dispute to a Medical Advisory Physician (MAP), who is required to make a "final and binding determination." Shortly after submitting the appeal, Grant was evaluated by Dr. Glenn Perry, who found that Grant did qualify for the LOD benefits. With these conflicting medical reports, Defendant consulted a MAP. Dr. Bernard R. Bach, Jr. performed the controlling evaluation of Grant and also found Grant eligible for LOD benefits; however, he was asked to reevaluate his findings to ensure compliance with AMA guidelines. In his revised report, Bach commented that, although Grant would be credited with a substantial disablement in his elbow under AMA standards, that was not his opinion. The Board denied Grant's appeal. Grant petitioned the denial in federal court, as allowed under ERISA.

The Eleventh Circuit has established a six-step framework for use in judicially reviewing virtually all ERISA-plan benefit denials. Under the first step, the court is to apply the de novo standard to determine whether the claim administrator's benefits-denial decision is "wrong." If so, the court must then

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71. 2010 WL 3749197 (N.D. Ga. Sept. 21, 2010).

determine whether the administrator was vested with discretion in review claims. If not, the decisions must be reversed. If so, the court must then determine whether the decision was based on reasonable grounds. Here, the court found that the Board's decision was wrong. It has asked Dr. Bach to ensure that his report was consistent with AMA standards and then was willing to accept Dr. Bach's disregard of those standards. Because the Board does have discretion in interpreting and applying the terms of the Plan, the court moved to reasonability. The court found this decision to be an abuse of the Board's discretion because it failed to comply with the terms of the Plan. The claim was remanded back to the Board to conduct an evaluation that complied with the language of the Plan.

*Kommendant v. Diocese of Trenton*<sup>72</sup>

In *Kommendant*, the Appellate Division of the Superior Court of New Jersey affirmed the trial court's granting summary judgment for Defendants, finding no evidence of wrongful discharge, malicious prosecution, or abusive process.

Plaintiff is a former teacher and varsity girls' softball coach. In 2003, he complained to his school's athletic director about the disparity in treatment between the boys and girls athletic programs. In 2004, he filed a complaint with the Office of Civil Rights. The complaint was denied because the school was not a recipient of federal funding. In the time between these two complaints, Plaintiff entered into a conflict with the school's principal over a portable fence used for softball games. The fence was purchased by Plaintiff with funds raised by the team and was being stored at a player's home. When Plaintiff refused to return the fence to the school, the principal filed a police report. In late 2004, Plaintiff was fired. He returned the fence, plus \$359 that had been raised for the team. He also agreed to return six trophies after the team's end-of-season banquet. When only one trophy was returned, the principal filed another police report.

On June 13, 2005, Plaintiff was convicted on two counts of theft. On appeal the Law Division affirmed. On November 14, 2005, Plaintiff was indicted by a Grand Jury for third-degree theft by deception, over alleged misappropriated school funds. The trial resulted in a mistrial after the jury failed to reach a verdict. Plaintiff was subsequently acquitted, and the indictment was dismissed. On October 26, 2006, the Appellate Division of the Superior Court of New Jersey reversed the two convictions of theft.

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72 . 2010 WL 1526262 (N.J. Super. Ct. App. Div. Apr. 13, 2010).

Plaintiff subsequently filed a complaint against Defendants, claiming wrongful discharge, malicious prosecution, and abuse of process, among other things. The trial court granted a summary judgment motion in favor of Defendants. The Appellate Court affirmed. On the first count, the Appellate Court disagreed with the trial court's reasoning but found the conclusion to be correct. Plaintiff had claimed that he was being retaliated against because of his written complaint filed with the Office for Civil Rights; however, he failed to present any evidence establishing a causal connection between his filing of the complaint and the school's failure to renew his employment contract. Further, to prove a malicious prosecution claim, plaintiff must establish that "(1) a criminal action was instituted by [the] defendant against [the] plaintiff; (2) the action was motivated by malice; (3) there was an absence of probable cause to prosecute; and (4) the action was terminated favorably to the plaintiff." Here, a grand jury's indictment was prima facie evidence of probable cause. Thus, Plaintiff was unable to prove the elements of malicious prosecution. As for the abusive process claim, the parties attended a voluntary mediation. Plaintiff declined to resolve matter through this process. The trial court found nothing "coercive or oppressive" about this approach. The Appellate Court affirmed.

*Margarito v. State Athletic Commission*<sup>73</sup>

In *Margarito*, the California Second District Court of Appeals affirmed the State Athletic Commission's revocation of appellant's professional boxing license.

Appellant, Antonio Margarito, was licensed as a professional boxer in the state of California. In January 2009, he was scheduled to fight Shane Moseley in the welterweight championship. During a pre-match inspection, Commission inspectors found an illegal "knuckle pad" taped to one of Margarito's hands. Margarito's trainer was asked to rewrap the fighter's fists, this time utilizing a softer knuckle pad.

Several days after the fight, Margarito received a letter from the Commission informing him that he had violated Rule 323 of the Boxing Act, which limits the amount of tape and gauze that can be applied to a boxer's hand. He was also informed that, under Rule 390, the Commission may "revoke, fine, suspend or otherwise discipline any licensee who 'conducts himself . . . in a manner . . . to reflect discredit to boxing.'" As a result, his boxing license had been temporarily suspended until a final determination regarding the matter had been made. After an administrative hearing, in which

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73. 2010 WL 4010605 (Cal. App. Oct. 14, 2010).

Margarito's trainer admitted that the knuckle pads in question violated Commission rules, Margarito's license was revoked. During the hearing, Margarito argued that he could not be held liable for the conduct of his trainer; however, the Commission found that knowledge or intent was not required to find an infraction. Margarito responded by filing a writ of mandate, which was denied by the trial court. The trial court agreed that Rule 323 had been violated and that Rule 390 authorized a revocation of appellant's boxing license. Additionally, the court disagreed with Margarito's argument that he had not been made aware that a violation of Rule 323 was a strict liability crime.

On de novo review, the California Second District Court of Appeals affirmed the Commission's decision. According to the court, the Boxing Act granted the Commission sole jurisdiction over professional boxing in the state and authorized the Commission to adopt and amend rules and regulations "necessary to enable it to carry out the laws relating to boxing." Because courts afford great deference to administrative agencies in interpreting their own regulations, the relevant inquiry was whether the interpretation offered at the administrative hearing was reasonable. The absence of any language mentioning "guilty knowledge" as an element of a violation, plus the strong relationship between the interpretation and the Commission's statutory duty to "protect the public," were enough to confirm the reasonableness of the Commission's decision.

As for Margarito's due process argument, the court acknowledged that administrative agencies are not bound to strict rules of pleading. Because he was informed of the general substance of the charges brought against him and was afforded an opportunity to be heard, Margarito could not complain about a lack of due process.

#### GENDER EQUITY / EDUCATION LAW

Issues related to gender equity in sports implicate Title IX of the Education Amendments. Essentially, in the sports context, Title IX requires entities receiving federal funding to take steps to place female athletes on equal footing with male athletes by providing more opportunities to participate in athletics. Although it was passed over thirty-five years ago, Title IX issues continue to arise at both the high school and college levels. The following cases display Title IX's continued impact on athletic opportunities for females in the United States.

*Barrs v. Southern Conference*<sup>74</sup>

The Southern Conference brought a motion to dismiss based on a failure to state a claim after several past members of the Samford University softball team brought a Title IX action, alleging that, when the Conference reduced the number of teams advancing to the playoffs in a number of sports, it disproportionately affected female student athletes.

To be held liable under Title IX, a school must receive federal financial assistance. In its motion, the Conference argued that it is not subject to Title IX because the Conference does not directly receive federal assistance and it does not have enough control over its schools, which do receive assistance. The court denied the motion, holding that, under *Williams v. Bd. of Regents of Univ. Sys. Of Ga.*, 477 F.3d 1282 (11th Cir. 2007), an entity may be liable under Title IX if it indirectly receives federal funding.

*Biediger v. Quinnipiac University*<sup>75</sup>

Several former female Quinnipiac University athletes brought a Title IX suit against Quinnipiac University, alleging that the University violated Title IX after it eliminated the women's volleyball team, the men's golf team, and the men's outdoor track team but decided to add a varsity cheerleading team. A bench trial was held, which resulted in three holdings.

First, the court held that, as a matter of law, the University discriminated on the basis of sex by failing to provide equal athletic participation opportunities for women because cheerleading is not considered a sport for Title IX purposes. Second, the court held that the University cannot count runners who compete in cross-country, indoor track, and outdoor track three times under Title IX. Finally, the court held that the University violated Title IX by not offering equal participation requirements for women.

With regard to the court's gender discrimination holding, the court concluded that the University could not count cheerleading as a sport for Title IX purposes. In its reasoning, the court noted that the NCAA does not recognize cheerleading as a sport, nor is it considered an emerging sport. Additionally, it mentioned several factors for why Quinnipiac cheerleading was not a sport: (1) the team could not engage in off-campus recruitment; (2) no uniform set of rules governed its competitions; (3) the post-season was short compared to other varsity sports; and (4) the University did not offer the same resources to cheerleaders as other athletes.

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74. No. 2:10-cv-01227-AKK, 2010 WL 3446869 (N.D. Ala. Aug. 10, 2010).

75. No. 3:09cv621, 2010 WL 2977043 (D. Conn. July 21, 2010).

With regard to its cross country and track and field holding, the court held that the University could not triple count injured and redshirted cross-country runners because they did not receive the same athletic opportunities as other varsity athletes. This reason was supported by the fact that cross-country runners at Quinnipiac are required to compete in both indoor and outdoor track; therefore, injured and redshirted runners are receiving varsity resources without competing.

Finally, the court held that the University was not in Title IX compliance. To determine that, the court applied the two-prong test that looks at the total number of athletes and whether that number is substantially proportional to the University's undergraduate female population. The court found that there were 274 female athletes out of 400 total at Quinnipiac; however, the court removed forty-one females because cheerleaders did not count. Then, the court found that 61.87% of the study body was female, leaving 3.62% disparity. The court said the disparity was a borderline case of disproportionate athletic opportunities. But ultimately it relied on the Office for Civil Right's Clarification on Title IX, which says that a 3.62% disparity is sufficient to show an absence of substantial proportionality; therefore, the University violated Title IX.

*Bolla v. University of Hawaii*<sup>76</sup>

The University of Hawaii women's basketball coach, James Bolla, brought a Title IX retaliation claim against the University of Hawaii and various individual defendants after he was allegedly reprimanded and then fired for complaining of gender inequities between the men's and women's basketball teams. He also brought a claim alleging that his First Amendment rights had been violated. The defendants brought a motion for summary judgment, arguing that Bolla's complaints were not protected under the First Amendment. Additionally, the University of Hawaii argued that Bolla failed to raise a genuine issue of fact as to whether the University retaliated against him.

The district court granted summary judgment on the First Amendment issue. The court relied on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which held that the First Amendment does not protect government employees from discipline based on speech made pursuant to the employee's official duties. Here, because Bolla's statements were made in his official duties as head coach of the University of Hawaii women's basketball team, his comments were not protected under the First Amendment; therefore, the court granted

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76. Civ. No. 09-00165, 2010 WL 5388008 (D. Hawaii Dec. 16, 2010).

summary judgment to the defendants.

With regard to the retaliation claim, the court first laid out the proper retaliation claim inquiry. Bolla first had to make out a prima facie case, then the burden shifted to the employer to bring forth legitimate reasons for termination. Finally, Bolla could defeat summary judgment by offering circumstantial or direct evidence that a discriminatory reason motivated the employer.

In applying that standard, the court held that Bolla had made out a prima facie case for a retaliation claim. To make a prima facie case, the court said that Bolla must have (1) engaged in protected activity; (2) been thereafter subjected to an adverse action; and (3) a causal link existed between the protected activity and the adverse action. The court found that Bolla had made out a claim that he was terminated for making protected statements; therefore, he made out a prima facie case.

Next, the court found ample evidence of legitimate, nondiscriminatory reasons for terminating Bolla. Specifically, the court found that Bolla acted unprofessionally when he told a player either “I’m gonna put my foot up your ass” or “I’m gonna stick it where the sun don’t shine.”

*Foltz v. Del. State Univ.*<sup>77</sup>

Members of the Delaware State University (DSU) women’s equestrian team brought a Federal Rules of Civil Procedure Rule 23 motion for class certification for a potential class action Title IX lawsuit against DSU after DSU eliminated its women’s equestrian team. The proposed class was for all “present, prospective, and future DSU female students” who are participating or are interested in participating in intercollegiate athletics.

In granting the motion, the court analyzed each element under Rule 23 necessary to certify a class. First, the court looked to see if the class was too big so that joinder in one case was impracticable. The court found that the number of current and future female DSU students was unclear but undeniably large. Next, the court looked at whether common facts and characteristics existed between the class and the class representatives. The court said that a number of cases say an eliminated sports team can serve as a class representative for all athletes. Finally, the court looked at whether the representatives would adequately represent the interests of the class. The court found that no conflicts existed between the representatives and the class; therefore, the equestrian team would adequately represent the class.

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77. No. 10-149-LPS, 2010 U.S. Dist. Lexis 69106 (D. Del. July 12, 2010).

*Jones v. Beverly Hills Unified Sch. Dist.*<sup>78</sup>

Chelsea Jones, a former student at Beverly Hills High School in California, and her mother, Mary Jones, brought Title IX claims against Beverly Hills High School for unequal treatment and retaliation.

Chelsea Jones tried out for her high school basketball team in 2005 and 2006 but did not make it. During the same time period, she also tried out for softball and again did not make the team. However, she did make the softball team in 2007 but alleged she did not receive enough playing time because the coach played less qualified Jewish players instead of Chelsea, a Christian.

The court first looked at Chelsea's mother's Title IX claim for equal treatment. The court denied the claim due to lack of standing because she was outside the class of people the statute was designed to protect. However, the court allowed the mother's Title IX retaliation claim because the victim of the retaliation does not have to be a member of the protected class. But the court still dismissed the claim, holding that the mother did not suffer any retaliation and the daughter may have suffered retaliation.

Then the court looked at Chelsea's Section 1983 and Title IX claims for retaliation, race discrimination, and less experienced athletes being given spots on the basketball team. The court quickly dismissed the latter claim because under Title IX she must allege she was treated differently than boys, not girls. But, the court held that Chelsea had stated claims for race discrimination and retaliation. For the retaliation claim, Chelsea alleged the basketball team did not accept Chelsea as a result of her mother's complaints. The court held that was enough to support a retaliation claim. For the gender discrimination claim, Chelsea alleged that she did not make the team based on her race, which the court held was sufficient to support a claim.

*Mansourian v. Regents of Univ. of California*<sup>79</sup>

University of California at Davis operated a co-ed wrestling team. However, during the 2000-01 academic year, the University eliminated all women from the team. After student protest and administrative complaints, the University allowed women to compete if they could beat male wrestlers on the team; however, no women made the team. Several former women wrestlers at the University sued under Title IX, alleging the University denied equal athletic participation opportunities. The trial court granted the University's motion for summary judgment because the former athletes did

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78. No. WD CV 08-7201-JFW, 2010 WL 1222016 (C.D. Cal. Mar. 24, 2010).

79. 602 F.3d 957 (9th Cir. 2010).

not provide the University notice before filing suit so the University did not have an opportunity to resolve the violation. The former wrestlers appealed.

The district court held that notice was necessary based on case law that requires notice before bringing a sexual harassment suit under Title IX. The appellate court, however, said notice is required only when the Title IX violation does not involve a university's official policy. Because Title IX only imposes duties on federally funded entities, the reason for notice in those cases is to make sure the University, a federally funded entity, caused the violation. In contrast, the court said notice is not required for violations based on official University policies because policies are easily attributable to the federally funded recipient. Ultimately, because the former wrestlers were alleging a Title IX violation based on official policy, the court held notice was not required.

Finally, the appellate court addressed the University's alternative motion for summary judgment that argued the school had a history and continuing practice of program expansion. In analyzing the motion, the court was required to look at the University's record of adding female athletic opportunities and the University's plan for expansion. The court found that, after adding a women's program in the early 1970's, the school did not add any more programs until 1996. After adding three teams in 1996, the University only expanded its outdoor female track program to include indoor track. With regard to the University's future plan for expansion, the court found that the University did not make a satisfactory attempt to add women's programs. Thus, the court denied the University's motion for summary judgment.

*Ollier v. Sweetwater Union High School District*<sup>80</sup>

In *Ollier*, the United States District Court for the Southern District of California granted Plaintiffs' motions to exclude high school Defendant's expert witnesses, finding that the witnesses failed to meet the standard under the Federal Rules of Evidence.

Under Rule 702 of the Federal Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." This is conditioned on the fact that (1) the testimony is based upon sufficient facts or dates; (2) testimony is the product of reliable principles and methods; and (3) the witness has applied the

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80. 267 F.R.D. 339 (S.D. Cal. Apr. 26, 2010).

principles and methods reliably to the facts of the case. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court explained that Rule 702 requires trial courts to determine (1) whether the proffered testimony is based on principles and methodology that are scientific and reliable and (2) whether the testimony is relevant.

Here, Defendants' expert witnesses, Peter Schiff and Penny Parker, did not meet the standards set by Rule 702 and *Daubert*. Peter Schiff was designated to offer testimony about the quality of athletic facilities, access to training rooms, access to coaching staff, access to promotional support, and access to financial support offered by Defendant. Schiff considered himself an expert in public school finances, as he was a former school superintendent. However, this experience did not make him an expert on Title IX compliance or gender equity standards. Thus, he was precluded as an expert witness.

Penny Parker was an assistant principal and former softball coach and player. Defendants wished to offer her testimony regarding the softball program at Castle Park High School and the participation opportunities in the program as required by Title IX. However, her testimony was purely speculative, as her methodology was unclear. She contended that it was based on thorough cite inspections, which consisted of one, one-and-a-half hour visit in which she took no measurements or photographs. Further, her opinions regarding the quality of coaching was not informed by a qualitative review. As a result, she was also precluded from serving as an expert witness.

*Parker v. Ind. High Sch. Ath. Ass'n.*<sup>81</sup>

Plaintiffs and Defendants brought motions to reconsider on a Title IX and Section 1983 suit. Amber Parker, a high school basketball player, and her mother, the high school basketball coach, alleged that members of the high school and the Indiana High School Athletic Association scheduled girls' basketball during non-preferred times.

First, the court looked at whether the Plaintiff's Section 1983 claim could proceed. The trial court first denied the claim because it erroneously relied on *Doe v. Smith*, 470 F. 3d 331 (7th Cir. 2006) for the proposition that an individual is preempted from bringing a Section 1983 claim by Title IX. The court, though, recognized it was required to review the Section 1983 claim because, under *Fitzgerald v. Barnstable School Committee*, 129 S.Ct. 788 (2009), individuals can bring both claims. The court ultimately denied the defendant's motion to dismiss the Section 1983 claim because the Parkers had pleaded enough information to satisfy the *Twombly* pleading requirements.

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81. 2010 U.S. Dist. LEXIS 23409 (S.D. Ind. Mar. 11, 2010).

Then the court analyzed the non-county school defendant's motion to dismiss the Title IX claims. The defendants argued the first decision did not consider whether the Plaintiffs are beneficiaries of the school's activities. The court rejected the defendant's argument for two reasons. First, the court noted that the defendants did not have any cases that directly supported their argument. Second, the court said the defendants' argument ignored Title IX's language because the statute never limits recovery to beneficiaries of programs or activities.

*Patterson v. Hudson Area School*<sup>82</sup>

In *Patterson*, the United States District Court for the Eastern District of Michigan, Southern Division granted Defendant's motion for judgment as a matter of law and dismissed Plaintiff's cause of action.

Throughout middle school, Plaintiff endured a steady barrage of malicious bullying. In sixth grade, he was the recipient of sexually explicit insults. Plaintiff had to see a psychologist, who diagnosed Plaintiff as distraught, anxious, and angry. In seventh grade this behavior only got worse. Plaintiff was called even more names and began eating lunch in the school's band room. He began regularly meeting with the school's principal, counselors and several teachers to whom he contemplated quitting school. This series of events culminated in ninth grade when Plaintiff, as member of his school's junior varsity baseball team, was physically assaulted in the locker room. The assault was particularly traumatizing because one teammate held Plaintiff down while the other rubbed his genitalia on Plaintiff's neck and face. Plaintiff finished high school off-site, taking online and college courses. He filed a sexual discrimination suit under Title IX.

The court found judgment as a matter of law was appropriate where, after a party has been fully heard on an issue, there was no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Here, Plaintiff alleged that he was sexually harassed in violation of Title IX. A student-on-student sexual harassment claim may be supported when a plaintiff can demonstrate that (1) plaintiff was subjected to harassment based on sex; (2) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; (3) the funding recipient had actual knowledge of the sexual harassment; and (4) the funding recipient was deliberately indifferent to the harassment. Plaintiff did not demonstrate that he was bullied and verbally assaulted because of his sex.

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82. 2010 WL 2670167 (E.D. Mich. July 1, 2010).

There was no evidence that Plaintiff was actually gay; in fact, it was offered that he was not. There was no evidence that any of the persons who harassed Plaintiff had any sexual desire for him, any general hostility toward male students, or treated female students differently or better than male students. Harassment is not discrimination based on sex merely because the words or gestures used have a sexual content or connotation or are based upon gender, sexual orientation, or perceived sexual orientation. Although these incidents were colored with offensive sexual connotations, no evidence was introduced that the harassment was based upon the gender, sexual orientation, or perceived sexual orientation of the plaintiff.

Similarly, the locker room assault involved an offensive, sexual touching; however, there was no evidence offered that those actions were based upon the gender, sexual orientation, or perceived sexual orientation of Plaintiff. Further, it should be kept in mind that schools are unlike the adult workplace, and children may regularly interact in a manner that would be unacceptable among adults. Because students are still learning how to interact appropriately with peers, damages are not available for simple acts of teasing and name-calling among children. As a result, the harassment to which Plaintiff was subjected constituted bullying, not sexual harassment. Therefore, Plaintiff's cause of action was dismissed.

Because the jury verdict was against the great weight of the evidence, it was set aside. Defendant's motion was granted, and a new judgment was entered accordingly.

*Stouter v. Smithtown Central School District*<sup>83</sup>

In *Stouter*, the United States District Court for the Eastern District of New York granted Defendant's motion for summary in part and denied it in part, finding that Plaintiff's gender and age discrimination claims were unsupported by evidence and that her remaining claims required the finding of additional facts.

Plaintiff, Maura Olga Stouter, was a fifty-nine year old Caucasian female. She was also a lesbian. She was employed by defendant, Smithtown Central School District, as a physical education teacher from 1970 to June 2003. She was a volleyball coach from 1970 to June 2006. In 2004, Stouter advised Smithtown's Coordinator of Physical Education Athletics and Health Education, Patrick Smith, of concerns she had concerning the school's compliance with Title IX. Smith conducted his own investigation and concluded that the school was in fact in compliance with that statute. Stouter

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83. 687 F. Supp. 2d 224 (E.D.N.Y. 2010).

responded by preparing her own assessment, which contradicted Smith's stance.

In September 2005, Smith reprimanded Stouter for interfering with the junior varsity girls' volleyball team. The reprimand was in response to certain complaints that Smith had received from parents and athletic officials. Stouter responded by later disputing the assertions and suggesting that Smith and she rebuild their professional relationship with the help of a mediator. In February 2006, Stouter was told that she would not be reappointed as a coach. Subsequently, Stouter filed a charge with the Equal Employment Opportunity Commission and received a Right to Sue letter. She commenced this action, alleging (1) discrimination on the basis of gender and sexual orientation, as well as retaliation pursuant to Title VII; (2) age discrimination and retaliation in violation of the Age Discrimination in Employment Act; (3) gender discrimination and retaliation in violation of Title IX; and (4) discrimination on the basis of gender, sexual orientation and age, as well as retaliation, pursuant to the New York Human Rights Law.

Summary judgment is appropriate when the pleadings, discovery and disclosure materials on file, and any affidavits show that there is not genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Motions for summary judgment in employment discrimination actions should be evaluated with special care because direct evidence of an employer's discriminatory intent will rarely be found. Evidence must be carefully scrutinized for circumstantial proof, which can show discrimination. However, a plaintiff must provide more than conclusory allegations to defeat a motion for summary judgment.

Under the statute of limitations, any acts that occurred prior to October 12, 2005 were time-barred. Here, Plaintiff supported her hostile work environment claim with five alleged unlawful acts: (1) elimination of Plaintiff's middle school coaching position; (2) refusal to appoint Plaintiff as the middle school volleyball coach for Great Hollow Middle School and appointment of a younger male coach instead; (3) rescheduling a volleyball match to an inferior date and time; (4) reclassification of the volleyball program as an "outside organization," which resulted in the program having to pay to use Smithtown athletic facilities; and (5) Smith's reprimanding Plaintiff for allegedly interfering with the junior varsity girls volleyball program. The hostile work environment claim may have constituted a continuing violation and was thus not subject to the time bar. However, the court found claims one and two were clearly discrete discriminatory acts as defined by the United States Supreme Court and thus were time-barred. Further, claim three was too remote to be part of a hostile work environment claim and was time-barred. Claims four and five may have supported a hostile work environment claim.

Pursuant to Title VII, it is unlawful for an employer to discriminate against any individual because of such individual's race, color, religion, sex, or national origin. Nothing in the statute protects an individual from discrimination on the basis of sexual orientation. However, it does protect against gender-based disparate treatment in the workplace. To establish a prima facie case of gender discrimination based on disparate treatment, a plaintiff must demonstrate that (1) she is a member of a protected class; (2) she was qualified for the position that she held; (3) she was terminated or subjected to some other adverse employment action; and (4) the adverse employment action "occurred under circumstances giving rise to an inference of discrimination." Here, it was undisputed that Stouter satisfied the first three components of the prima facie case. But, she did not fulfill the fourth, as she provided no evidence suggesting so. Further, factors existed that suggested that that her termination was nondiscriminatory. For instance, Stouter had been hired by the same boss for two consecutive years before being fired in 2006 and her replacement was also female. Accordingly, Defendant was entitled to summary judgment with respect to all gender discrimination claims.

To establish a prima facie case of age discrimination under the ADEA, the plaintiff must demonstrate that (1) she was in the protected age group; (2) she was qualified for the position she held; (3) she was subject to an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. Again, here only the fourth criterion was in dispute. To demonstrate evidence of age discrimination, Stouter relied on hearsay on the fact that Defendant allowed other coaches over the age of fifty-five to continue to coach after retiring from teaching. This evidence was insufficient to defeat summary judgment and actually weighed against a finding of discrimination.

As for Stouter's remaining claims, (1) hostile work environment; (2) sexual orientation discrimination; and (3) retaliation, issues of material fact precluded the entry of summary judgment. Thus, Defendant's motion for summary judgment with respect to those claims was denied.

#### INTELLECTUAL PROPERTY LAW

Intellectual property law has had a substantial impact on the sports industry, and its impact continues to grow and evolve. Teams, leagues, schools, associations, and athletes are constantly searching for new ways to exploit and protect their trademarks and common-law publicity rights. The following cases demonstrate the issues associated with licensing agreements, trademarks, patents, copyrights, and publicity rights in collegiate and professional sports. Decisions of the World Intellectual Property Organization

(WIPO) are discussed in a separate section below.

*Brown v. Electronic Arts, Inc.*<sup>84</sup>

In *Brown*, the United States District Court for the Central District of California denied EA's motion for attorney's fees under California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute.

On March 6, 2009, former NFL superstar running back Jim Brown brought an action against EA, claiming that, in its videogame "Madden NFL," EA had violated the Lanham Act and performed an invasion of privacy under California common law by using Brown's name, identity, and likeness. After Brown amended his motion on July 22, 2009 and EA filed a motion to dismiss all claims, the court granted EA's motion to dismiss Brown's claims because, even if EA used Brown's likeness in the video game, the use was protected under the First Amendment because it was an expressive work. EA then filed a motion for attorney's fees incurred in connection with Brown's Lanham Act claim and EA's anti-SLAPP motion.

The court first noted that attorney's fees would be granted for Brown's Lanham Act claim only if it was "groundless" or "vexatious." The court found that Brown's Lanham Act claim was not groundless or vexatious because he had reasonable basis to believe in the factual allegations, there was a legal basis for his claim grounded in law, and, even though Brown failed to file an opposition to EA's motion to dismiss, (an inaction that increased EA's litigation costs) that inaction was not part of Brown's plan to add costs to EA's litigation. Although the anti-SLAPP statute allows a prevailing defendant on a special motion to strike to recover attorney's fees and costs, the court found that EA did not "prevail" because, in previously dismissing Brown's complaint, the court did not reach the "merits" of the state law claims in Brown's amended complaint but simply declined to address them.

*Cummings v. Adidas USA*<sup>85</sup>

In *Cummings*, the United States District Court for the Southern District of New York held that Nike and Converse did not infringe on the plaintiffs' patent because Nike and Converse had already created a shoe for sale that fully anticipated the plaintiffs' patent claim by more than one year.

William Cummings and Jay Levine brought an action claiming that Nike and Converse infringed on their patent claim for a "lateral foot stabilizer," which is a small piece on the side of a shoe that widens the sole and gives

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84. 722 F. Supp. 2d 1148 (C.D. Cal. July 13, 2010).

85. 2010 U.S. Dist. LEXIS 51284 (S.D.N.Y. May 24, 2010).

athletes more stability and ankle support. Nike and Converse argued that, because one of their shoes, the Air Jordan XV (AJXV), already had this feature, Nike and Converse had anticipated the “lateral foot stabilizer” patent claim by more than one year and the plaintiffs’ claim was invalid under the statutory “on-sale bar” at section 102(b) of title 35 of the United States Code. The statute states that a patent is not valid if “the invention was . . . on sale in this country, more than one year prior to the date of the application for patent in the United States.” The Supreme Court has held that the “on-sale” bar applies when two conditions are satisfied before the critical date. First, the product must be the subject of a commercial offer for sale before the critical date. Second, the invention must be ready for patenting by the critical date. Cummins and Levine filed their patent application on July 17, 2000; therefore, the critical date was July 17, 1999. The court found that the first condition was met because Nike had offered the AJXV for commercial sale by selling eighteen pairs of the shoes to showrooms and sales representatives in June 1999. The court also found that the second condition was met because the Nike design drawings that were completed in May 1999 were sufficiently specific enough for a person skilled in the art of creating shoes to practice the invention. Therefore, Nike had proven that the AJXV had fully anticipated the patent claim of Cummings and Levine.

*Donovan v. Bishop*<sup>86</sup>

This dispute involved the right to use a trademark related to the legendary African American cyclist, Marshall W. “Major” Taylor. Major Taylor died intestate in Cook County, Illinois in 1932. Karen Donovan, the plaintiff, is the great granddaughter of Major Taylor, and Courtney L. Bishop, the defendant, owns two U.S. Trademarks for the mark “Major Taylor” for use in fundraising operations and a bicycle retail store and/or online computerized ordering service. At the time Bishop registered the marks, he was not aware if anyone else had the right to use the mark. Upon hearing of Bishop’s use of the mark relating to her great-grandfather, Donovan brought this suit, asking the court to cancel Bishop’s trademark due to fraud and grant her an injunction related to Bishop’s use of the mark because it violated the Indiana Rights of Publicity Statute. Both parties moved for summary judgment.

Regarding Donovan’s request to cancel the trademark due to fraud claim, the court first stated that “fraud in procuring a trademark registration . . . occurs when an applicant knowingly makes false, material representations of fact in connection with his application.” None of the evidence Donovan

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86. 2010 U.S. Dist. LEXIS 110204 (S.D. Ind. Oct. 14, 2010).

provided in her brief established that Bishop made *knowingly* inaccurate statements regarding his application, so Bishop's motion for summary judgment was granted related to this claim. Donovan's claim that the registrations of the "Major Taylor" trademarks were illegal because they falsely suggested a connection between Major Taylor and Bishop were also granted summary judgment in favor of Bishop. The court reasoned that Donovan failed to show that Bishop's marks would be recognized by the public as pointing "uniquely and unmistakably" to Major Taylor. However, the court granted Donovan summary judgment on her right of publicity claim under the Indiana Statute because she sufficiently proved that, under the statute, she, and not Bishop, had the right to use Major Taylor's likeness because, as his great-granddaughter, she had a legal interest in Major Taylor's rights.

*Dryer v. NFL*<sup>87</sup>

In *Dryer*, the United States District Court for the District of Minnesota denied the NFL's motion for judgment on the pleadings because the films were commercial, not expressive, works and, thus, not granted the same protections under the First Amendment. Furthermore, the plaintiffs proved that the constitutional protection to be afforded the films may not outweigh the plaintiffs' right of publicity.

In this case, former NFL players brought a right of publicity action against the NFL due to the NFL's use of the players' names and images in NFL Films' promotional videos. The videos include footage of the players' names and images of the players from their days playing in the NFL. The NFL argued that the NFL players' claims were precluded by the First Amendment and preempted by the Copyright Act. The court held that the films were not expressive works but, rather, commercial speech and not granted the same height of First Amendment protections that expressive works are. The court analyzed three factors in making this decision: (1) whether the communication was an advertisement; (2) whether it referred to a specific product or service; and (3) whether the speaker had an economic motivation for the speech. The court found that the NFL had an economic motivation for creating the films, that the films were an advertisement, and that the films reference a specific product - NFL football. Regarding the NFL's Copyright Act preemption claim, the court found that the NFL did have a valid copyright in the video clips used in the film. However, a state claim is only preempted by the Copyright Act if (1) the work in issue is within the subject matter of copyright

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87. 689 F. Supp. 2d 1113 (D. Minn. 2010).

and (2) the state-law created right is equivalent to any of the exclusive rights within the general scope of the Act. The court held that the players' right of publicity claim was not preempted by the Copyright Act because the right of publicity was not equivalent to any of the exclusive rights in the Copyright Act and the work at issue was not within the subject matter of copyright because the "work" at issue was not the NFL's video but the players' identities.

*Fleurimond v. N.Y. Univ.*<sup>88</sup>

In *Fleurimond*, the United States District Court for the Eastern District of New York denied New York University's (NYU) failure to state a claim motion because, although NYU provided evidence that it was the rightful copyright owner of the work, that evidence cannot be addressed on a motion for failure to state a claim.

Ariel Fleurimond created Orion, a drawn caricature of a cougar, at the request of the NYU athletic department, and she registered Orion with the United States Copyright Office. NYU, without Fleurimond's knowledge or consent, used Orio on flyers, posters, its website, clothing, and other memorabilia. Fleurimond brought a copyright infringement claim against NYU, and NYU moved to dismiss the complaint for failure to state a claim. The court noted that, at the pleading stage, a plaintiff asserting a copyright infringement claim must allege (1) the specific work that forms the subject of the claim; (2) the acts and time that the defendant infringed the copyright; (3) that the copyright at issue has been registered pursuant to the Copyright Act; and (4) that she owns the copyright. NYU claimed that, under the "made for hire" exception to the general copyright ownership rule, Fleurimond did not own the copyright because, although she created the work, she did so as an employee of NYU and acted within the scope of her employment. However, the court ruled that the evidence supporting NYU's argument could not be addressed during a motion for judgment on the pleadings because the documents that NYU referenced were not referenced in or relied upon on Fleurimond's complaint. The court found that Fleurimond offered a plausible copyright infringement claim and denied NYU's motion.

*Hart v. Elec. Arts, Inc.*<sup>89</sup>

Ryan Hart played quarterback on the Rutgers University football team from 2002-05. After graduation, he brought a lawsuit against Electronic Arts, Inc. (EA Sports), alleging a violation of his right of publicity because EA

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88. 2010 U.S. Dist. LEXIS 82772 (E.D.N.Y. July 14, 2010).

89. 2010 U.S. Dist. LEXIS 99622 (D.N.J. Sept. 21, 2010).

Sports appropriated and used his likeness for commercial purposes in connection with EA Sports' popular video-game "NCAA Football". Hart alleged that he was depicted as virtual football player in NCAA Football." EA Sports brought a motion to dismiss Hart's claim, arguing that his complaint failed to state a claim because it failed to point to specific attributes that were used in the video game that belonged to Hart. EA Sports also argued that the video game is an expressive work entitled to First Amendment protection.

The court found that Hart's complaint failed to state a proper right of publicity claim because it did not "put forth sufficient facts detailing the attributes [Hart] believes are appropriated in the "NCAA Football" game." Hart only detailed the similar attributes in a declaration opposing EA Sport's motion to dismiss. In the declaration, he stated that the virtual player in the game had the following same attributes that Hart had while playing for Rutgers: height, weight, jersey number, and equipment accessories. But, because the court found that the declaration could not be considered on a motion to dismiss, it ruled in favor of EA Sports. However, the court did note that the proposed allegations in Hart's declaration were "the sort recognized by New Jersey courts as stating a prima facie right of publicity claim." The court dismissed Hart's right of publicity claims without prejudice and granted him leave to file a Second Amended Complaint asserting the same claim within twenty days. Furthermore, the court did not consider EA Sports' First Amendment defense and instead chose to reconsider it if Hart filed a Second Amended Complaint.

*Keller v. Elec. Arts, Inc.*<sup>90</sup>

In *Keller.*, the United States District Court for the Northern District of California denied the defendants' motion to dismiss Keller's right of publicity claims because their use of his name and likeness in a video game was not a transformative use and did not fall under the California Civil Code section 3344(d) exemption.

Sam Keller, former college quarterback, brought an action against Electronic Arts, Inc., (EA), the NCAA, and the Collegiate Licensing Company (CLC), alleging that, by using his and other athletes' images and likenesses in a college football video game, the defendants had violated his right of publicity. To prove a valid claim for right of publicity under California common law, Keller had to prove "(1) the defendant's use of plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting

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90. 2010 U.S. Dist. LEXIS 10719 (N.D. Cal. Feb. 8, 2010).

injury.” To prove a statutory right of publicity claim in California, Keller had to also prove “knowing use,” in addition to the common law right of publicity elements. EA argued that Keller’s right of publicity claims were barred because the game was a transformative use because it contained “significant transformative elements or that the value of the work [did] not derive primarily from the celebrity’s fame.” The court held that the video game was not a transformative use because the quarterback in the game shared many of Keller’s characteristics, including the same jersey number, height, and weight. EA also argued that section 3344(d) of the California Civil Code provides a public affairs exemption to the statutory right of publicity. The court rejected this defense because it found that the exemption only applies to factual reporting of a matter in the public interest, and EA’s use of Keller image and likeness in the video game goes beyond reporting information about him.

*McDavid Knee Guard, Inc. v. Nike USA, Inc.*<sup>91</sup>

In *McDavid Knee Guard*, the United States District Court for the Northern District of Illinois, Eastern Division denied the McDavid Knee Guard and Stirling Moulding Limited’s (McDavid) motion for preliminary injunction because McDavid failed to prove a likelihood of success on the merits and irreparable harm.

McDavid filed a patent infringement claim against Nike for the method of manufacturing it was using to create flexible foam padding for its line of “ProCombat” clothing. McDavid argued that it had been granted the exclusive license to manufacture the flexible foam padding using the method described in the patent. To be granted the preliminary injunction against Nike, McDavid had to prove (1) some likelihood of success on the merits and (2) that it had no adequate remedy at law and would suffer irreparable harm if preliminary relief was denied. The court found that McDavid would not likely succeed on its patent infringement claim because Nike’s process of manufacturing did not use a “jig device” to separate the foam sheet to hold the elements in place like the McDavid method used. To have a valid infringement claim, the court explained, every element of the claim must be present in the accused device. The court also found that McDavid failed to prove irreparable harm if the preliminary injunction was not granted because McDavid could not prove a loss of sales or loss of market share due to Nike’s “ProCombat” clothing line. McDavid could only prove that Nike and McDavid compete in the same product category.

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91. 683 F. Supp. 2d 740 (N.D. Ill. 2010).

*Ohio State Univ. v. Thomas*<sup>92</sup>

In *Ohio State University*, the United States District Court for the Southern District of Ohio, Eastern Division granted Ohio State University's motion for a temporary restraining order and preliminary injunction against the defendant's use of the following federally registered trademarked words: "BUCKEYES," "OHIO STATE," "OSU," "OHIO STATE UNIVERSITY," "O," and "O – Ohio State."

Ohio State University filed a claim against Antonio Thomas and GDS Marketing, LLC for trademark infringement, unfair competition, and cyberprivacy in violation of the Lanham Act for publishing two electronic magazines "Buckeye Gameday" and "Ohio State Buckeyes E-Book," a print publication, and also a website, [www.buckeyeillustrated.com](http://www.buckeyeillustrated.com). Ohio State argued that multiple aspects of the website and the publications infringed on Ohio State's exclusive right to use the trademarked words. For example, the website had the word "Buckeye" in it, and both the magazines and website used Ohio State's school colors and the word "Buckeye" in various forms.

In analyzing Ohio State's claims and the factors for a temporary restraining order and preliminary injunction, the court noted it had to determine Ohio State's likelihood of success regarding an infringement and unfair competition claim. After referencing the statutory elements for each claim, the court determined that the likelihood of confusion element was the touchstone for both. After examining the eight factors (strength of the mark; relatedness of the goods or services; similarity of the marks; evidence of actual confusion; marketing channels used; likely degree of purchaser care; intent of the defendant in selecting the mark; and likelihood of expansion of the product lines.) a court uses to determine whether there is a likelihood of confusion, the court determined that seven of the eight factors indicated that the defendants' website and publications were highly likely to result in consumer confusion. Because the court found that Ohio State was likely to succeed on the merits, there was irreparable harm to Ohio State if the motion was not granted, the injunction would not cause harm to others, and that the public interest favored issuing a preliminary injunction, the court granted Ohio State's motion for a temporary restraining order and a preliminary injunction against the defendants.

*Rich & Rich P'ship v. Poetman Records USA, Inc.*<sup>93</sup>

In *Rich & Rick P'ship*, the United States District Court for the Eastern

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92. 2010 U.S. Dist. LEXIS 96478 (S.D. Ohio Aug. 27, 2010).

93. 2010 U.S. Dist. LEXIS 48949 (E.D. Ky. May 18, 2010).

District of Kentucky granted the defendant's motion for summary judgment regarding the copyright infringement claim because the plaintiff's registration of the work in questions was unenforceable. However, the court denied the defendant's summary judgment motion regarding the plaintiff's copyright infringement claim involving the basketball artwork because the plaintiffs had been assigned the copyright for it.

Rich & Rich created a music album and then signed a contract deal with Poetman to market the album. Three years after the marketing contract ended, Poetman released an album of its own, although it was part of a fundraising effort for the University of Kentucky Pep Band, that was similar to Rich and Rich's because each had identical songs and album artwork related to the University of Kentucky Wildcats basketball team. The main song in dispute was a version of "My Old Kentucky Home" sang by former Governor Happy Chandler (Chandler remix). Rich and Rich had obtained separate copyright registrations for its album and album artwork. Rich and Rich brought multiple claims against Poetman, including copyright infringement against Poetman. Both parties filed motions for summary judgment on the copyright claims.

The court first explained that the two main issues regarding a copyright action are (1) whether the plaintiff owned the copyrighted work and (2) whether the defendant copied it. The court held that Rich and Rich's registration of the Chandler remix was unenforceable because, in registering the song, it failed to identify the derivative nature of the song. However, the court ruled that Rich and Rich had a valid registration for the artwork on the album because the owner of the artwork had assigned the copyright to Rich and Rich.

*Ruggers, Inc. v. United States*<sup>94</sup>

This dispute arose over the use of USA Rugby's registered and unregistered trademarks. Ruggers is a vendor of rugby clothing and gear, and in May 2004, it entered into an exclusive agreement to provide USA Rugby-sanctioned teams with rugby clothing and gear in exchange for the exclusive rights to use the USA Rugby trademark on its clothing. In mid-2006, USA Rugby allegedly entered into an agreement with Under Armour (one of Ruggers' competitors) to use the USA Rugby logo. On March 30, 2009, Ruggers filed suit against USA Rugby, alleging a violation of the exclusive sponsorship agreement and later amended the complaint to add a claim against Under Armour for false advertising and trademark infringement under the Lanham Act. Under Armour moved to dismiss or, in the alternative, for

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94. 2010 U.S. Dist. LEXIS 94354 (D. Mass. Sept. 10, 2010).

summary judgment as to all claims against it.

The court found that, in order to succeed on its Lanham Act claims against Under Armour, Ruggers had to show that Under Armour “used” the USA Rugby trademark. However, Ruggers’ complaint was insufficient to demonstrate that Under Armour had “used” the USA Rugby trademark because it included no examples of Under Armour selling or producing any items that had the USA Rugby mark on it. Instead, in the words of the court, Ruggers allegations were “undifferentiated” and therefore insufficient to support claims against Under Armour. The court granted Under Armour’s motion to dismiss.

*Sportschannel New Eng. L.P. v. Fancaster*<sup>95</sup>

Fancaster is a company that provides sports-related information and videos through its website, Fancaster.com. The President of Fancaster, Inc., Craig Krueger, trademarked the name “Fancaster” in 1988. Sportschannel New England LP, doing business as Comcast Sports Net New England (SportsNet) is a cable sports network in Boston that began a public service program called “The New England FanCaster Program” in 2001. Upon learning of the program, Krueger notified SportsNet that he trademarked the “Fancaster” name and advised them to discontinue their use of the name. In 2008, Krueger and Fancaster, Inc. brought a suit against SportsNet, alleging that their use of the mark “Fancast” infringed their trademark. That action is currently pending.

In the interim, SportsNet brought an action seeking a declaration of its rights in connection with the use of the word “Fancaster,” which Fancaster Inc. & Krueger had trademarked. SportsNet brought the claim in Massachusetts because Fancaster Inc.’s website is accessible in the Commonwealth. Fancaster, Inc. filed a motion to dismiss the claim, arguing that the court lacked subject matter and personal jurisdiction to hear the case. The court granted Fancaster, Inc.’s motion to dismiss because it found that it did not have personal jurisdiction over the matter. The court reasoned that Fancaster, Inc. was a South Dakota corporation with a principal place of business in New Jersey and merely operated a website accessible in Massachusetts. Thus, it did not fall within any of the provisions of the Massachusetts long-arm statute.

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95. 2010 U.S. Dist. LEXIS 106272 (D. Mass. Oct. 1, 2010).

*Team Gordon, Inc. v. Specialized Bicycle Components, Inc.*<sup>96</sup>

Team Gordon, Inc. and Speed Energy Drink, LLC (Team Gordon) filed a complaint against Specialized Bicycle Components, Inc. and DOES 1-10 (Specialized) for declaratory relief that they are not infringing on or diluting Specialized's trademarks. Specialized filed a counterclaim to enjoin Team Gordon's use of the "S" logo. The court granted the preliminary injunction.

Team Gordon is Robby Gordon's (NASCAR, Indy Car, and off road race car driver) racing team. Team Gordon adopted a stylized S letters as a logo and wanted to use it to market its energy drinks. Specialized sells bicycles and bicycle equipment and uses a stylized S in connection with the sale of its products. First, in looking at the likelihood of success on the merits, the court found that Specialized had a valid, protectable trademark in its Specialized S Logo. Next, in analyzing the eight factors for likelihood of confusion between Team Gordon's logo and the Specialized S Logo, the court found that all eight factors weighed in favor of likelihood of confusion. After determining that Specialized would suffer irreparable harm if Team Gordon was able to use its S Logo because it could lead to Specialized losing the "investment and competitive position" it had acquired through its trademark, that Team Gordon would not suffer harm if the injunction was granted, and that it would not be against the public interest to grant the injunction, the court granted Specialized's motion for a preliminary injunction against Team Gordon's use of the stylized S.

*Titlecraft, Inc. v. NFL*<sup>97</sup>

Titlecraft, Inc. manufactures fantasy-football-league trophies and brought an action against NFL Properties, LLC seeking a declaration that its trophies do not infringe the NFL's rights in the Vince Lombardi Trophy. The NFL counterclaimed, alleging copyright and trademark infringement and then moved for summary judgment on the copyright claim. The court ruled in favor of the NFL.

First, the court found that the NFL has a valid copyright registration for the Lombardi Trophy. Next, the court found that the trophies made by Titlecraft were similar in appearance to the Lombardi trophy because each consists of "a football sitting, at a downward angle, atop a base with three tapered sides." However, where the sides of the Lombardi Trophy are concave and made of silver, the sides of the Titlecraft trophies are not concave and are made from wood.

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96. 2010 U.S. Dist. LEXIS 130738 (C.D. Cal. Nov. 18, 2010).

97. 2010 U.S. Dist. LEXIS 134367 (D. Minn. Dec. 20, 2010).

The court discussed that, in order to be successful on its copyright infringement claim, the NFL had to provide that “(1) it owns a valid copyright to the Vince Lombardi Trophy, (2) Titlecraft had access to the trophy, and (3) Titlecraft’s trophies and the Vince Lombardi Trophy are substantially similar.” In its analysis of these three elements, the court found that the only issue was whether the trophies were substantial similar. Although the court found that there were differences in the trophies (e.g., wood versus metal, slightly different sizes), it ultimately found that the trophies were substantially similar because, when placed side by side, the similarities between them were obvious and “if it walks like a duck, quacks like a duck and looks like a duck, it has to be a duck – or in this case a copy.”

*Who Dat Yat Chat, LLC v. Who Dat? Inc.*<sup>98</sup>

Who Dat?, Inc. brought a suit against NFL Properties LLC and the New Orleans Louisiana Saints, LLC alleging, among other claims, trademark infringement. The NFL and the Saints brought a motion to dismiss the claims. After analysis, the court granted the motion in part and denied it in part.

Who Dat? is a company who claims to be the founder of “WHO DAT NATION” and asserts that it developed the phrase “WHO DAT.” Who Dat? claims that it generates revenue from its Licensees from the sale of merchandise bearing the “WHO DAT” trademarks. In 1988, the Saints allegedly approached Who Dat? about creating a “WHO DAT” membership for Saints Fans. Who Dat? alleged that “the Saints agreed to transfer, assign, and convey to Who Dat? whatever right, title and interest the Saints had or claimed to have in the trademark of ‘WHO DAT’ and acknowledged that as the first user Who Dat? had exclusive right to use the mark.” Later, disputes arose between the parties as to the “validity and scope of each party’s interest in the ‘WHO DAT’ trademark.”

In analyzing the various claims, the court first found that the Saints and NFL’s motion to dismiss the breach of contract claim should be denied because the statute of limitations had not run on Who Dat?’s ability to bring a breach of contract claim against the Saints in relation to the 1988 “WHO DAT” membership agreement. Next, Who Dat? sought relief under various subsections of Louisiana’s trademark statute and requested that the court “order the Defendants to take all steps necessary to cause the Louisiana Secretary of State to transfer to [Who Dat?] each registration obtained for ‘WHO DAT’ and variations thereof obtained by the Saints . . .” Who Dat? also sought monetary damages. The Saints and the NFL attempted to dismiss

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98. 2010 U.S. Dist. LEXIS 122069 (E.D. La. Nov. 17, 2010).

this claim by arguing that, although the statute permits cancellation under certain circumstances, it does not provide for money damages. The court ultimately found that, just because Who Dat?'s complaint broadly sought all available damages and relief, the law provided was not grounds to dismiss the claim.

*Williams v. Univ. of Ga. Ath. Dep't*<sup>99</sup>

Louis Williams brought an action against the University of Georgia Athletics Department and multiple members of the University of Georgia Athletics Department, alleging that the Defendants used Williams' "professional materials, music, dances, lyrics, voices, songs, and entertainments" without compensating him. Williams demanded \$30,000,000 from the Defendants for the use of his professional materials and an additional \$50,000,000 for the "harms, hurts, wrongs, damages, and incorrigible and irreparable injuries" he suffered. The court dismissed the action because the defendants were entitled to sovereign immunity and because his Complaint was frivolous.

Although Williams did not specify any specific legal provision, statute, regulation, or state law under which he brought his action, the court interpreted his claims to be ones of copyright infringement. The court dismissed the claims against all but one of the defendants because the Eleventh Amendment bars suits against states and state entities by their citizens. The court also dismissed the claim against the remaining Defendant who was not covered by sovereign immunity because it found that Williams' Complaint was frivolous in that it did not have "an arguable basis either in law or in fact."

#### LABOR LAW

Federal labor law has a significant impact on the world of sports. Labor laws govern the relationship between employers and employees who are unionized or who are seeking to unionize. The vast majority of major professional athletes in the United States belong to player unions; thus, labor laws play a vital role in sports. The cases below discuss some of the issues concerning labor law in sports.

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99. 2010 U.S. Dist. LEXIS 134214 (M.D. Ga. Nov. 24, 2010).

*Adams v. Barnes*<sup>100</sup>

Plaintiff Flozell Adams is a professional football player. In 2005, his agent, Barnes, filed for arbitration under the NFLPA Regulations Governing Contract Advisors (Agent Regulations) to recoup unpaid agent fees owed to him for the 1999-2004 football seasons. Arbitrator Roger P. Kaplan found for Barnes; however, Adams contested the award, alleging several prejudicial and incorrect rulings. Barnes then filed a complaint seeking confirmation of the award under the Federal Arbitration Act, which Adams neglected to answer. Barnes consequently obtained a default judgment. In 2008, Barnes filed a second claim for arbitration. Again, Kaplan, who was selected by the National Football League Players Association, served as the arbitrator. When Kaplan found for Barnes a second time, Adams filed a motion to vacate the arbitration award.

Adams' motion rested on two grounds. First, that Kaplan was partial and biased. Second, that Kaplan engaged in misconduct during the arbitration by making mistakes in applying the Agency Regulation. The Federal Arbitration Act enumerates four limited cases where an arbitration award may be vacated, including "evident partiality or corruption" on the part of the arbitrator. Here, the court was unable to find any evidence suggesting that Kaplan was partial. As for Adams' second claim, the court cited the Supreme Court, stating that a "manifest disregard of the law" is no longer an independent ground for vacating an arbitration award.

*Givens v. Tennessee Football, Inc.*<sup>101</sup>

Plaintiff David Givens is a former professional football player. In 2006, he signed a professional football contract with Defendant. Around that time, Givens underwent a complete physical examination to determine his fitness to engage in professional football and to determine his capacity to fulfill the terms of the proposed contract. The examination was performed by Defendant's orthopedic surgeon, who found a large defect in Givens' left knee. The results of the examination were not released to Givens, and eight months later, he suffered a career-ending knee injury while playing in a game for Defendant. While seeking to recover future payments from Defendant, Givens was made aware of the results of the earlier medical examination. Givens then filed three state law claims in federal district court: (1) outrageous conduct; (2) negligent and/or intentional infliction of physical and emotional injury; and (3) breach of the contractual duty of good faith.

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100. No. 3:09-CV-1860-B, 2010 WL 2484251 (N.D. Tex. June 17, 2010).

101. 684 F.Supp.2d 985 (M.D. Tenn. Feb. 10, 2010).

Under the Labor Management Relations Act, state law claims are preempted by federal law when the state law claims depend on consideration of the terms of a labor contract. Thus, to survive preemption, the state law claims must be “independent” of the collective bargaining agreement (CBA). Applying the Sixth Circuit’s two-step inquiry, the court found that none of Givens’ claims were independent of the CBA between the National Football League and the National Football League Players Association, as each claim required interpreting Article XLIV of the Agreement.

#### MISCELLANEOUS

##### *Hutton Group, Inc. v. Advantage Marketing International*<sup>102</sup>

Harvey Slater and the Hutton Group had been doing business together in the sports ticket market since approximately 2001. Advantage Marketing had previously supplied Hutton Group with tickets to the 2006 World Cup and a Masters of Golf event. Hutton Group then ordered tickets to the 2008 Olympic Games for the opening and closing ceremonies and various other events. The plaintiff knew that Advantage did not have the tickets in inventory and that all tickets would have to be supplied by National Olympic Committees, who provided them to brokers. The plaintiff supplied the defendant with one-half of the purchase price in advance and Advantage attempted to procure the tickets from his contact, Desmond Lacon. Four days before the opening ceremonies, Lacon notified Advantage that he was unable to obtain the tickets, and Hutton initiated the present action, and Advantage moved for summary judgment.

The Court granted summary judgment for Advantage because the plaintiff had failed to offer any evidence of fraud. The court analyzed the claims against Slater by determining whether Florida Law permitted the court to pierce the corporate veil. To pierce the veil, three factors must be proven by a preponderance of the evidence: (1) the shareholder dominated and controlled to corporation to such an extent that he was an alter ego of the corporation; (2) the corporate form was used for a fraudulent purpose; and (3) the fraudulent use caused injury to the plaintiff. The Hutton Group alleged that Advantage’s corporate meetings were a sham that were only attended by Slater and that he was also guilty of commingling personal and corporate funds. The court found that the plaintiff had offered no evidence for these claims and could not produce evidence that Advantage was undercapitalized. Therefore, the court refused to pierce the corporate veil and granted Slater’s motion for summary

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102. 2010 U.S. Dist. LEXIS 106203 (W.D. Pa. 2010).

judgment.

*Indiana High School Athletic Association v. Watson*<sup>103</sup>

In *Indiana High School Athletic Association*, the Indiana Supreme Court reversed the decision of the lower courts to grant a preliminary injunction to allow the female student-athlete, Jasmine Watson, to be eligible to play high school sports because it ruled that the lower courts applied an incorrect standard for analyzing the decision of the Indiana High School Athletic Association (IHSAA). The Supreme Court of Indiana ruled that the IHSAA did not act arbitrarily or capriciously in denying Ms. Watson's eligibility.

Ms. Watson was a star basketball player for Elkhart Memorial before her father was put in jail and her family was forced to move to South Bend, Indiana to be closer to family to allow for greater access to transportation. The plaintiff was also upset that Elkhart Memorial had declined to pay a small fee to have her picture in the state's women's basketball pre-season all-star magazine. As a result of the move, Ms. Watson was forced to transfer high schools. Her mother met with the coaches of South Bend's Clay High School and Washington High School, who actively recruited Ms. Watson to become part of their basketball teams. The IHSAA regulates transfers under IHSAA Rule 19-4, which prohibits transfers from playing IHSAA sports when a transfer is based on primarily athletic reasons or if the student-athlete is subject to undue influence. The IHSAA ruled that Ms. Watson's transfer was based on undue influence stemming from her mother's contact with other high school coaches.

Having accepted evidence that Ms. Watson's mother's house was close to foreclosure and of the family's need for the transportation in South Bend, the court found that it could only affirm the decision of the lower court if the IHSAA did not follow its own rules. Therefore, the IHSAA ruled that Ms. Watson was ineligible to participate in IHSAA-sanctioned women's high school basketball.

*Matter of Ansah v. Douglas*<sup>104</sup>

The Harlem Hellfighters, a club football team, commenced a proceeding to request a temporary restraining order against the New York City Public School Athletic League, its executive director, and the New York City Department of Education, seeking a court order to direct respondents to immediately allow the Hellfighters to compete in the 2010 football season.

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103. 938 N.E.2d 672 (Ind. 2010).

104. 2010 NY Slip Op 33323U (N.Y. Sup. Ct. 2010).

The court denied the team's request and dismissed the case.

The Hellfighters were a club football team organized in Harlem in response to the fact that the city did not have its own high school football team. The Hellfighters were allowed to join the league from 2005-07 but were denied league entry in 2008. The team did not play in 2008 and received no explanation for the League's refusal to invite them to play. After being left off the schedule in 2009, the Hellfighters brought an action to force the league to allow them to play and to forgive all of the losses that they had previously forfeited. The League responded by arguing that the Hellfighter's coach violated numerous regulations by not having first aid at practices nor a person that understood CPR and automated external defibrillator practices.

The league then fired the coach, and the Hellfighters had no one that could provide standing to bring a claim against the League. The named respondent, Elisha Ansah, was a minor and did not have the capacity to sue. Moreover, only one player on the team was at least eighteen-years-old, and he was not named as a petitioner. Therefore, the Hellfighters claims failed, and they were prohibited from joining the 2009 New York City Public School Athletic League.

*Williams v. District of Columbia*<sup>105</sup>

The plaintiff, Michael Williams, was the Associate Director of Athletic Programs at the District of Columbia Department of Parks and Recreation (DPR). As part of his job, Mr. Williams managed the DPR's "pee wee" and "pony" basketball leagues. The "pee wee" league was for children ages six through eight, and the "pony" league was for children ages nine and ten. The plaintiff then began receiving complaints that the mayor's children were playing in the "pee wee" league when they were actually too old. The plaintiff attempted to discuss the issue with the mayor, but the mayor responded angrily, and the coach was fired shortly thereafter. As a result, the plaintiff brought three claims against the DPR; first was a claim that DPR was in violation of the District of Columbia Whistleblower Protection Act; second, that the DPR intentionally inflicted emotional distress; and third, that he was illegally defamed prior to his firing.

The Court held that Williams was not protected under the Whistleblower Act because the information that the mayor's children were playing in the "pee wee" league was public and could not be considered a "protected disclosure." The court also found that Williams could not establish intentional infliction of emotional distress because the DPR's conduct could not be considered

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105. 9 A.3d 484 (D.C. 2010).

“extreme and outrageous.” Lastly, the court ruled that, although Williams failed to identify a speaker, he had pled sufficient facts to proceed with a defamation claim by showing that the allegations that he was terminated for embezzlement were “out there” in the community.

#### PROPERTY LAW

Property law frequently affects sports when teams seek to build new playing facilities. Often, owners of businesses or homes or people who have alternative interests in the area where the proposed sports facility will be built oppose the construction for a variety of reasons. The cases below demonstrate some of these issues, as well as other matters concerning property law.

#### *California Oak Found. v. Regents of Univ. of Calif.*<sup>106</sup>

The University of California at Berkley had a plan to renovate Memorial Stadium and build an athlete center. Additionally, the University was going to renovate other buildings on campus. However, the California Oak Foundation, an environmental group, sought an injunction against the University for allegedly violating the Alquist-Priolo Earthquake Fault Zoning Act and the California Environmental Quality Act. The Alquist-Priolo Act prohibits constructing structures within fifty feet of an active fault and prohibits building an addition to a structure on a fault if the value of the addition exceeds 50% of the value of the structure. The California Environmental Quality Act requires public agencies to prepare and certify an environmental impact report.

The trial court determined that the University did not violate the Alquist-Priolo Act because the stadium renovations did not constitute an addition or alteration under the Act. The court looked to the California Building Code and the Uniform Building Code to define the terms “addition” and “alteration.” Additionally, the court noted that, when a word has both a legal and ordinary meaning, legislators are presumed to use the word in the legal sense. Therefore, the court held that an alteration means “any change, addition, or modification in construction or occupancy or structural repair or change in primary function to an existing structure.” It also defined addition as “an extension or increase in floor area or height of a building or structure.” Ultimately, based on the expert testimony, the trial court determined that stadium renovations and the athlete center are not an addition or alteration.

The appellate court affirmed, holding that the lower court did not abuse its discretion in finding that the renovations were not an addition or alteration.

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106. No. A122511, 2010 WL 3449117 (Cal. Ct. App. Sept. 3, 2010).

Specifically, the appellate court focused on the fact that expert testimony showed that the stadium's floor area and height would not change.

Finally, with respect to the Environmental Quality Act claim, the California Oak Foundation appealed the district court's finding that the University's environmental impact report was adequate. The appellate court affirmed, holding that there was substantial evidence to support the Universities certification of the environmental impact report.

*Circle X Land & Cattle Co. v. Mumford Indep. Sch. Dist.*<sup>107</sup>

Circle X Land & Cattle Company appealed a partial summary judgment that held that Mumford Independent School District's condemnation of Circle X's land was necessary. Initially, Mumford School District brought an action to condemn thirty acres of Circle X's land to build a sports and recreation complex.

Under Texas statute, a school district may condemn land if it meets three elements: (1) the district must follow statutory procedure; (2) the condemnation must be for the public use; and (3) the condemnation must be necessary.

Circle X argued on appeal that the school district never proved what its purpose for the condemnation was. Specifically, it argued the only evidence was vague minutes from board meetings. However, the appellate court disagreed, noting that the school district presented affidavits from school board members that show a clear purpose. Furthermore, the court said it did not matter that the school district changed its plan to include a school because the condemnation statute does not prohibit changing the specific purpose.

*Deer Valley Resort Co. v. Christy Sports*<sup>108</sup>

Deer Valley moved for a permanent injunction to enforce a negative restrictive covenant that prohibits Christy Sports from renting skis at a store within the Deer Valley resort. Deer Valley sold a mountain slope to S.Y. and Betty Kimball by special warranty deed. The twenty-five-year deed included a requirement that Deer Valley consent for ski rental on the property. In 1990, an owner of the slope leased the property to operate a ski store. The owner entered into a contract with Deer Valley to rent skis. Then, in 1985, the owner merged with another company to form Christy Sports. From 1995 to 2005, Christy Sports rented skis without Deer Valley's permission.

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107. No. 14-09-00330-CV, 2010 WL 3409597 (Tex. App. Aug. 31, 2010).

108. LLC, No. 2:07-cv-904-CW, 2010 WL 1065940 (D. Utah Mar. 23, 2010).

First the court found the covenant enforceable and Deer Valley's claim within the statute of limitations. Then, the court addressed Christy Sports' defenses of laches, estoppel, abandonment, and waiver. The court rejected the laches and estoppel defenses because Christy Sports failed to show how it suffered a detriment from selling skis for ten years without permission. Likewise, the court rejected the abandonment defense because Christy did not bring forth sufficient evidence supporting it. Also, the court rejected the waiver defense because Christy Sports violated the clean hands doctrine. The court found that Christy Sports knew it was violating the covenant; therefore, it would be inequitable for Christy Sports to claim Deer Valley had waived its rights.

Finally, the court analyzed Deer Valley's injunctive claim on its merits. Ultimately, the court granted the injunction because Deer Valley would suffer harm because, without the injunction, it would not receive the benefit of its covenant.

*Enclave Arlington Associates Limited Partnership v. City of Arlington*<sup>109</sup>

An apartment complex adjacent to Cowboys Stadium sued the owner of the stadium, the City of Arlington, for an illegal seizure under the Fourth Amendment. The federal district court granted the City's motion for summary judgment, and the apartment complex appealed to the Fifth Circuit Court of Appeals.

On appeal, the apartment complex argued that the City effected a seizure by denying residents access to and from the apartment complex during stadium events. The court, though, rejected that argument because Fourth Amendment rights are personal rights and an apartment complex does not have standing to assert claims of third parties.

The apartment complex also argued that the City's actions had meaningfully interfered with its use and enjoyment of the property due to the thousands of people passing near the complex on days and the partying and loud noise taking place in the parking lot. The court also rejected that claim because the apartment complex failed to assert any authority supporting that their claim amounted to a seizure.

*Vang v. WRC Sports Complex, Inc.*<sup>110</sup>

Mai Her Lee Vang appealed a judgment that ruled WRC Sports Complex did not breach its contract to buy land with Vang when it gave timely notice

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109. No. 09-11202, 2010 WL 4608816 (5th Cir. Nov. 15, 2010).

110. No. 2009AP1167, 2010 Wisc. App. LEXIS 263 (Wis. Ct. App. Apr. 8, 2010).

declaring the contract void. Vang entered into a contract with WRC Sports Complex to sell WRC Sports land. The contract contained a provision that allowed WRC Sports to back out of the contract if the land was not rezoned. Specifically, the contract stated, “Said contingencies to be satisfied unless buyer delivers notice prior to 10/31/07 & contract is null and void & earnest money returned.” Later, the parties changed the deadline in the opt-out clause to November 28, 2007. Before midnight on November 28, 2007, WRC Sports notified Vang it was backing out of the contract because Cottage Grove did not rezone the land.

On appeal, Vang argued that the terms “prior to November 28, 2007” unambiguously means anytime before midnight on November 27, 2007. The court disagreed and held the only reasonable reading of the contract is that WRC Sports had the full day of November 28 to provide notice. In its analysis, the court looked at the intent of the parties. First, the court noted that the contract had a provision that said deadlines expressed in the contract “expire at midnight of that day.” Second, the court emphasized that, when the provision was read in context with the refund provision, the only way the clause makes sense is if the deadline is at the end of November 28.

Next, Vang argued that the trial court erred in awarding sanctions for frivolous claims. The court affirmed because Vang’s suit was based on an unreasonable reading of the contract and no basis of law existed for her position.

Finally, the court addressed WRC Sports’ motion for attorney fees based on a frivolous appeal. An appeal is frivolous if the party knew or should have known it had no basis in law. The court awarded fees because the original suit was frivolous and the appeal argued the same legal position.

#### STATUTORY LAW

#### *City of Chicago v. Stubhub!, Inc.*<sup>111</sup>

The City of Chicago argued that its 2005 Amendment to the Ticket Sale and Resale Act, which allowed internet auction services to resale tickets, required Stubhub! to provide its resellers with a written notice of their liability for the state’s amusement tax for the resale of their tickets. Stubhub! refused to provide the notice, and rather than attempt to contact each reseller individually, the City of Chicago brought this action against Stubhub! to force their compliance with Illinois’ amusement tax procedures.

Stubhub! argued that two federal statutes barred Chicago’s claims. First,

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111. No. 09-3432, 2010 WL 3768072 (7th Cir. 2010).

it argued that the Communications Decency Act barred, requiring Stubhub! to provide a tax notice to its resellers. However, the court found that the Communications Decency Act did not give Stubhub! immunity of any kind but, rather, was designed to protect Internet publishers from defamation, obscenity, or copyright infringement. Alternatively, Stubhub! argued that the Internet Tax Freedom Act created a type of “tax freedom” for transactions on the internet. However, the court found that the Act was established to prevent internet sellers from facing multiple taxes from multiple states. Therefore, the resale of tickets for events in Chicago was not protected by the Act because the sales were not subject to multiple state taxes. The Seventh Circuit then shifted their analysis to state law to determine whether the Ticket Sale and Resale Act required ticket intermediaries like Stubhub! to collect and remit amusement taxes. Because the issue was one of first impression for Illinois’ state courts, the Seventh Circuit remanded the case to the Supreme Court of Illinois to rule on the issue.

*George v. NCAA*<sup>112</sup>

The plaintiffs in this class action suit unsuccessfully applied for tickets to NCAA basketball games and forfeited handling fees as a result. The plaintiffs claim that the NCAA’s ticket distribution system constituted an illegal lottery under Indiana law. Under the NCAA distribution process, buyers submitted an application with up to ten ticket entries, and each entry required a \$6 handling fee. The plaintiffs claimed that the system was an illegal lottery under Indiana Code section 35-45-5-3(a)(4), arguing that the fees constituted consideration paid and that the tickets constituted the prize because they were worth far more than their face value. The NCAA argued that the statute’s exception for bona fide business transactions applied. The Seventh Circuit initially ruled that the exception did not apply but, upon rehearing, certified three questions for the Indiana Supreme Court to answer in determining whether the NCAA’s system was an illegal lottery. First, do the allegations about the NCAA’s method for allocating scarce tickets to championship tournaments describe a lottery that would be unlawful under Indiana law? Second, if the plaintiffs’ allegations describe an unlawful lottery, would the NCAA’s method for allocating tickets fall within Indiana Code section 35-45-5-1(d) exception for bona fide business transactions that are valid under the law of contracts? Third, if the plaintiffs’ allegations describe an unlawful lottery, do plaintiffs’ allegations show that their claims are subject to an *in pari delicto* defense?

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112. 613 F.3d 658 (7th Cir. 2010).

*Heard v. City of Villa Rica*<sup>113</sup>

In *Heard*, the Georgia Court of Appeals affirmed a lower court's grant of immunity to the defendant volunteer track and field coach and the City of Villa Rica in a negligence action brought by plaintiff Shonvorreo Heard.

The injuries occurred when the defendant, Brian Cash, was teaching the plaintiff and other children the proper way to long jump. In order to teach the proper form and posture, plaintiff placed a small hurdle in the front of the sand pit, which the children were told to jump over. On his second attempt to clear the hurdle, the plaintiff fell and was injured. Heard brought a negligence action against the coach and the city. In response, Coach Cash claimed that Georgia Statute section 51-1-41 barred the plaintiff's claims based on governmental immunity. The trial court agreed, but Heard argued on appeal that immunity was barred because the Coach's conduct rose to the level of gross negligence because he used a hard object as a hurdle with knowledge that Heard did not have the proper form to clear the hurdle. The court reasoned that gross negligence required a showing that the coach failed to exercise even the slightest degree of common sense or diligence. The court found that Coach Cash was not grossly negligent because he learned the technique of placing a hurdle in the pit from another coach and he had used the technique successfully for several years. Therefore, the court affirmed the lower court's grant of immunity to Coach Cash and the City of Villa Rica.

*Kieffer v. High Point Regional High School*<sup>114</sup>

Following the resignation of a high school baseball coach amid complaints by parents to school officials alleging improper behavior; the plaintiff, Charles X. Kiefer, an aggrieved parent, began making numerous requests under New Jersey's Open Public Records Act (OPRA) for documents associated with the school's investigation of the coach. The school refused multiple requests, and this lawsuit was filed to have the documents made public. To resolve the dispute over disclosing the resignation letter and awarding attorney's fees, the trial judge conducted an in camera review of the letter and determined that it was confidential under OPRA and the common law right of access because the letter contained no information related to the plaintiff's overall request and because the privacy interests outweighed the public policy interests in disclosure.

The appellate court affirmed the lower court's holding that neither OPRA nor the common law right of access applied and that attorney's fees were not

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113. 306 Ga. App. 291 (Ct. App. 2010).

114. 2010 N.J. Super. Unpub. LEXIS 3115 (App. Div. 2010).

appropriate because the letter was a private, rather than public, document. The court made its conclusion based on its own in camera review of the letter, which led the court to conclude that OPRA was not implicated because the letter did not reflect upon the coach's job performance. The common law was also ruled to be inapplicable based on the court's balance of the public's interest in open access to public records and the State's interest in confidentiality, along with the coach's interest in privacy. The court ruled that the confidentiality and privacy interests were paramount and affirmed the trial court. The appellate court also denied attorney's fees based on its own in camera review, which revealed that the document was a private document that did not require public disclosure.

*McNichol v. South Florida Trotting Center, Inc.*<sup>115</sup>

Defendant South Florida Trotting Center's horse training track, used for harness racing training, was impacted by a series of storms that caused the defendant to use a grader to push dirt from the track, which created a large mound on the inside of the track. The mound remained there for some period of time. The plaintiff, Myles McNichol, was injured while training when a horse was startled and bolted over the mound of dirt. The plaintiff was ejected and suffered injuries. The defendant argued that McNichol's claim was barred because Florida granted absolute immunity for injuries related to equine activities and, alternatively, that the plaintiff's claim was barred based on his express assumption of the risk. However, the plaintiff argued that Florida Statutes section 773.03(2)(d) provided an exception to that immunity when the injuries were caused by the track owner's negligence.

Evidence at trial indicated that the presence of a dirt mound was not a normal condition for training tracks. The court found that evidence was produced at trial that established that the mound was a hazard not associated with training horses and that the question of whether the mound was an inherent risk should have been presented to the jury. Lastly, the court found that the trial court erred in finding that plaintiff's express assumption of risk barred recovery. The court determined that the correct standard was an implied assumption of risk because horse racing is not a contact sport. Therefore, the court reversed and remanded the case for the jury to decide whether the placement of the mound was an inherent risk of horse racing thus barring liability.

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115. 2010 Fla. App. LEXIS 15047 (Fla. Dist. Ct. App. 2010)

*Sandholm v. Kuecker*<sup>116</sup>

The defendants were a group of concerned parents and citizens who formed a group called the “Save Dixon Sports Committee” with the goal of getting the school’s basketball coach and athletic director, Steve Sandholm, fired. The group first complained about Sandholm at a school board meeting but was unsatisfied with the school’s response and began seeking support from the public for Sandholm’s dismissal. The defendants complained that Sandholm humiliated players and was excessively abusive. They claimed that his coaching style was to abuse, bully, discourage, and desecrate players. The defendant’s published these claims on the radio, Internet, and the newspaper.

Sandholm brought claims of defamation against multiple defendants who claimed that the plaintiff’s claims were barred by Illinois’ Citizen Participation Act (CPA). The CPA offered immunity if a citizen speaker’s comments were a genuine effort at petitioning for government action, even if that speaker was motivated by an illegal purpose. The trial court held that the defendants acted in furtherance of their desire to have Sandholm removed as coach and athletic director; therefore, the act barred liability. On appeal, Sandholm challenged the district court’s holding and argued that the Act violated his constitutional right to a remedy for his injuries, as well as his right to due process and equal protection. Plaintiff argued that the Illinois Constitution guaranteed him a remedy for his injuries. The court held that the legislature had the power to grant increased protection for the freedom of speech and that he did not have a constitutional right to a remedy.

Sandholm next argued that his equal protection rights were violated because the Act unequally affected public employees. The court held that, because the Act could also be used as a shield by government employees, it did not affect public workers unfairly. Lastly, plaintiff argued that the Act should not provide immunity because the defendants’ comments were made outside of a school board meeting. The court found that the Act provided immunity where (1) the defendant’s acts were in furtherance of his rights to petition, speak, associate, or participate in government to obtain favorable governmental action; (2) the plaintiff’s claim is based on or in response to the defendant’s “acts in furtherance;” and (3) the plaintiff fails to produce clear and convincing evidence that the defendant’s acts were not genuinely aimed at procuring favorable government action. The court found that the defendants satisfied the requirements for immunity under the Act; therefore, Sandholm’s defamation claims were dismissed, and the trial court’s decision was affirmed.

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116. 2010 Ill. App. LEXIS 1095 (Ill. App. Ct. 2010).

*United States Olympics Committee v. Ruckman*<sup>117</sup>

Ruckman, along with other former U.S. Rowers, filed a demand for arbitration with the American Arbitration Association under the Ted Stevens Olympic and Amateur Sports Act, challenging the U. S. Rowing Association's (USRA) procedures for selecting athletes for participation in the Olympics. The arbitrator ruled in favor of USRA, which then brought suit in New Jersey state court to confirm the arbitration award, which named Ruckman and five other athletes as defendants. Ruckman, alone, removed the case to federal court. The USRA argued that Ruckman lacked both subject matter and diversity jurisdiction and sought to have the case remanded to state court. The court concluded that Ruckman lacked subject matter jurisdiction because the Amateur Sports Act expressly states that it does not create a private right of action. Alternatively, Ruckman argued that the court possessed diversity jurisdiction; however, the court found that USRA's underlying state court claim sought no monetary relief, so the amount in controversy requirement was not met.

*United States Olympic Committee v. Tobyhanna Camp Corp*<sup>118</sup>

The Tobyhanna Corporation ran a series of children's summer camps using the name "Camp Olympic" starting in 2008. The logo for the camps included the use of the five interlocking Olympic rings and the "i" in the logo was an Olympic torch. In addition, the camps activities centered around the same sports that are featured in the Olympic Games. Upon discovering the use of the word Olympic, the USOC sent a written demand to Tobyhanna, requesting them to stop using the protected terms and logos as required by the Ted Stevens Olympic and Amateur Sports Act.

Starting in 2009, Tobyhanna changed the name of their summer camps to "Camp Olympik" and had the colored rings spread out instead of interlocked in their logo. A torch was still used in place of the "i" in the logo. The USOC was unsatisfied with the changes and brought this action to enjoin Tobyhanna from using the term "Camp Olympik" and other protected marks.

The Amateur Sports Act forbids any person or company from using the name Olympic or any associated marks in commerce to falsely suggest an association with the Olympic Games or the USOC. The court looked at the totality of the circumstances and decided that the use was infringing. Although any of the individual elements of the camp's logo may not be enough to constitute infringement, when viewed together and in context, the

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117. No. 09-4618 (FLW), 2010 U.S. Dist. LEXIS 52840 (D.N.J. 2010).

118. 2010 U.S. Dist. LEXIS 117650 (M.D.Pa 2010).

logo was a violation. The court also ruled that the protection of the word Olympic extends to any intentional misspelling or other phonetic changes to the word.

The court agreed with the USOC and issued a permanent injunction to stop Tobyhanna from using the term “Olympik” and the use of the Olympic rings and torch. Additionally, the court ruled that these circumstances were “exceptional” because of the bad faith on the company’s part and ordered Tobyhanna to pay attorney’s fees and costs.

*Vaughn v. Barton*<sup>119</sup>

The plaintiff, Debbie Vaughn, was injured while watching her son play baseball in a local recreational league. She was hit in the eye by a ball thrown by a player warming up for the next game. Vaughn argued that the Recreational Use of Land and Water Areas Act (Recreational Use Act) did not provide immunity for the recreational association and Barton as its agent because her son paid to play in the league. The association argued that the fee paid was not the type that could defeat the applicability of the Recreational Use Act. The court reasoned that the Recreational Use Act provides liability under two circumstances: (1) for willful or wanton failure to guard or warn against a dangerous condition, use, structure, or activity and (2) where the owner of land charges the person who enters the land for recreational use. The court found that fees paid by the injured spectator, not a participating athlete, are the type that would hold the association liable. Therefore, the court granted the association immunity.

The court also accepted the association’s alternative argument that it was immune from liability based on the Baseball Facility Act. The act grants immunity to the owner of a facility for spectator injuries unless (1) the person is situated behind a screen or backstop and it is defective or (2) the injury is caused by willful or wanton conduct. The court found that neither situation applied; therefore, the Baseball Facility Act also provided immunity.

#### TORT LAW

Tort law is one of the most commonly litigated areas in sports law. Tort law governs the duty of care that owners and operators of sporting events owe to others and the duty of care that athletes owe to other athletes, among other things. Courts must balance the inherent physicality and dangers associated with the particular sport at issue with the duty of owners and operators of sporting events to provide participants and spectators with certain degree of

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119. 933 N.E.2d 355 (Ill. Ct. App. 2010).

safety and the duty of athletes to conduct themselves in a manner that is safe for other participating athletes. The following cases display the common and the recent interaction of tort law with sports law.

*Archibald v. Kemble*<sup>120</sup>

Robert Archibald was injured during a no-bodily-contact hockey league after Cody Kemble “slew-footed” him, which means Kemble tripped Archibald from behind. In this appeal from a motion for summary judgment in favor of Kemble, the court had to decide, as a matter of first impression, what standard to apply for co-participant injuries in a recreational hockey league.

The court reversed and remanded, holding that the recklessness standard applied. First, it looked at other jurisdictions and noted a majority uses a recklessness standard. In adopting the majority approach, the court noted that a negligence standard would result in a flood of litigation. Then, the court applied the new standard to the facts of the case. In its analysis, the court mentioned seven non-exclusive factors it should consider: (1) the game involved; (2) the ages of athletes; (3) the skill and knowledge of athletes; (4) the status as either amateur or professional; (5) the risks inherent to the game; (6) the uniform protections available; and (7) the enthusiasm of the game. Finally, after looking at the record, the court concluded that Archibald had produced enough information to get past summary judgment, and it remanded the case for trial.

*Bell v. Dean*<sup>121</sup>

Gordon Bell appealed a motion for summary judgment, which held the Pennsylvania Skier’s Responsibility Act barred recovery for his injuries stemming from a collision with a snowboarder. Bell was working as a ski patroller when William Dean, a recreational snowboarder, came down the hill at a fast speed and collided with Bell.

Bell’s first argument on appeal was that the Pennsylvania Skier’s Responsibility Act, which imposes the doctrine of assumption of risk, only applies to suits between skiers and ski resort owners or operators and not suits between two skiers. However, the court held that nothing in the language of the statute supported Bell’s argument.

Bell’s second argument was that risk of another negligent skier is not inherent to the sport and thus not covered under the doctrine of assumption of

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120. 971 A.2d 513 (Pa. Super. Ct. 2010).

121. No. 1741 MDA 2009, 2010 Pa. Super. LEXIS 2618 (Pa. Super. Ct. Aug. 16, 2010).

risk. But the court disagreed, holding that one expects to ski with other people who have varying degrees of skill and an accident is foreseeable.

*Berry v. Lynch*<sup>122</sup>

Plaintiff, Jason Berry, was injured in a paintball game on the defendant's property when he momentarily lifted his mask to defog it and was struck in the face. The lower court entered two orders: one that granted partial summary judgment to Linda, Gary, and Joseph by requiring plaintiff to meet a higher standard of reckless conduct established in *Crawn v. Campo* and a second order that granted summary judgment to Linda and Gary and dismissed plaintiff's complaint against them because no evidence of reckless conduct was found. The court affirmed the grant of summary judgment but for different reasons.

On appeal, Berry argued that the trial court erred in holding plaintiff to a heightened standard of reckless conduct and also erred in granting summary judgment based on an improper standard. The court found that nothing in the fact pattern of this case resembled the cases the trial court relied on to hold plaintiff to a higher standard. The court determined that, as the defendants were not co-participants in the sport, the defendants were not entitled to the heightened standard as shown in *Crawn*.

The court then had to determine if the defendants had any duty at all in determining if Linda, Gary, and Joseph needed to provide plaintiff with instructions on defogging a mask as part of premises liability. The court determined that any risk inherent to the plaintiff removing his mask in the middle of scrimmage was not something known by defendants. Yet, the plaintiff was aware of the possibility of injury. The court concluded that the plaintiff cannot impose a duty to give him instruction on the use of his own mask.

*Brokaw v. Winfield- Mt. Union Cmty. Sch. Dist.*<sup>123</sup>

High school Basketball player Jeremy Brokaw and his parents brought this case to the Iowa Supreme Court to review the appellate court's decision over damages and negligence against Winfield-Mt. Union School District. Specifically, the Brokaw's argued that the appellate court erred in affirming an inadequate compensatory damage award, in denying punitive damages, and in dismissing their negligence claim against the school district. The high court affirmed all of the appellate court's rulings.

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122. 2010 N.J. Super. Unpub. LEXIS 1174 (N.J. Super. Ct. App. 2010).

123. 2010 Iowa Sup. LEXIS 91 (2010).

Jeremy was involved in a fight during a high school basketball game. During the fight, an opponent, Andrew McSorely, struck Jeremy in the head, which caused Jeremy to suffer loss of mind and body.

On the punitive and compensatory damages issues, the court said substantial evidence supported the awards because the lower courts relied on expert testimony, witness testimony, and medical records that showed Jeremy had both pre-existing conditions and subsequent injuries that made a clear damage determination difficult. On the negligence issue, the court affirmed the appellate court's ruling that the school district did not act negligently. The court emphasized that substantial evidence showed the instigator, McSorely, always played basketball aggressively and the school district could not foresee that he would commit a battery against Jeremy.

*Chepkevich v. Hidden Valley Resort, L.P.*<sup>124</sup>

Lori Chepkevich was skiing with her family at Hidden Valley Resort. During her trip, she and her nephew, Nicholas, tried to board a ski lift. The ski lift operator said he would stop the lift to allow Nicholas to safely board. However, the operator did not stop the lift. As a result, Nicholas fell from the lift while trying to board. The trial court granted the ski resort summary judgment on the basis of a release the skiers signed. The appellate court reversed, finding that the release did not define or give examples of negligence. Additionally, the appellate court reversed because it found issues of material fact existed over what the ski lift operator said to Lori. Hidden Valley then appealed to the Supreme Court of Pennsylvania.

The high court reversed, holding that the case was barred by the Skier's Responsibility Act, which applies the doctrine of assumption of risk to all inherent risks of skiing. Additionally, the court held that the absence of a definition of negligence did not make the release invalid. On the Skier's Responsibility Act issue, the court noted that the Act applied to ski owners and operators and protected them from liability for injuries caused by inherent risks of the sport. Then, the court concluded that falling from a ski lift is an inherent danger of skiing that occurs frequently.

Next, the court addressed the whether the absence of a definition of negligence made the release invalid. The court held the release was valid, emphasizing that valid releases do not necessarily need the word negligence in them; therefore, it was only logical to conclude that a definition of negligence was not necessary.

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124. 2010 PA. LEXIS 1311 (Pa. 2010).

*Crace v. Kent State Univ.*<sup>125</sup>

Former Kent State University cheerleader Rhonda Crace appealed a motion for summary judgment ruling against her and in favor of her coach, based on primary assumption of risk after she fell from the top of a human pyramid and became a paraplegic. Before she fell, the coach replaced the original spotter with someone who was unfamiliar with the maneuver. As Crace was falling, the spotter panicked, blocked his eyes, and moved out of the way, resulting in Crace falling to the ground.

On appeal, Crace argued that the trial court erred in applying the assumption of risk doctrine. Specifically, she argued the assumption of risk defense does not apply to a non-participant, such as the coach. However, the appellate court rejected that argument, saying that precedent showed that assumption of risk had been applied to non-participants. Then, the court looked at whether Crace had assumed the risk. Under Ohio law, an assumption of risk analysis only considers whether a sport is inherently dangerous; therefore, whether a participant is actually aware of the risk is irrelevant. In its analysis, the court held that cheerleading was inherently dangerous because the risk of falling is foreseeable and a customary aspect of the sport.

Crace also argued on appeal that, even if she did assume the risk, the coach was still liable because he acted recklessly by substituting in an inexperienced spotter. The appellate court affirmed the lower court's ruling that the coach did not act recklessly. Its decision was based largely on evidence showing that the coach followed national cheerleading guidelines.

*D'Agostino v. Easton Sports, Inc.*<sup>126</sup>

The plaintiff, Jamie D'Agostino, brought a two-count complaint against a bat manufacturer and a batter after he was struck in the eye from a batted softball. Specifically, he brought a products liability action against the bat manufacturer and a negligence action against the batter. Both defendants brought a motion for summary judgment.

With regard to the claim against the batter, the plaintiff alleged that, because the batter paid a higher price than the manufacturer's retail price, a jury could infer that the batter purchased an altered bat for the purpose of enhancing athletic performance. The court rejected that argument because it was based purely on speculation. Additionally, a claim against a co-

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125. 924 N.E.2d 906 (Ohio Ct. App. 2010).

126. 2010 Conn. Super. LEXIS 3200 (Conn. Dec. 9, 2010).

participant in an athletic contest is only allowed for recklessness or intentional conduct. Here, there was no evidence of anything more than negligence; therefore, the defendant's motion for summary judgment was granted.

With regard to the products liability action, the plaintiff alleged that the bat's design was dangerous. Based on the manufacturer's evidentiary presentation, the court concluded that the manufacturer did not establish that the bat's design did not unreasonably increase the risk of harm from a batted softball; therefore, the defendant's motion for summary judgment was denied.

*Davis v. City of Philadelphia*<sup>127</sup>

Roman Davis, plaintiff, was injured in a flag football game organized by Philadelphia Sport and Social Club (PSSC) and on a field owned by City of Philadelphia. He tripped in a depression in the field, and the trial court granted a motion for summary judgment for PSSC.

On appeal, Davis argued that the trial court erred in granting the motion for summary judgment when questions of material fact remained and that the court erred in holding that the city was immune from liability under the Recreational Use of Land and Water Act (RULWA). Plaintiff argued that RULWA did not shield the city because it only covered properties that were unimproved and where there was no admission fee. He stated that the court should look at the park as a whole and not just the field. He also contended that he paid dues that acted as admission to the park.

The court determined that plaintiff did not provide particular case law to support his argument. The court determined that the field was not a highly developed recreational area and therefore RULWA applied. It also determined that the city did not charge the plaintiff to use the field, so the exemption to RULWA did not apply. The court upheld the trial court's grant of the motion for summary judgment.

*Deutsch v. Birk*<sup>128</sup>

Todd Deutsch appealed a motion for summary judgment against him based on immunity from negligence for recreational activities. The accident happened when the defendants, Suzzane Birk and her daughter Michaela Birk, were rollerblading and biking on a bike trail. At one point, Michaela walked her bike across the path and in front of Deutch, which caused him to fall from his bike.

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127. 987 A.2d 1274 (Pa. Commw. Ct. 2010).

128. 937 N.E.2d 638 (Ohio Ct. App. 2010).

On appeal, Deutsch argued that, despite recreational immunity, he could bring a negligence claim based on Michaela violating vehicular traffic laws. In essence, his argument was that bikes are required to comply with local traffic laws. The court rejected that argument, holding that cyclists are only required to comply with traffic laws when they are on a highway or roadway. Here, the court ruled that Birk was on a bike-only path; therefore, the duty to follow traffic laws did not apply.

Finally, in affirming summary judgment, the court rejected Deutch's argument that recreational immunity only applies when defendants are engaged in a common recreational activity. Deutch argued that, because Suzanne Birk was rollerblading and Michaela was biking, the two were not engaged in a common recreational activity and immunity did not apply. The court, though, said no case law supported that argument.

*Doody v. Evans*<sup>129</sup>

Michael Doody, a recreational softball catcher, appealed a motion for summary judgment against him that ruled that Martin Evans did not act recklessly when he ran home and violated league rules by colliding with Doody. On appeal, Doody argued that issues of material fact existed over whether Evans acted recklessly. The court affirmed summary judgment, holding that a league violation does not necessarily determine recklessness. It emphasized that a collision between a base runner and catcher is a foreseeable hazard in softball. Moreover, the fact that the league specifically outlawed collisions showed that the league contemplated the hazard as a part of the game, and the accident was thus foreseeable.

*Edward C. v. City of Albuquerque*<sup>130</sup>

Plaintiff, her son Emilio, and other family attended an Albuquerque Isotopes game, sitting in the picnic area behind the left field wall in foul territory. As they began to eat their food, batting practice started without warning. A ball was hit into the picnic area, striking Emilio in the head. Plaintiff sued the city, the Isotopes, and other defendants. The district court granted summary judgment for the city and Isotopes because, under the "baseball rule," their duty was limited to providing screening behind home plate. The appellate court reversed, holding issues of material fact existed. The New Mexico Supreme Court granted certiorari to determine the duty a baseball stadium owner and operator owes to a spectator.

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129. 935 N.E.2d 926 (Ohio Ct. App. 2010).

130. 241 P.3d 1086 (N.M. 2010).

In analyzing the duty, the court looked to other jurisdictions and gave a thorough history of the “baseball rule.” In essence, the “baseball rule,” limits the duty of baseball owners and operators based on the negligence theory of assumption of risk and contributory negligence. The court noted that baseball owners and occupiers should have a limited duty based on a need to protect the inherent nature of the game; however, spectators should be able to recover for unique circumstances. Ultimately, the court decided to modify the “baseball rule” and held that baseball stadium owners and occupiers owe a duty that is symmetrical to spectators. Thus, spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play, and the owner/occupant must exercise ordinary care not to increase that inherent risk.

*Estate of Richardson v. Bowling Green State Univ.*<sup>131</sup>

The estate of Aaron Richardson filed suit against Bowling Green State University (BGSU) for wrongful death and survivorship. Liability and damages were bifurcated and proceeded to trial on the issue of liability. Plaintiff alleged that the university did not meet the standard of care required and that a call for emergency medical attention made at an earlier time would have given Aaron life-saving treatment.

Aaron was a walk-on athlete to the BGSU football team and was attending practice. He had just finished “gassers,” a series of sprints, when he experienced cramping in his legs. He was helped off the field with a student coach to the locker room. While in the locker room, a student assistant for the training staff of the women’s soccer program assisted Aaron. Aaron’s cramping spread throughout his body, and a series of phone calls was made to athletic trainers and ultimately to 911. However, as the last emergency call to 911 was being made, Aaron suffered cardiac arrest and never regained consciousness. Aaron was diagnosed with sickle cell trait as a child, and his brother suffered from sickle cell disease.

The court found that the standard of care did not require the BGSU training staff to perform an exam on Aaron before he left the field. The court concluded that cramping in Aaron’s legs was a common condition among practicing athletes and would not need to be evaluated by training staff. The training staff was also not aware that Aaron had sickle cell trait.

The other issue addressed was if medical treatment had been sought earlier Aaron would have survived. The court determined that they could not pinpoint the moment in time when Aaron’s life was irretrievably lost. The

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131. No. 2005-10179, 2010 Ohio Misc. LEXIS 135 (Ohio Ct. Claims July 26, 2010).

court noted that the plaintiff has the burden of proof to establish proximate cause, and that burden was not met. The court concluded that the plaintiff failed to prove her claim, and judgment was rendered in favor of the defendant.

*Gamache v. New York*<sup>132</sup>

Junior welterweight Joey Gamache sustained head injuries during a boxing match against Arturo Gatti that ended his career. Gamache sued the New York State Athletic Commission because he alleged the official weigh-in was done negligently. He alleged that Gatti did not make his required weight but that the Athletic Commission still allowed him to fight. As a result, Gatti came into the fight weighing twenty pounds more than Gamache. The weight mismatch allowed Gatti to land powerful punches, which ultimately led to Gamache's injuries.

In its decision, the court first found that Athletic Commission was negligent in its weigh-in. It found that the Athletic Commission allowed Gatti to get off the scale before the Commission could determine that he made the contracted weight of 141 pounds. Furthermore, it concluded that Gatti probably weighed slightly more 141 pounds at the time of weigh-in.

The court, though, still denied liability because Gamache did not prove that the negligent weigh-in caused his injuries. Ultimately, the court found that Gatti's youth, reach advantage, and ability to put on weight after the weigh-in caused Gamache's injuries, not the small difference between contract weights at weigh-in.

*Green v. Schutt Sports Mfg. Co.*<sup>133</sup>

Jeremy Green was a high school football player who became quadriplegic after tackling a player during a scrimmage. He brought a products liability claim against the manufacturer of his football helmet. At trial, the jury did not find a design defect. Green appealed, arguing that the lower court erred in dismissing his claim for punitive damages and erred in numerous evidentiary rulings. The appellate court affirmed.

On the punitive damages issue, the appellate court held that a Texas statute precludes punitive damages when no damages are awarded. Because the jury did not find negligence, under the statute, Green could not receive punitive damages.

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132. 898 N.Y.S.2d 426 (N.Y. Claims Ct. 2010).

133. 369 Fed. App'x 630 (5th Cir. 2010).

Then the court looked at the evidentiary appeals. First, the court held that the lower court did not abuse its discretion when it held Thomas “Hollywood” Henderson, a former pro football linebacker, was not an expert witness on helmet safety. Second, the court held there was no abuse of discretion on permitting evidence that the manufacture complied with industry standards or that the high school continued to use the same helmet Green used. Third, the court held there was no abuse of discretion in permitting a bar graph that compared manufacturing test scores or literature saying football helmets cannot protect against neck injuries. Finally, the court held that the lower court did not abuse its discretion by excluding Green’s evidence on bike helmet safety.

*Feld v. Borkowski*<sup>134</sup>

Benjamin Feld appealed an affirmation of summary judgment from an Iowa appellate court decision holding that softball was a contact sport and that Luke Borowski did not act recklessly when he swung a bat and released it, which consequently hit Feld in the forehead. Specifically, during batting practice, Feld was playing first base, and Borowski was batting. Borowski, a right-handed hitter, released the bat after he hit a ball, and the bat flew toward Feld, hitting him in the forehead.

Under Iowa common law, an individual may not recover for injuries from contact sports unless the tortfeasor acted recklessly. On appeal, Feld argued that softball is a contact sport and that Borowski did act recklessly.

In its opinion, the court first looked at whether softball is a contact sport. The court noted a risk of contact occurs between a participant and a bat swung by a batter. Furthermore, the court said batting is a normal activity within the sport of softball; thus, it is a contact sport. Next, the court looked at whether Feld brought forth enough evidence to support a jury question on recklessness. The court concluded, based on an affidavit from a long-time baseball coach, that a jury question of recklessness existed. In the affidavit, the coach said he had never seen or heard of right-handed hitter hitting a first basemen in the head with a bat. Ultimately, the abnormal activity was enough to create a jury question on recklessness, and summary judgment was reversed.

*Felix v. Spaulding High Sch. Union Dist.*<sup>135</sup>

The school district and high school football coaches brought motions for summary judgment based on assumption of risk, municipal immunity, and

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134. 790 N.W.2d 72 (Iowa 2010).

135. No. 411-6-08 Wncv, 2010 Vt. Super. LEXIS 1 (Vt. Super. Ct. Mar. 3, 2010).

qualified immunity after a high school football player suffered a catastrophic neck injury from tackling head-first during a game. Vermont requires each high school athlete to participate in ten practice sessions before taking the field. Before injuring himself, Derek Felix, the high school football player, had only participated in seven practices and a few “chalk talks” with coaches. Moreover, Felix had not seen a tackling safety video before entering the game.

First, the court addressed the defendant’s motion for summary judgment based on assumption of risk. In denying summary judgment, the court explained that primary assumption of risk does not apply because coaches have a duty toward their athletes and primary assumption of risk is a no-duty doctrine. Then, the court said that secondary assumption of risk, which bars recovery based Felix’s awareness of the risk, also does not apply because the doctrine of comparative fault replaced secondary assumption of risk.

Second, the court looked at the school district’s motion for summary judgment based on municipal immunity. Under Vermont law, municipal immunity exists for all governmental activities but not proprietary activities. Governmental activities are those for the public benefit and convenience, while proprietary activities are for revenue generating activities. Here, the court concluded that high school football was a governmental activity because it served an educational purpose and is not meant to generate revenue. Therefore, because high school football was considered a governmental activity, the school district received immunity

Finally, the court addressed the athletic director and football coaches’ motions for summary judgment based on qualified immunity. Governmental employees receive immunity for discretionary activities but not ministerial ones. The court said that the purpose of qualified immunity is to protect officers who make decisions that inevitably harm individuals, like police officers, and to protect employees who are required to make allocations of public resources. With that purpose in mind, the court denied the individual defendants’ motions for summary judgment because an athletic director or coach is insufficiently similar to a police officer and the decision of letting a player into the game does not involve allocating public resources.

*Goldman v. Young Israel of Woodmere*<sup>136</sup>

Plaintiffs Zachary Goldman, a ten year old boy, and his mother, Sheila Goldman, brought an action after Zachary injured himself during a kickball game when he ran into a gymnasium door after running through home plate. The plaintiffs alleged negligence in the placing of home plate too close to the

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136. No. 15712/08, 2010 N.Y. Misc. LEXIS 5365 (N.Y. Sup. Ct. Nov. 1, 2010).

unpadded doors and in not providing enough supervision. The defendant that owned the gymnasium, Young Israel of Woodmere, denied those claims and brought a motion for summary judgment.

On the padding issue, the plaintiffs brought forth an expert affidavit from the World Adult Kickball Association that claimed that kickball guidelines recommend that a space of ten feet is needed to allow a runner to slow down. But the expert failed to identify any violations in the defendant's gymnasium; therefore, the court granted summary judgment on the issue.

The court also granted summary judgment on the lack of supervision issue. The court held that a lack of supervision was not the proximate cause of the injury because the incident took place in so short a time that no reasonable person could have stopped Zachary from hitting the door. Additionally, the court held that Zachary assumed the risk. In its opinion, the court noted that Zachary had played kickball in that gymnasium five times before and had never complained.

*Gortych v. Brenner*<sup>137</sup>

New York City moved for summary judgment against James Gortych based on assumption of risk after Gortych collided with a biathlon competitor in Central Park while Gortych was recreationally cycling in the park. In its opinion that denied summary judgment, the court first looked at whether the City owed Gortych a duty. The court held that municipalities owe a general duty of safety based on their ownership of property open to the public. Furthermore, municipalities may be liable for injuries caused by third parties if the injury was foreseeable. The court determined that New York City did owe a duty to Gortych because the possibility of a collision during the biathlon was foreseeable.

Next, the court analyzed whether Gortych's assumed the risk of colliding with a biathlon competitor. It first concluded that the risk of collision was obvious to Gortych based on the fact that Gortych had already cycled around the park before the accident. But, the court ultimately denied New York City's motion for summary judgment based on its determination that an issue of fact existed over whether Gortych fully comprehended the risk.

*Hlywa v. Liberty Park of Am.*<sup>138</sup>

Amateur soccer player Julie Hlywa appealed a summary judgment decision against her that ruled Denise Pond, an opposing soccer player, did not

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137. 910 N.Y.S.2d 762 (N.Y. Sup. Ct. 2010).

138. No. 2008-000662, 2010 WL 2793562 (Mich. Ct. App. July 14, 2010).

act recklessly when she tackled Hlywa during a soccer game. Hlywa alleged that, as she was preparing to take a shot, Pond left her goalie position and slide tackled Hlywa.

The court noted that the standard for co-participant injuries is recklessness. On appeal, Hlywa argued that, because slide tackling was prohibited by the facility, Pond knowingly violated a rule and thus acted recklessly. However, the court affirmed summary judgment because a rule violation does not establish recklessness and slide tackling is well within the ordinary range of activity in soccer.

*Kalan v. Fox*<sup>139</sup>

Mary Kalan, a recreational softball catcher, was injured when Adrian Fox collided with her as Fox tried to score home from third base. Kalan appealed a motion for summary judgment against her that ruled the recreational-use doctrine prevented recovery because Fox did not act recklessly or intentionally when injuring Kalan.

Kalan argued on appeal that the trial court erred because it did not apply the negligence standard because Fox's conduct violated a league rule and thus did not constitute a part of the sport of softball. The appellate court affirmed the lower court's ruling that a negligence standard was inappropriate because rule violations are an ordinary part of the game. Therefore, a reckless or intentional standard is appropriate.

Kalan also argued that summary judgment was inappropriate because issues of material fact existed on whether Fox acted recklessly. Specifically, she argued that an issue existed over whether Fox recklessly barreled into Kalan or permissibly slid face-first into home plate. The court held that Kalan had brought enough evidence to create an issue of fact and remanded to the Court of Common Pleas to determine whether Kalan had acted recklessly.

*Larson v. Cuba Rushford Central School District*<sup>140</sup>

A cheerleader sustained injuries when she fell while performing a stunt during practice. After discovery, the defendants moved for summary judgment based on the doctrine of assumption of risk. The lower court denied summary judgment, and the defendants appealed.

The appellate court said that the doctrine of assumption of risk applied to cheerleading. Moreover, the court said the defendants met their burden in

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139. 933 N.E.2d 337 (Ohio Ct. App. 2010).

140. 78 A.D.3d 1687 (N.Y. App. Div. 2010).

showing that the plaintiff voluntarily engaged in the activity. However, the court affirmed the lower court's denial of summary judgment because the plaintiff raised triable issues of fact, including the inexperience of the cheerleading coach and failure to use proper coaching techniques.

*Lin v. Spring Mountain Adventures, Inc.*<sup>141</sup>

Plaintiff Dong Lin was skiing at the defendant's ski area, Spring Mountain, when she lost control and fell into a partially padded snow-making machine. The defendant brought a motion for summary judgment. Specifically, the defendant argued that its release from liability was valid and Lin assumed the inherent risks of skiing.

With regard to the first argument, the court said a valid liability waiver must meet three conditions: (1) the clause must not contravene public policy; (2) the clause must be between persons relating entirely to their own private affairs; and (3) each party is a free bargaining agent. Ultimately, the Federal District Court found that the liability waiver was valid because it was clear what Lin was signing. Indeed, the court found that the document stated five times that it was a release from liability.

With regard to the second argument, the court noted a two-part inquiry to determine whether a skier assumed the risk of an injury. First, the court must look at whether the skier was engaged in the sport of downhill skiing at the time of the injury. If the answer is yes, the court then looks at whether the injury arose out of an inherent risk of skiing. The court answered both questions in the affirmative. The court easily concluded that Lin was engaged in downhill skiing. The court also determined that a collision with a snow-making machine is an inherent risk of the sport because a person should reasonably anticipate the dangers of obstructions on the slopes.

*Mangan v. Engineer's Country Club, Inc.*<sup>142</sup>

Plaintiff Warren Mangan slipped and fell while walking on a staircase from the cart path to the eleventh tee box at Defendant Engineer's Country Club's golf course. The trial court granted summary judgment in favor of defendant based on the doctrine of assumption of risk. On appeal, Mangan argued that the doctrine did not apply.

The appellate court, though, flatly rejected that argument and held assumption of risk applies to inherent risks arising out of the nature of the sport, including the construction of playing surfaces and open and obvious

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141. No. 10-333, 2010 U.S. Dist. LEXIS 136090 (E.D. Pa. Dec. 17, 2010).

142. 79 A.D.3d 706 (N.Y. App. Div. 2010).

risks associated with it. On that ground, the appellate court affirmed summary judgment in favor of Defendant.

*Miller v. Dunham's Discount Sports*<sup>143</sup>

Plaintiff Marcia Miller broke her foot as she attempted to get off an elliptical machine at defendant's sporting goods store. The trial court granted summary judgment in favor of the defendant because the danger was open and obvious, which meant that the defendant did not have a duty to protect Miller from the danger.

Miller appealed, but the appellate court affirmed summary judgment. In its opinion, the appellate court held that the elliptical constituted an open and obvious danger. The court further held that the danger was not unreasonably dangerous; therefore, the defendant did not owe Miller a duty to protect her from the danger of the elliptical.

*Pfenning v. Lineman*<sup>144</sup>

Sixteen year-old Cassie Pfenning was voluntarily operating a beverage cart when a golf ball struck her in the mouth during a Whitey's Bar-sponsored golf scramble. She appealed from the trial court's summary judgment ruling that the defendants owed her no duty because, under Indiana state law, sports participants do not owe each other a duty to prevent injuries inherent to the sport. On appeal, Pfenning brought forth four arguments.

First, Pfenning argued that the defendants owed her a duty because, as a beverage cart operator, she was not a participant in the golf event. The court disagreed and held that, because she was involved in the event, she was therefore considered a participant of the event. Additionally, Pfenning argued that, even if she was considered a participant, she did not consent to the inherent risks of the golf event. The court again disagreed and noted that Pfenning had spent three hours on the course before the injury occurred, which gave her plenty of time to learn about the inherent risks of golf.

Second, Pfenning argued that an issue of material fact existed as to whether the golfer who hit the errant ball acted recklessly by not yelling "fore." However, the court said that Pfenning had not brought forth any facts to support her argument.

Third, Pfenning argued that the lower court erred by granting summary judgment on the issue of negligent supervision because her care had been

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143. No. 29445, 2010 Mich. App. LEXIS 2424 (Mich. Ct. App. Dec. 16, 2010).

144. 922 N.E.2d 45 (Ind. App. 2010).

entrusted to the operators of the golf event. The court affirmed the lower court's ruling and held that no special relationship existed between Pfenning and event operators; therefore, her safety had not been entrusted, and no duty existed.

Finally, Pfenning argued that an issue of fact existed over whether the golf course and event operators owed a duty of care under premises liability. In rejecting Pfenning's argument, the court applied a totality of the circumstances test and determined the defendant's did not owe Pfenning a duty.

In all, the appellate court rejected all of Pfenning's arguments and affirmed the lower court's motion for summary judgment in favor of the defendants.

*Pickel v. Springfield Stallions, Inc.*<sup>145</sup>

Wendy Pickel was injured while attending a Springfield Stallions arena football game when a football player fell over a wall and collided with her. She appealed a grant of summary judgment against her that held the heightened contact sports standard, which requires willful or wanton conduct, applied to injured spectators, as well as participants. On appeal, Pickel argued that the contact sports exception applied only to athletic participation injuries. The appellate court agreed and emphasized that a heightened standard exists for participants because they voluntarily engage in physical contact. But the same is not true of spectators; simply attending a contact sporting event is not enough to trigger the heightened injury standard.

Then the court went on to discuss the proper standard for spectator injuries. The Springfield Stallions argued that the doctrine of primary assumption risk applied because a football player coming into the stands was an inherent risk of attending an arena football game. But, the court rejected that argument and held that the Stallions owed Pickel a duty to take reasonable action to protect her against unreasonable harm. Although the court rejected a primary assumption of risk defense, it did say defendants could still argue contributory negligence.

Ultimately, the court reversed the lower court's summary judgment order and remanded the case to be tried under the negligence standard.

*Pryor v. Iberia Parish Sch. Bd.*<sup>146</sup>

Ms. Pryor appealed a denial of her claim for damages against the Iberia

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145. 926 N.E.2d 877 (Ill. App. Ct. 2010).

146. 42 So.3d 1015 (La. Ct. App. 2010).

Parish School Board. Ms. Pryor was injured when she fell while descending the bleachers on the visitors' side of the field, in which there was an eighteen-inch differential between the bleachers. The trial court found that the bleachers did not present an unreasonably dangerous condition and that Ms. Pryor observed the gap in the bleachers.

On appeal, Ms. Pryor argued that the trial court erred in failing to conduct a proper analysis of the risk-utility balancing test; concluding the defective bleachers were not unreasonably dangerous; relying on facts not in evidence; and ascribing fault to the plaintiff. The court looked at the Louisiana civil code for the obligations of a land owner and found that, in this case, Ms. Pryor had to show that the stadium seats were in the care, custody, and control of the school board, there was a vice or defect that created an unreasonable risk of harm, her injury was caused by the defect, and the school board had actual or constructive knowledge of the dangerous condition.

The court concluded that the height differential presented a clearly dangerous condition and it would be relatively inexpensive to remedy the condition, thus finding the school board liable for injuries suffered by Ms. Pryor. The school board asserted that Ms. Pryor was contributorily negligent for her injuries. The court found evidence to support fault on both parties and apportioned 30% fault to Ms. Pryor and 70% to the school board..

*Sanchez v. Candia Woods Golf Links*<sup>147</sup>

Plaintiff, Paul Sanchez, III, appealed a lower court grant of summary judgment in favor of Defendant, Candia Woods Golf Links. The suit arose out of a round of golf that Sanchez played at the Candia Woods. During the round, Sanchez hit a ball that ricocheted off a yardage marker and hit him in the eye. On appeal, Sanchez argued that Candia Woods breached a non-delegable duty to provide a safe environment and that the placement of the yardage markers was inherently dangerous.

The appellate court disagreed with Sanchez's arguments and affirmed summary judgment, holding that the Candia Woods owed no duty under the doctrine of assumption of risk. Additionally, the appellate court held that a yardage marker was an inherent risk of the sport, which the golf course did not owe a duty to protect against.

*Anand v. Kapoor*<sup>148</sup>

Plaintiff Azad Anand appealed summary judgment in favor of the

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147. 13 A.3d 268 (N.H. 2010).

148. 942 N.E.2d (N.Y. Dec. 2010).

defendant. Anand was playing golf at a nine-hole course when Defendant, Anoop Kapoor, hit a ball without saying “fore.” The ball went in an unintended direction and struck Anand in the eye. The appellate court affirmed the summary judgment because Kapoor’s failure to warn did not amount to intentional or reckless conduct; therefore, the doctrine of assumption of risk barred recovery.

*Searle v. Town of Bucksport*<sup>149</sup>

John Searle appealed a motion for summary judgment based on governmental immunity after he fell through the visitor’s bleachers while watching a high school football game in Bucksport, Maine.

Under Maine state law, negligent acts related to public buildings or the appurtenances of public buildings do not receive governmental immunity; however, accidents caused from governmental personal property do receive immunity. Therefore, on appeal, Searle argued that the football bleachers were either a government building or an appurtenance of a building.

The court quickly rejected the argument that the bleachers were a building because they did not have the required walls and a roof. Then the court analyzed whether the bleachers were considered an appurtenance of a public building. In its analysis, the court looked at three factors: (1) was the object “physically annexed” to the public building; (2) was the object adopted for the same use as the land it is attached to; and (3) the intent of the party.

For the first factor, the court found that the bleachers were not a part of the field because they had been moved multiple times. For the second factor, the court found that the bleachers were generic and never designed specifically for Bucksport high school; consequently, they were not adopted for the same use. For the third factor, the court found that the school intended the bleachers to be mobile rather than fixed to the field. Based on its three factor analysis, the court ultimately affirmed the lower court ruling and held that the bleachers were not a public building or appurtenance and thus subject to governmental immunity.

*Socia v. Pacers Basketball Corp.*<sup>150</sup>

Julie Socia was working at the Palace of Auburn Hills when a brawl occurred between the Indiana Pacers, Detroit Pistons, and fans attending the game. During the brawl, a fan threw a chair, which hit Socia in the head. She appealed a grant of summary judgment against her. On appeal, Socia argued

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149. 3 A.3d 390 (Me. 2010).

150. No. 284845, 2010 WL 446912 (Mich. Ct. App. Feb. 9, 2010).

that NBA players Jermaine O'Neal and David Harrison owed a duty to protect her from harm.

The appellate court rejected Socia's argument and said that an individual does not owe a duty to protect another from a third party criminal acts unless a special relationship between the plaintiff and the defendant exists. The court further said that Socia failed to establish a special relationship between herself and the NBA players, so it affirmed summary judgment.

*Verneris v. Wang*<sup>151</sup>

Defendant Connecticut Islanders brought a motion for summary judgment after Marga Verneris was struck in the head by a hockey puck while watching a Connecticut Islanders game. In its motion, the Islanders argued that Connecticut's limited duty baseball rule, which says stadium owners and operators only have a duty to protect spectator seats in the most dangerous area of the stadium, should extend to hockey.

In extending the rule and granting summary judgment, the court first examined the baseball rule's rationale. The court said the rule is designed to create specific duties for baseball owners, which prevent litigation that could destroy the nature of baseball stadiums. It also pointed out that the baseball rule is not based on assumption of risk because Connecticut had abandoned assumption of risk.

Then the court looked to other jurisdictions for guidance. Specifically, the court looked for jurisdictions that denied hockey spectator liability for reasons other than assumption of risk. Because the court found a number of jurisdictions that did so, it followed those jurisdictions and extended the baseball rule to hockey.

*Weisberg v. Chicago Steel*<sup>152</sup>

Michael Weisberg appealed a summary judgment ruling against him that held the contact sports exception applied to his injuries. Weisberg was employed by Chicago Acceleration and assigned as an athletic trainer for an amateur hockey team, the Chicago Steel. One of his duties was to refill water bottles during practice. During a practice, Weisberg entered the bench area to refill a bottle and was struck in the eye by a hockey puck. He then sued various defendants, alleging negligence.

On appeal Weisberg argued that the contact sports exception, which

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151. No. CV075014070, 2010 Conn. Super. LEXIS 678 (Conn. Super. Ct. Mar. 19, 2010).

152. 922 N.E.2d 489 (Ill. 2010).

requires willful or wanton conduct, did not apply to his case. The appellate court agreed and reversed summary judgment.

In its opinion, the court first explained that Weisberg was an independent contractor and not a hockey player or part of the Steel organization. As such, his relationship with the sport of hockey was tenuous. Additionally, allowing Weisberg to pursue a negligence claim would not have a chilling effect on the vigorous participation in hockey because he had no role in the game.

*Wolfe v. Bison Baseball, Inc.*<sup>153</sup>

Beverly Wolfe appealed a motion for summary judgment against her that held primary assumption of risk and the open and obvious doctrines barred her claim for injuries she suffered when she was hit in the head with a baseball. Wolfe was working at a Columbus Clippers baseball game against the Buffalo Bison as a television crew manager. While the visiting Bisons were taking infield practice, an errant baseball struck Wolfe in the head.

On appeal, Wolfe argued that the Bison were liable as occupiers of the land, the danger was not open and obvious, and primary assumption of risk did not apply. The court rejected all arguments and affirmed summary judgment.

In its analysis, the court first looked at whether the visiting team, the Buffalo Bisons, was an occupier of the baseball field. The court concluded that the Bisons' only power to exclude was in telling the home team to leave during the Bisons' practice; however, the court did not think that was enough control to call it an occupier of the land.

Then, the court looked at whether the danger was open and obvious. The court held that the open and obvious doctrine did not apply to flying objects because individuals cannot anticipate those objects. But although the open and obvious doctrine did not apply, the court still affirmed summary judgment on that issue because Wolfe was still on notice of the danger and the Bisons were not negligent.

Finally, the court analyzed whether primary assumption of risk barred Wolfe's claim. The court held primary assumption of risk applied, emphasizing that, when the injury occurred, Wolfe was performing a task she had done many times before and knew the risks involved.

WORLD INTELLECTUAL PROPERTY ORGANIZATION

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations committed to protecting intellectual property

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153. No. 09AP-905, 2010 WL 1254597 (Ohio Ct. App. Mar. 31, 2010).

around the world through the cooperation of Member States and in collaboration with other international organizations. Over ninety percent of the world's nations are Member States. Headquartered in Switzerland, WIPO offers private parties arbitration and mediation services, which are particularized for technology, entertainment, and other intellectual property issues, to resolve international commercial disputes. Often, intellectual property issues related to the sports industry are addressed by WIPO, and the following decisions demonstrate some sports-law-related issues that WIPO faced in 2010.

*CBS College Sports Network v. Jaomadesigns*<sup>154</sup>

Tony Barnhart and CBS brought this complaint against Jaomadesigns (Jao) after Jao registered the domain tonybarnhartshow.com in 2009. Barnhart is a journalist and television host of *The Tony Barnhart Show* on CBS College Sports Network. The show airs weekly and discusses college sports topics from the preceding week. Barnhart also owns the rights to tonybarnhart.com.

Barnhart claimed that he had common law rights regarding the unfair use of his name because the association could be used for commercial gain and that Jao has no legitimate use for the domain. Respondent Jao claimed that Barnhart did not have common law rights to the use of his name because the name is not unique and the name is not famous enough to invoke a secondary meaning. In addition, Jao claimed his legitimate use of the name was to inform the public, a right protected under the First Amendment to the United States Constitution.

The panel ruled Tony Barnhart was well-known in the field of college football and, because he has used his name in connection with commercial offerings, he had a protectable interest in his name. In addition, the panel ruled that the First Amendment rights of Jao were not restricted if he was required to relinquish the domain because he is free to choose another domain name and continue to inform the public through that avenue. Finally, the panel ruled that, because Jao was using the domain to discuss college football and post advertisements that were used for financial gain, the use of the domain was in bad faith. The rights to the domain were transferred to Barnhart.

*FIFA v. Seo Jae Woo*<sup>155</sup>

FIFA filed a complaint before WIPO after a Korean business registered

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154. WIPO Administrative Panel Decision Case No. D2010-0219 (Apr. 12, 2010).

155. WIPO Administrative Panel Decision Case No. D2010-1717 (Dec. 2, 2010).

the domain FIFA11.com. FIFA contended that not only did the offending domain name deprive them of their exclusive right to use their trademarked FIFA name but it also diluted the name recognition of their popular EA Sports video games, which are named FIFA followed by the two digit representation of the year in which the game is released. Indeed, the 2011 version of the EA Sports soccer game is named FIFA11.

A WIPO panel will order the transfer of a domain name if the name is identical or confusingly similar, the defendant has no legitimate rights to the name, and the domain is registered in bad faith. FIFA owns undisputed, worldwide rights to the use of the FIFA name. In addition, FIFA claimed that the addition of the number 11 to the domain increases the likelihood of confusion because of the similarity to the name of the popular video games. FIFA also asserted that the defendant did not have legitimate rights to use the name because he was not licensed to use the name and did not present any legitimate reasons for using the name. Finally, FIFA claimed that the defendant knew of both FIFA's rights to the name as well as the possibility that wording would be used as the name of an upcoming video game. These factors showed that the domain was registered in bad faith.

WIPO ruled in favor of FIFA and ordered the domain transferred.

#### CONCLUSION

The cases decided in 2010 will undoubtedly have a significant impact on the continued growth and evolution of the law as it relates to sports. This survey displays the massive collection of legal areas associated with sports law, provides a summary of those cases that presented the more compelling issues throughout the previous year, and demonstrates the continued evolution of sports law in the United States and abroad. Each year, as the judicial system answers questions concerning the law and its interaction with sports, new questions arise. Courts and arbitral bodies resolved their share sports law issues in 2010, and 2011 should not be expected to be any different.